

OHIO BOARD OF TAX APPEALS

The Robbins Company,)
)
 Appellant,)
)
 vs.)
)
 Richard A. Levin,)
 Tax Commissioner of Ohio,)
)
 Appellee.)

CASE NO. 2006-V-2345
(PERSONAL PROPERTY TAX)
DECISION AND ORDER

APPEARANCES:

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Entered May 19, 2009

Ms. Margulies, Mr. Johrendt, 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 behalf of appellant The Robbins Company (“Robbins”). Appellant appeals a final order of the Tax Commissioner, appellee herein, denying a petition for reassessment, in part. The underlying assessment relates to Robbins’ 2003 personal property tax return and the appropriate listing of certain items.

The matter is considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript (“S.T.”) certified to this board by the Tax Commissioner,

and the testimony and other evidence adduced at the hearing (“H.R.”). Both parties have filed merit briefs.

Appellant designs, manufactures, sells and leases custom equipment for the underground excavation industry. At issue before this board is appellant’s tunnel boring machines (“TBM”) and small boring units (“SBU”) which excavate tunnels through the earth. This appeal concerns the appropriate method of valuing two specific items of machinery listed on appellant’s personal property tax returns for 2003.

Initially, we note that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *National Tube v. Glander* (1952), 157 Ohio St. 407. The taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner’s determination is in error. *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213. It is with these authorities in mind that we turn to the merits of the instant appeal.

Every taxpayer engaged in business in Ohio must annually file a personal property tax return with the county auditor of each county in which property used in the taxpayer’s business is located. R.C. 5711.02. On that return, the taxpayer must list “all his taxable property *** as to value, ownership and taxing districts as of the tax lien date he engages in business.” R.C. 5711.03. R.C. 5711.18 describes the manner in which taxable property is to be listed, providing in pertinent part:

“In the case of personal property used in business, the book value thereof less book depreciation at such time shall be listed, and such depreciated book value shall be taken as the true value of such property, unless the assessor finds that such book value is greater or less than the then true value of such property in money. Claim for any deduction from *** depreciated book value of personal property must be made in writing by the taxpayer at the time of making his return ***.”

In its 2003 personal property tax return, Robbins claimed one SBU and two TBM units to be “idle” and exempt from taxation pursuant to Ohio Adm. Code 5703-3-22(C). S.T. at 359. Specifically, Robbins declined to include the following boring machines as taxable: “64 inch SBU Yard,” “TBM DS 77-294 Triad,” and “TBMSS96-296 Zublin.” S.T. at 208.

After audit by the Ohio Department of Taxation, Robbins was informed that the three items of machinery were taxable via letter dated July 28, 2005. S.T. at 176.

On August 8, 2005, Robbins filed its petition for reassessment, raising the following issue:

“The Robbins Company objects to the assessment of personal property tax on its tunnel boring machines and small boring units based on the assumption that the property is ‘temporarily idle for purposes of overhaul or repair or due to seasonal or economic fluctuation or other temporary circumstances.’ The tunnel boring machines and small boring units are incapable of use and thus not subject to taxation. Support for this position is attached as exhibits hereto.” S.T. at 24.

Attached to Robbins’ petition for reassessment were photographs of purported tunnel boring machines taken before and after remanufacture as well as cost estimates for remanufacture. S.T. at 25-97.

In his final determination, the commissioner amended Robbins' 2003 return to reflect that one of the three machines (TBMSSS96-296 Zublin) was outside the state of Ohio on the tax listing date of December 31, 2002 and removed said item from the assessment. The commissioner affirmed the assessment as to the remaining two items. S.T. at 1-4.

At hearing before this board Robbins presented the testimony of James Virost, chief financial officer of Robbins. Mr. Virost testified that Robbins previously had identified "64 inch SBU" as being scrapped and written off Robbins' books for 2003. H.R. at 17, 28-30. However, Mr. Virost testified that he was recently informed by Robbins' engineers that the machine known as "64 inch SBU" was reconditioned, renamed "Shielded Hard Rock TBM Model DS 1.6," and leased to an entity in Nebraska in June of 2002. H.R. 13-15, 28-31, Ex. E. When asked how he could be sure that "Shielded Hard Rock TBM Model DS 1.6" was the same as "64 inch SBU," Mr. Virost testified this conclusion was not from his personal knowledge, but rather, it was based upon what Robbins' engineers told him in the week before this matter came to trial. H.R. at 30, 34-35.

Appellant's presentation at hearing before this board was limited to two issues: (1) that the machine consistently identified during the audit and before the commissioner as "64 inch SBU" was recently discovered to have been reconditioned into a machine referred to as "Shielded Hard Rock TBM Model DS 1.6," and (2) that the boring machines of the appellant have a functional life span of five years. No evidence

regarding the second machine (“TBM DS 77-294 Triad”) was addressed at hearing before this board.

I. Jurisdiction

A. Notice of Appeal

The statutory requirements for filing an appeal with this board from a final determination of the Tax Commissioner are set forth in R.C. 5717.02, which provides, in part:

“Such appeals shall be taken by the filing of a notice of appeal with the board ***. The notice of appeal shall have attached thereto *** a true copy of the notice sent by the commissioner *** and *shall also specify the errors therein complained of* ***.” (Emphasis added.)

Thus, in order to invoke the jurisdiction of this board to consider the Tax Commissioner’s final determination, R.C. 5717.02 requires that the appellant specify the errors complained of in its notice of appeal. The Ohio Supreme Court has consistently held that the specification requirement of R.C. 5717.02 is a mandatory, jurisdictional requirement which must be strictly complied with in order to invoke the jurisdiction of this board to consider an issue. *Queen City Valves, Inc. v Peck* (1954), 161 Ohio St. 579; *Lenart v. Lindley* (1980), 61 Ohio St.2d 110; *Ellwood Engineered Castings Co. v. Zaino*, 98 Ohio St.3d 424, 2003-Ohio-1812; *Cousino Construction Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162; *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856. “For more than 50 years, this court’s decisions interpreting the specificity requirement of R.C. 5717.02 have made clear that a notice of appeal filed with the BTA must explicitly and

precisely recite the errors contained in the Tax Commissioner's final determination.”

Cousino Construction Co., supra at ¶41.

In *Am. Restaurant & Lunch Co. v. Glander* (1946), 147 Ohio St. 147, 149-150, the Ohio Supreme Court reviewed the requirements for filing a notice of appeal under G.C. 5611, the predecessor to R.C. 5717.02, and held:

“These requirements are specific and in terms that are mandatory. The very statute which authorizes the appeal prescribes the conditions and procedure under and by which such appeal may be perfected. Where a statute confers the right of appeal, adherence to the conditions thereby imposed is essential to the enjoyment of the right conferred. ‘The party who seeks to exercise this right must comply with whatever terms the statutes of the state impose upon him as conditions to its enjoyment,’ quoting *Collins v. Millen* (1897), 57 Ohio St. 289, 291, 48 N.E. 1097.”

In *Queen City Valves*, supra, at 583, the Ohio Supreme Court held that “under the wording of the statute the [BTA] was entitled to be advised specifically of the various errors charged to the Tax Commissioner. The statute requires in plain language that the errors complained of be specified.” “The purpose of specifying error to the BTA is to put the tax commissioner on notice as to the issues that will be contested.” *Gen. Commodities Candy & Tobacco, L.L.C. v. Levin*, Franklin App. No. 08AP-126, 2008-Ohio-3173, at 5 (citing *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, at ¶39). The Ohio Supreme Court further held in *Buckeye Internatl., Inc. v. Limbach* (1992), 64 Ohio St.3d 264, 267, that “[f]ailure to include errors in the notice of appeal to the BTA results in the BTA’s lack of jurisdiction over the errors ***.” The Ohio Supreme Court has also held that “under R.C. 5717.02, a notice of appeal does not confer jurisdiction upon the Board of Tax Appeals to resolve an issue, unless that issue is

clearly specified in the notice of appeal.” *Cleveland Elec. Illum. Co. v. Lindley* (1982), 69 Ohio St.2d 71, 75. Finally, in *Lenart*, supra, the Ohio Supreme Court held that the BTA exceeded its statutory authority under R.C. 5717.02 when it determined issues not specified in the notice of appeal.

In its notice of appeal, appellant failed to address the issue, raised for the first time at hearing before this board, that the “64 inch SBU Yard” was reconditioned and out of the state during the audit period at issue. Rather, appellant had previously alleged that the machine was “physically removed from the production facilities of the Appellant to a scrap yard adjacent to those production facilities.” See Notice of Appeal at 1. Therefore, we lack the requisite jurisdiction to consider appellant’s new issue alleging the machine was not situated in the state.

However, even if we had jurisdiction to consider the issue, we would have found that appellant’s evidence failed to rebut the presumption of validity of the commissioner’s final determination and establish a right to the relief requested. Mr. Virost’s testimony that the “64 inch SBU Yard” was subsequently reconditioned and sent out of state, predicated upon what Robbins’ engineers told him only days before this board’s hearing, is unreliable and arguably hearsay. Beyond Mr. Virost’s testimony about what he was told by others, there is no documentary evidence to support that the machine identified in exhibit E is the same as “64 inch SBU Yard.”

B. Petition for Reassessment

In *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28, 32, the court concluded that “a taxpayer has not substantially complied with the statute, so as to invoke

the right to review of a particular error, if he has not set forth that error with specificity in the petition for reassessment.” See, also, *Shugarman Surgical Supply, Inc. v. Tracy*, 97 Ohio St.3d 183, 186, 2002-Ohio-5809; *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *American Fiber Systems, Inc. v. Wilkins* (Sept, 16, 2005), BTA No. 2004-K-1222, unreported. Although R.C. 5711.31 also permits a taxpayer to raise additional objections with the commissioner, if submitted in writing prior to the date upon which the commissioner issues his final determination, under *CNG*, neither the commissioner nor this board has jurisdiction to consider those issues that are not raised in a petition for reassessment or prior to the issuance of the final determination. Where a taxpayer has not advanced such written objections, this board is without jurisdiction to consider the issue upon appeal. *CNG*, supra; *Printing Service Co. v. Tracy* (Interim Order, Oct. 15, 1999), BTA No. 1998-N-781, unreported.

The commissioner argues in his brief that the petition for reassessment was limited to whether the machinery was idle and incapable of use. S.T. at 24. The commissioner further argues that Robbins’ notice of appeal before this board now includes new issues never raised before the commissioner.

Appellant has not brought to this board’s attention, nor have we found through a review of the documents filed by appellant with the commissioner, that some of the issues advanced on appeal were raised by appellant during the proceedings before the commissioner. Specifically, appellant claims for the first time in the notice of appeal that the commissioner incorrectly classified TBMs and SBUs as Class V property. It is the responsibility of a taxpayer to expressly identify the claims it wishes the commissioner to

consider. Accordingly, appellant is now precluded from advancing claims not previously raised while its petition for reassessment was pending before the commissioner. We therefore find our jurisdiction restricted to the only issue properly raised in appellant's notice of appeal, whether the two described machines were idle.

Even if we had the requisite jurisdiction to consider the appropriate classification of the machinery, we would have found that Mr. Virost's testimony that the functional life spans of the machinery were limited to five years was not supported by any credible evidence; i.e., disposal studies, records documenting the life spans of machinery, and the like.

II. Merits

The commissioner correctly argues in his brief that the only issue raised by appellant before the commissioner, and, hence, the only issue properly before this board, was whether the described machinery was idle and not subject to taxation pursuant to Ohio Adm. Code 5703-3-22.

At hearing before this board, appellant failed to address whether either machine was idle, and further did not even mention the Triad machine.¹

Ohio Adm. Code 5703-3-22 provides in pertinent part:

“(A) Tangible personal property that is being held for disposal and is no longer being held for use in business on tax listing day may be valued separately from that personal property kept or maintained as part of a plant or business that is capable of operation. To be so valued, such personal property must be:

¹ Appellant states in its brief that the Triad machine is “subject to tax.” Appellant's Brief at 7. Further, appellant appears to have abandoned its theory that the machine “64 inch SBU yard” was idle and now argues in its brief that before the Tax Commissioner, it was “unable to locate” the “64 inch SBU Yard” machine and it *believed* the item had been scrapped. Appellant's Reply Brief at 4.

“(1) Located in closed-off buildings or rooms or otherwise segregated, if physically possible, from areas where manufacturing or other business is being conducted;

“(2) Rendered functionally inoperative; and

“(3) Held for disposal on tax listing date.”

Appellant has failed to demonstrate that either machine was not used in business and idle under Ohio Adm. Code 5703-3-22.

Given the foregoing, appellant has failed to establish its right to the relief requested. Accordingly, it is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

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