

OHIO BOARD OF TAX APPEALS

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| Nestle R & D Center, Inc., |) | CASE NO. 2006-M-1365 |
| |) | |
| Appellant, |) | (CORPORATION FRANCHISE TAX) |
| |) | |
| vs. |) | DECISION AND ORDER |
| |) | |
| William W. Wilkins, |) | Reversed & Remanded on Appeal Apr. 30, 2009 |
| Tax Commissioner of Ohio, |) | Ohio Supreme Court # 2008-1285 |
| |) | |
| Appellee. |) | 2009-Ohio-1929 |

APPEARANCES:

For the Appellant -

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Entered June 3, 2008

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This cause and matter comes to be considered by the Board of Tax Appeals upon a notice of appeal filed on September 27, 2006. This appeal is from a final determination of the Tax Commissioner, appellee, dated August 2, 2006. Through that determination the commissioner denied a refund claim filed by appellant regarding tax year 2001.

Appellant, Nestle R & D Center, Inc. (“Nestle”), sought a refund for corporate franchise taxes paid for tax year 2001. The basis of the refund request was

the application of a credit claimed pursuant to R.C. 5733.0610. That statute provides that a tax credit granted by a “tax credit authority” for the purpose of creating or retaining jobs within the state may be claimed against corporate franchise taxes due by the employer. The creation of the tax credit authority and the requirements for obtaining a tax credit are found in R.C. 122.17.

The Ohio Department of Development issued a tax credit certificate for 2001 to Nestle on December 6, 2004 and Nestle submitted its amended return and claim for refund on January 6, 2005. The Tax Commissioner denied the refund application, finding that the application was not filed within the time requirements prescribed by R.C. 5733.12, i.e., within three years from the date of the illegal or erroneous payment. S.T. at 1. The Tax Commissioner concluded a timely refund claim had to have been submitted by October 9, 2004. S.T. at 18.

Nestle agrees to the dates as presented in the final determination, but challenges the Tax Commissioner’s denial based upon untimely filing. Nestle argues that the credit certificate itself was dated outside the period during which refund claims were permitted. Thus, Nestle argues, it was impossible to file for a refund based upon a jobs credit certificate that had not yet been issued. Therefore, Nestle argues, this board should reverse the Tax Commissioner and allow its refund claim.

SCM Chemicals, Inc. v. Zaino, 106 Ohio St.3d 43, 2005-Ohio-3676 dealt with a similar issue. In that appeal, the refund claim was based upon a certificate granting exemption from personal property tax for certain pollution control equipment. Under R.C. 5709.25(B), “[f]or the period subsequent to the effective

date” of the certificate, personal property covered by the certificate is exempt from taxation. SCM Chemicals, Inc. had paid personal property tax on the equipment for the tax years prior to the issuance of the pollution control certificate. When the certificate issued, refund claims for the years for which tax was paid were filed. The Tax Commissioner denied refund requests when the requests were not for statutorily open years, but the Board of Tax Appeals reversed, finding a conflict between the statutes granting exemption and the statutes limiting refund claims. The court, however, concluded that the statute of limitations controlled:

“R.C. 5709.21(B) states that exempt-facility certificates are effective as of ‘the date the application was made for such certificate or the date of the construction of the [pollution-control] facility, whichever is earlier,’ and former R.C. 6111.31 established an effective date of the acquisition date of the exempt property or the beginning of construction, whichever was earlier. These provisions could result -- as in this case -- in the issuance of a certificate with an effective date years earlier than the date on which the certificate itself is issued. *But R.C. 5711.25 and 5711.26 are the only provisions that address refund requests for personal property taxes, and those provisions do not contain any language that might allow a taxpayer to file an untimely request for a refund when a certificate for a tax-exempt pollution-control facility has been issued after the R.C. 5711.26 time period has expired.*” Id. at ¶15. (Emphasis added.)

The Tax Commissioner’s denial in the present matter is consistent with this precedent. The Tax Commissioner looked first to the time periods provided for corporate franchise tax refund requests. R.C. 5733.12(B) provides the following:

“Except as otherwise provided under divisions (C) and (D) of this section, an application to refund to the corporation the amount of taxes imposed under section 5733.06 of the Revised Code that are overpaid, paid illegally or erroneously,

or paid on any illegal, erroneous, or excessive assessment, with interest thereon as provided by section 5733.26 of the Revised Code, shall be filed with the tax commissioner, on the form prescribed by the commissioner, within three years from the date of the illegal, erroneous, or excessive payment of the tax, ***. For purposes of division (B) of this section, any payment that the applicant made before the due date or extended due date for filing the report to which the payment relates shall be deemed to have been made on the due date or extended due date.”

Like the refund statute in *SCM Chemicals, Inc.*, R.C. 5733.12(B) provides no exception for an untimely refund request based upon the date of issuance of a jobs credit certificate. Nestle suggests that its only protection would have been to file an estimated refund claim case, and suggests that it did not take that path due to potential confusion and administrative burden. However, the Tax Commissioner has no equitable authority and may not ignore the express terms and conditions imposed by statute and grant in this matter what would amount to equitable relief. The Tax Commissioner has no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend, or improve the provisions of a statute to meet a situation not provided for. *Great American Ins. Co. v. Limbach* (Mar. 19, 1993), BTA No. 1990-J-632, unreported, affirmed (1994), 70 Ohio St.3d 357. See, also, *VeriFone, Inc. v. Limbach* (1994), 69 Ohio St.3d 699, 702 (“[S]tatutory filing requirements are mandatory, jurisdictional requirements which cannot be waived even by a tax official.”).

Based upon the foregoing, the determination of the Tax Commissioner must be, and hereby is, affirmed.

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