

**OHIO BOARD OF TAX APPEALS**

S. Mitchum, Inc., ) CASE NO. 2007-B-296  
)  
Appellant, ) (SALES TAX)  
)  
vs. ) DECISION AND ORDER  
)  
Richard A. Levin, )  
Tax Commissioner of Ohio, )  
)  
Appellee. )

APPEARANCES:

For the Appellant - Jones Law Offices  
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For the Appellee - Richard Cordray  
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Entered May 12, 2009

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

The Board of Tax Appeals (“BTA”) considers this matter pursuant to a notice of appeal filed by S. Mitchum, Inc. (“Mitchum”), which appeals from a final determination of the Tax Commissioner, in which the commissioner affirmed assessment number 7040409740 against the appellant. Through the final determination, the commissioner affirmed a sales tax assessment previously issued for the period of January 1, 2000 through December 31, 2003. The commissioner found that Mitchum had failed to properly remit sales tax on its cigarette and tobacco

products during this time frame. The assessment is for \$124,160.33, including tax, penalties, and interest. S.T. at 1.

Mitchum's notice of appeal<sup>1</sup> reads as follows, in pertinent part:

"1. The Commissioner erred in finding that the tax payer [sic] purchased cigarettes from Hancock Wholesalers for the entire year of 2003.<sup>2</sup>

"2. The Commissioner erred in its [sic] finding of the amount of sales tax due."

A review of the record indicates Mitchum operated Al's Delicatessen, a retail beverage/deli store on the east side of Cleveland. S.T. at 31. An audit was conducted by the Ohio Department of Taxation ("department") of Mitchum's sales between January 1, 2000 and December 31, 2003. By letter dated February 20, 2003, the department notified Mr. Mitchum of its intent to start its audit on March 31, 2003. S.T. at 45. Apparently, Nathaniel Turner, CPA, Mitchum's authorized representative, requested a start date of June 16, 2003. S.T. at 32. Mr. Turner met with the department on July 9, 2003 and provided "purchase invoices" from January 2002 to December 2002 and agreed "that the period from January 2002 through December 2002 would be designated as a test period for computing the taxable sales percentage." S.T. at 32. The department requested and obtained Mitchum's purchase records from Hancock Wholesale Candy & Tobacco ("Hancock") for the period of July 2002

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<sup>1</sup> As amended, June 18, 2007.

<sup>2</sup> In its brief, appellant claims, in footnote 6, that it was "noted during the August 21, 2007 [BTA] Hearing [sic], Appellant's February 1<sup>st</sup> letter contains a typing error and misstates the year 2003 instead of 2002." Id. at 4. This refers to a letter sent from the president of Mitchum, Samuel Mitchum, dated February 1, 2007, to the department's Office of Chief Counsel in which he states that Mitchum did not purchase cigarettes and tobacco products from Hancock for the entire year of 2003, having closed its account on January 2, 2003. S.T. at 3. This does not appear to be a typographical error but rather a possible confusion over the correct year involved by the writer. H.R. at 35-36. *We note that appellant has not asserted a typographical error in its notice of appeal.*

through December 2002 and found them to total \$60,427.95.<sup>3</sup> From this figure, it then estimated an annual purchase of \$120,855.90.<sup>4</sup> This annual amount was in contrast to Mitchum's purchase records totaling \$6,335.60 for its claimed purchases from Hancock. S.T. at 33. The department also found discrepancies with another supplier, Seaway Cash N Carry.

The commissioner, via the audit conducted, determined Mitchum's applicable sales tax liability based upon the 2002 purchase invoices supplied by appellant and purchase information obtained from Mitchum's wholesalers to determine the total sales tax liability for the entire audit period to be \$134,769.59. After reducing the liability based upon sales tax reported and remitted by appellant, the resulting tax deficiency was \$72,417.45. S.T. at 34.

The commissioner assessed penalties totaling 50% of the sales tax deficiencies: an automatic 35% penalty for the nonremittance of sales tax, and an additional 5% penalty for having less than a 60% compliance level in remitting taxes, for poor prior audit compliance improvement, and finally for unsatisfactory audit responsiveness. S.T. at 36.

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner ("S.T."), and the record of the evidentiary hearing ("H.R.") held in this matter. At this

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<sup>3</sup> The records were limited to the six months because Hancock did not have computer records for the entire year. S.T. at 33.

<sup>4</sup> \$120,751 was allocated to cigarettes and \$104.90 was allocated towards the purchase of gum. From the six month total, the department extrapolated a monthly average and multiplied by 12 months to get the 2002 yearly estimate. S.T. at 33.

board's hearing, Mitchum was represented by counsel and presented the testimony of Fannie Mitchum, co-owner and secretary of Mitchum. H.R. at 10-11. The Tax Commissioner presented the testimony of Derek French, tax audit agent for the department.<sup>5</sup> H.R. at 61-71.

As a preliminary matter, we address a significant objection raised by the commissioner at hearing and in his brief. Appellee contends that this board does not have jurisdiction to consider the matter before us as it pertains to tax year 2002, as that year was not raised "below" or in the subject notice of appeal. H.R. at 8-9 and Appellee's Brief at 1-2.

Mitchum's petition for reassessment states that "[Mitchum disagrees] with the sales tax audit performed for the the [sic] period Jan 2, 2000 [sic] thru [sic] December 31, 2003,"; however, it appears that Mitchum's evidence<sup>6</sup> at this stage related only to 2003, rather than 2002. This discrepancy was somewhat addressed by Mrs. Mitchum, who characterized Mr. Mitchum's letter as "inaccurate" due to his confusion. H.R. at 35-36. Thus, the petition for reassessment appeared to cover the entire period in question, but the presentation of evidence did not.

Although appellant's counsel concedes that Mitchum's assertions regarding tax year 2003 was submitted in error below, we point out that the purported mistake was carried over to the notice of appeal filed with this board.<sup>7</sup> The notice of appeal is clear in that the specifications of error relate to tax year 2003, not 2002.

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<sup>5</sup> Mr. French described the procedure and history of the subject audit.

<sup>6</sup> See Mr. Mitchum's letter dated February 1, 2007 to the Department's Office of Chief Counsel. S.T. at 3.

<sup>7</sup> As amended.

R.C. 5717.02 provides in pertinent part that a notice of appeal “shall specify the errors therein complained of \*\*\*.” As such, based upon the narrow specification of error raised by the appellant in said notice of appeal, this board’s decision must be restricted to only those issues raised therein, i.e., tax year 2003. Accordingly, none of the testimony and evidence presented at hearing can be considered relevant because the errors to which it was addressed were not raised in the notice of appeal. See *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856; *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162. Citing *Kern*, supra, the Supreme Court stated in *Skuratowicz v. Tracy* (1997), 80 Ohio St.3d 52, 54, that “[u]nder R.C. 5717.02, a taxpayer must specify error in the notice of appeal to the BTA for the BTA to have jurisdiction over the error.” Therefore, as appellant’s evidence and testimony pertained to tax year 2002, rather than 2003, we are constrained to find that Mitchum did not meet its burden of proof herein, as none of the evidence and testimony offered supported appellant’s specification of error in its notice of appeal. Thus, the Tax Commissioner’s final determination must hereby be affirmed.

However, even if we were able to consider such evidence, the appellant would still not have prevailed.

In its brief, Mitchum claimed that the department’s averaging method for 2002 was improper and inequitable because the department was supplied with the actual sales tax invoices from Mitchum which could have been used to more accurately calculate appellant’s purchases from Hancock for the first half of 2002

rather than overweighting Hancock's second half data. *Id.* at 3. Appellant argued that its purchases from Hancock were substantially less for the first half of 2002 because it was forced to pay on a cash-only basis at that time and because it enrolled in a "Buy-Down Program with Lorillard Tobacco Company" which forced Mitchum to purchase a substantially higher than normal inventory for the second half of 2002. *Id.* at 4. Therefore, Mitchum argued that the department's mark-up analysis was inaccurate as to actual conditions. *Id.* at 5. Appellant presented the testimony of Mrs. Mitchum in support. H.R. at 13-24.

We disagree with appellant's assertion that the test check was inappropriate. R.C. 5739.11 provides that "[e]ach vendor shall keep complete and accurate records of sales \*\*\* and shall keep all invoices, bills of lading, and other such pertinent documents." The purpose of the foregoing record-keeping requirement is to permit the Tax Commissioner to ascertain with clarity whether sales tax has been properly collected and remitted. *McDonald's v. Kosydar* (975), 43 Ohio St.2d 5. "Adequate records" are those that allow the Tax Commissioner to determine whether sales tax has been properly collected and remitted. *Nat. Delicatessens v. Collins* (1976), 46 Ohio St.2d 333, *Kostecki v. Kosydar* (1975), 43 Ohio St.2d 14. Where records are inadequate, the Tax Commissioner may conduct a test check and use all information available to him to assist him in carrying out his duties. *S. S. Kresge Co. v. Bower* (1965), 2 Ohio St.2d 113; *Russo v. Donahue* (1967), 10 Ohio St.2d 201; *Pato Foods, Inc. v. Lindley* (1982), 7 Ohio App.3d 22.

In the case before us, the previous audit compliance was calculated to be 37.44%. Current audit compliance was calculated at 43.27%. S.T. at 36. It seems apparent that Mitchum's purchase invoices originally given to the department for the entire tax year of 2002 far understated the sales tax liability even when compared to only six months of Hancock's purchase data for Mitchum. Appellant argued that Hancock's second half year records should have been combined with Mitchum's first half year records to determine the correct tax liability. Mitchum Brief at 2. However, we point out that the completeness of Mitchum's purchase invoices was in doubt at the start and that the limited data provided by Hancock seriously reinforced that concern. Even the testimony of Mrs. Mitchum seemed to support the department's position that appellant's invoices were incomplete. She testified under cross-examination that she did make purchases from Hancock between July 2002 and December 2002 and that they would have been in the box of invoices given to the department by Mitchum. But, when asked to retrieve invoices from that period, she was unable to find any such documents. H.R. at 49-51. Further, we also note that Mitchum's authorized representative agreed to 2002 as a representative test year. It is apparent that the commissioner's use of a mark-up analysis test period was appropriate.

In its brief, appellant argued that the commissioner's decision not to remit the penalties was unreasonable, arbitrary and unconscionable. Id. at 8.

However, we find that this issue was not raised in appellant's notice of appeal and for the reasons stated above, we cannot consider Mitchum's contention.<sup>8</sup>

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, supra*; *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.

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<sup>8</sup>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. *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. \*\*\*."

In the case before us, if we were to consider the issue, we would find that 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.

*Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp.*, supra.

Based upon the foregoing, the board finds that Mitchum did not present probative credible evidence to show that the Tax Commissioner's findings were in error. 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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