

OHIO BOARD OF TAX APPEALS

Christopher M. DeVito,)
)
 Appellant,) (SALES TAX)
)
 vs.) DECISION AND ORDER
)
 William W. Wilkins, Tax)
 Commissioner of Ohio,)
)
 Appellee.)

APPEARANCES:

For the Appellant - Morganstern, MacAdams & Devito Co., LPA
Alexander J. Kipp
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Cleveland, Ohio 44113

For the Appellee - Richard Cordray
Attorney General of Ohio
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Entered May 19, 2009

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

Christopher M. Devito appeals from a final determination of the Tax Commissioner, in which the commissioner affirmed his denial of appellant’s refund claim for sales tax paid from July 2005 to March 2007. Appellant amended his original refund claim of \$80.80 to \$40.40 subsequent to the appeal filed with this board.

The commissioner’s final determination stated, in pertinent part, the following:

“The claimant, a Cuyahoga County resident, entered into a thirty-nine month lease for an automobile from a dealership in December of 2003. At the time that the lease began, the claimant was correctly charged 8 percent on the

cumulative total of all lease payments and initial charges. On July 1, 2005, the rate of tax in Cuyahoga County changed to 7.5 percent. The claimant argues that all lease payments made after July 2005 should be subjected to this lower rate of tax. Because the claimant was charged 8 percent sales tax for all of the lease payments, the claimant contends that a refund is due for the difference between 8 and 7.5 percent of the amount of lease payments remaining after July 2005.

“The claimant’s contention is not well taken. Prior to February 2002, the tax levied upon leases and rentals was calculated and paid ‘by the installments thereof’ under former [sic] 5739.02(A). The tax was applied to the individual installments and varied according to the rate of tax applicable at the time that the particular installment was due. R.C. 5739.02 was changed in February 2002 with the addition of subsection (A)(2), which levies the tax on the total amount that would be paid on any leases or rentals with terms longer than thirty days at the same time the lease or rental is consummated. The claimant entered into his lease in December 2003, after the enactment of R.C. 5739.02(A)(2); therefore, the claimant was correctly charged 8 percent sales tax on the total amounts due under the lease agreement.

“The claimant has also failed to show that any erroneous amount of sales tax was collected and remitted to the state on the lease payments. The information provided by the claimant shows that the lease agreement required an initial capital contribution of \$3,500.00 and a total of \$17,081.62 of payments to be made over the lease term. He was charged and paid 8 percent of tax on the capital contribution, but only 7.38 percent on the total amount of lease payments.

“Therefore, the total amount of tax paid on the lease by the claimant was less than the 8 percent required.” Statutory transcript (“S.T.”) at 1-2.

Appellant raised the following specifications of error in his notice of appeal to this board:

“The facts described in the final determination are contrary to those in the record.

“The facts described in the final determination are contrary to the evidentiary documentation attached to Appellant’s letters of September 13, 2005, and February 22, 2005.

“The calculation of tax paid on the total amount of lease payments is incorrect in the final determination.

“The application and interpretation of R.C. 5739.02 is contrary to law and fact.

“The Tax Commissioner has failed to prove that Mr. Devito is not entitled to a refund.

“The Tax Commissioner has wrongfully converted the difference between the 8% tax collected at the lease inception after Cuyahoga County reduced the tax to 7.5% during the lease term.

“The Tax Commission [sic] has appropriated and taken the difference between the 8% tax collected and the actual 7.5% tax rate, without proper compensation or legal authority.” (Emphasis sic.)

Both counsel for appellant and counsel for the tax commissioner appeared at a hearing before this board. Accordingly, we proceed to consider this matter based upon appellant’s notice of appeal, the statutory transcript, the record of the hearing before this board (“H.R.”), and the briefs submitted by the parties.

We begin our review by observing that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the

commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

The introductory language of R.C. 5739.02 states the following:

“For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.”

R.C. 5739.02(A)(2), which applies to the collection of sales tax on leased motor vehicles, provides, in pertinent part:

“In the case of a lease or rental, with a fixed term of more than thirty days or an indefinite term with a minimum period of more than thirty days, of any motor vehicles designed by the manufacturer ***, the tax shall be collected by the vendor at the time the lease or rental is consummated and shall be calculated by the vendor on the basis of the total amount to be paid by the lessee or renter under the lease agreement. ***.”

In considering appellant's specifications of error included in its notice of appeal, we focus initially on his contention that “[t]he application and interpretation of R.C. 5739.02 is contrary to law and fact.” Our review of the record indicates the opposite. R.C. 5739.02(A) mandates that the sales tax levied on leased motor vehicles is due at the time the lease is consummated, and requires such tax to be calculated based on the total amount to be paid by the lessee. Based on the record, this is precisely what occurred in the matter before us. The record contains three “dealer worksheets” that calculate the sales tax owed. S.T. at 13, 28, 29. Appellant paid this

tax based on a sales tax rate of 8%, the rate in effect in Cuyahoga County at the time the lease was consummated.¹ S.T. at 13, 29. Appellant advances the argument that he is entitled to a refund of the tax due for the period of July 2005 through March 2007 based on the aforementioned rate change, but provides this board with no authority to support that claim. At the hearing before this board, and in its briefs, appellant's counsel argues that, as a reason for granting the refund request, "the lease contemplated a change in tax rates." Again, we find no authority that supports this contention, and find appellant's other specifications of error to be without merit.² We note that the record reflects that appellant presented no witnesses or evidence at the hearing before this board, electing to rest upon the statutory transcript.

In his briefs to this board, appellant raises equitable and constitutional arguments in an effort to convince this board to grant his refund claim. Appellant's briefs at 1-2. We note that appellant has not raised such arguments with the required specificity in his notice of appeal, resulting in this board's inability to consider them. R.C. 5717.02. See, also, *Queen City Valves v. Peck* (1954), 161 Ohio St. 579; *Lenart v. Lindley* (1980), 61 Ohio St.2d 110; *Cousino Construction Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162; *Satullo v. Zaino*, 111 Ohio St.3d 399, 2006-Ohio-5856; *Lovell v. Levin*, 116 Ohio St.3d 200, 2007-Ohio-6054; *Castle Aviation, Inc. v. Zaino*,

¹ At the hearing before this board, appellant's counsel was asked why the worksheet initially submitted by appellant to the commissioner contained mathematical errors, which could have resulted in a tax due that was greater than what appellant actually paid. H.R., audio disc, S.T. at 13. Appellant's counsel was unable to provide a reason as to why this occurred. *Id.* Appellant later submitted another worksheet that appeared to contain the proper calculations related to his sales tax due. S.T. at 29. Appellant is correct in specifying that the commissioner's final determination erroneously provides a rate of 7.38% for the tax charged on the total lease amount. The record indicates that appellant was charged sales tax at a rate of 8%, based upon a capitalized amount of \$15,765.75. S.T. at 29.

² Counsel for the commissioner noted, at the board's hearing, that R.C. 5739.02(A)(2) was amended prior to the transaction in issue. In its prior form, the tax rate apparently varied per the tax rate in effect at the time of payment. A review of the statute in its current form does not reveal any such language as it relates to sales tax on leases.

109 Ohio St.3d 290, 2006-Ohio-2420; *Brown v. Levin*, 119 Ohio St.3d 335, 2008-Ohio-4081; *Newman v. Levin*, 120 Ohio St.3d 127, 2008-Ohio-5202. Even if such arguments had been specified in appellant's notice of appeal, these constitutional challenges are beyond the scope of this board's jurisdiction. Further, this board is without jurisdiction to determine the constitutional validity of a particular statute. See *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 197-198.

In summary, we find that appellant has not met his burden of showing that the commissioner's final determination was in error. *Federated*, supra. We therefore find that the commissioner's final determination is supported by a preponderance of the evidence and is in accordance with law. Accordingly, we affirm the Tax Commissioner's final determination.

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