

OHIO BOARD OF TAX APPEALS

333 Elyria, Inc.,)
)
 Appellant,)
)
 vs.)
)
 Richard A. Levin,)
 Tax Commissioner of Ohio,)
)
 Appellee.)

CASE NO. 2007-B-1164

(SALES TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant - 333 Elyria, Inc.
Adnan Mansour, president
12502 Kinsman Road
Cleveland, Ohio 44120

For the Appellee - Richard Cordray
Attorney General of Ohio
Alan P. Schwepe
Assistant Attorney General
State Office Tower, 25th Floor
30 East Broad Street
Columbus, Ohio 43215

Entered April 28, 2009

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

The Board of Tax Appeals considers this matter pursuant to a notice of appeal filed by Adnan Mansour, president of appellant, 333 Elyria, Inc. (“Elyria”), which appeals from a final determination of the Tax Commissioner, in which the commissioner denied appellant’s request for a penalty abatement, which was assessed as a result of unpaid sales tax covering the period of July 1, 2002 through June 30, 2005. Statutory Transcript (“S.T.”) at 1.

A review of the record indicates Elyria operates Kinsman Food Deal, a gas station/retail beverage/deli store “that sells deli sandwiches (prepared on site), frozen foods, potato chips, canned goods, snack foods, candy, pop, juice, dairy products, beer, wine, health & beauty products, cigarettes & tobacco products, household goods, [and] automotive products” within the “inner city of Cleveland.” S.T. at 9. Through the review of appellant’s sales tax returns (total sales¹ versus taxable sales during the relevant period), the commissioner determined Elyria reported an average of 15% of the total sales as taxable. S.T. at 10. Because comparable stores were reporting an average of 75% as taxable sales, the commissioner performed an audit. Id.

The commissioner’s agent determined the total sales tax liability for the entire audit period to be \$73,221.39. S.T. at 12. The commissioner assessed a penalty of 50% of the sales tax deficiency totaling \$36,610.50. Id. at 18. And preassessment interest of \$7,806.36 was added for a resulting sales tax assessment total of \$117,638.52. S.T. at 1.

In his final determination, the Tax Commissioner denied the penalty abatement request but granted a food stamp credit which lowered the total amount due to \$87,687.74. S.T. at 1.

The matter is submitted to the Board of Tax Appeals upon the notice of appeal and the statutory transcript certified to this board by the Tax Commissioner. The parties waived an evidentiary hearing and briefs before the board.

¹ Food items purchased “to go” are not subject to sales tax. S.T. at 10.

The notice of appeal filed with this board states, in pertinent part:

“I wish to appeal the application of the 50% penalty in my sales tax audit. Procedures have been instituted to be sure that compliance has been increased. The owner currently reviews all sales and tax records personally. All the purchase invoices are reviewed to be sure that the proper tax has been paid on all taxable sales.

“We feel that the application of the 50% penalty is excessive in light of the increased level of compliance and the sales tax audit amount being paid on a timely basis. If you can lower the penalty percentage charged it would be greatly appreciated.” *Id.* at 1.

We begin by observing that the Supreme Court of Ohio has determined 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 decision of the Tax Commissioner to rebut the presumption and establish a clear right to the relief requested. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St. 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69; *Natl. Tube v. Glander* (1952), 157 Ohio St. 407. The burden is on the taxpayer to present credible evidence to support its claim that an assessment is in error. *Kern, supra*; *May Co. v. Lindley* (1982), 1 Ohio St.3d 6; *Federated Dept. Stores v. Lindley* (1983), 5 Ohio St.3d 213.

Where no competent and probative evidence is developed and presented to this board by the appellant to show that the Tax Commissioner’s findings are incorrect, the Board of Tax Appeals must affirm the Tax Commissioner’s findings.

Kern, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp.*, supra. Mindful of such burden, the board proceeds with its determination.

The Tax Commissioner's authority to abate penalties assessed pursuant to R.C. 5739.13 is discretionary. The commissioner's exercise of discretionary powers must be sustained unless an abuse of that discretion is established. *Kern*, supra; *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70 ("R.C. 5739.13 mandates the imposition of a penalty in the event of an assessment. Remission of the penalty is discretionary. *** Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. ***"). See, also, *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29, 31-32. Generally, the Tax Commissioner abuses his discretion when the record manifests that his decision is "unreasonable, arbitrary, or unconscionable." *Jennings*, supra.

Relative to what constitutes an abuse of discretion, we note the Supreme Court of Ohio's decision in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83, 87, in which the court, quoting *State v. Jenkins* (1984), 15 Ohio St.3d 164, 222, stated:

"[A]n abuse of discretion involves far more than a difference in *** opinion ***. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias. ***."

We find the appellant presented no evidence to establish an abuse of discretion. A review of the record indicates the commissioner imposed the penalty in a reasonable, systematic fashion. S.T. at 12.

Based upon the foregoing, the board finds that Elyria did not demonstrate that the Tax Commissioner acted unreasonably, arbitrarily, or unconscionably in failing to remit the penalty. Accordingly, it is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be, and hereby is, affirmed.

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