

**OHIO BOARD OF TAX APPEALS**

Laurence C. Fetchet, )  
 )  
 Appellant, ) (CASE NO. 2007-T-751  
 vs. ) (SALES TAX PERSONAL LIABILITY)  
 )  
 ) DECISION AND ORDER  
 Richard A. Levin, Tax )  
 Commissioner of Ohio, )  
 )  
 Appellee. )

APPEARANCES:

For the Appellant – Laurence C. Fetchet, pro se  
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Columbia Station, Ohio 44028

For the Appellee Tax Commissioner - Richard Cordray  
Attorney General of Ohio  
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Entered February 10, 2009

Ms. Margulies and Mr. Dunlap concur; Mr. Johrendt not participating.

Laurence C. Fetchet appeals from a final determination of the Tax Commissioner, in which the commissioner affirmed his assessment of Mr. Fetchet as a person liable for the unpaid sales tax of Ann & Andy’s, Inc., for the period of September 1, 1995 through May 31, 1996. The assessment is for \$42,141, including tax, additional charges, and penalties.

Ann & Andy’s, Inc., is an Ohio corporation that operates a small bar and restaurant in Columbia Station. According to the record, Ann & Andy’s failed to file

the required sales tax returns for January 1995 through May 1996, and did not remit the amount of sales tax due. The commissioner issued assessments against Ann & Andy's for the period. The assessments against Ann & Andy's remained unpaid.<sup>1</sup> Consequently, the commissioner assessed Mr. Fetchet personally as a responsible party. Mr. Fetchet now specifies in his notice of appeal that the assessment against him is in error because "I was not the responsible party during the periods at issue."

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.

R.C. Chapter 5739 imposes, in the absence of statutorily recognized exceptions and exemptions, a tax on each retail sale made within the state. R.C. 5739.02, 5739.021, 5739.023, and 5739.026. Generally, vendors are required to collect the tax on behalf of the state, and, pursuant to R.C. 5739.12, the vendor must periodically file a sales tax return and remit the amount of sales tax collected.

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<sup>1</sup> The exact nature of the underlying assessments has not been provided to this board. However, the commissioner states in his final determination that the assessments against Ann & Andy's, Inc., have become conclusive. S.T. at 1-2.

Typically, this must be done by the twenty-third day of each month. R.C. 5739.12(A). Where a vendor fails to file any required return or to remit the tax due, the commissioner may assess the vendor based upon any information in his possession. R.C. 5739.12 and 5739.13. In addition, certain individuals may be held personally liable for the vendor's failure to file returns or remit the tax. R.C. 5739.33 contains the derivative liability provisions:

“If any corporation, limited liability company, or business trust required to file returns and to remit tax due to the state under this chapter, including a holder of a direct payment permit under section 5739.031 of the Revised Code, fails for any reason to make the filing or payment, any of its employees having control or supervision of or charged with the responsibility of filing returns and making payments, or any of its officers, members, managers, or trustees who are responsible for the execution of the corporation's, limited liability company's, or business trust's fiscal responsibilities, shall be personally liable for the failure. The dissolution, termination, or bankruptcy of a corporation, limited liability company, or business trust shall not discharge a responsible officer's, member's, manager's, employee's, or trustee's liability for a failure of the corporation, limited liability company, or business trust to file returns or remit tax due. The sum due for the liability may be collected by assessment in the manner provided in section 5739.13 of the Revised Code.”

R.C. 5739.33 is intended “to hold those officers or employees who were in charge of the operations of a defaulting corporation personally liable for unpaid sales tax if such persons filed returns or paid taxes, or controlled or supervised others who performed those tasks, or had responsibility for such tasks.” *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55, 57. See, also, *Soltész v. Tracy* (1996), 75 Ohio St.3d 477, at 479. R.C. 5739.33 is not intended to include all officers, members,

managers, and employees but only those persons who have a specific connection with the preparation and filing of reports and the remittance of the tax. *Weiss v. Porterfield* (1971), 27 Ohio St.2d 117.

Mr. Fetchet testified before this board that, during the assessment period, he was a “non-employee” of Ann & Andy’s. H.R. at 7-8. His duties were limited to stocking shelves, filling in as a bartender, cleaning and other janitorial duties, and running errands on behalf of the corporation’s president. H.R. at 22. Mr. Fetchet further testified that he was not an officer of the corporation, had no ownership interest in the corporate entity, and had no authority to sign checks. H.R. at 12. Mr. Fetchet represented that the check-book was under the control of Frank Fetchet, the corporation’s president and Mr. Fetchet’s father. H.R. at 10, 19. Finally, Mr. Fetchet testified that the responsibility for filing returns and remitting the sales tax was turned over to him in the latter part of 1996 – after the assessment period. H.R. at 11, 12, 13, and 15. Referring to sales tax returns in the statutory transcript, Mr. Fetchet indicated that those returns were filed and timely paid using money orders. H.R. at 12.

Upon review, we find that Mr. Fetchet is not among that class of persons who may be held liable under R.C. 5739.33. Initially, we note Mr. Fetchet’s testimony that he was not receiving wages during the period in issue. H.R. at 7. In *Blocher v. Tracy* (July 15, 1994), BTA No. 1992-N-594, unreported, we considered a derivative assessment issued against a person who had been volunteering her time to help out at her family’s failing business. She received no wages from the corporation. Upon

review, we held that she was not an employee of the corporation and therefore could not be held liable under R.C. 5739.33:

“R.C. 5739.33 is clear in that it applies to employees or officers. Webster’s Ninth New Collegiate Dictionary defines ‘employ’ as ‘to provide with a job that pays wages or a salary’. Here, appellant never received compensation for the services she performed. The appellee concedes at page 11 of his brief that ‘she only worked part-time and she drew no salary and took no tips.’ Appellant was not an employee, and as R.C. 5739.33 applies to employees and officers, then appellant must have been an officer to be found liable under the section. There is nothing in the record to indicate that appellant was an officer, and the testimony presented at the hearing confirms that appellant was never an officer of Invest TMT, Inc. As appellant was neither an employee nor an officer, R.C. 5739.33 therefore can not apply to appellant, and any claim made by appellee that appellant is liable under R.C. 5739.33 is not supported by law.” Id. at 3.

In the instant matter, we find Mr. Fetchet’s testimony that “My participation at Ann & Andy’s in ’95 and half of ’96 was a non-employee, as I was taken off of being an employee, paid employee, at the end of ’94” to be competent. H.R. at 7. As Mr. Fetchet was neither a paid employee of Ann & Andy’s nor an officer of the corporation, we conclude that, as a matter of law, R.C. 5739.33 is not applicable. *Blocher*, supra. See, also, *Zerbini v. Tracy* (Nov. 28, 1997), BTA No. 1997-K-145, unreported (holding that the executor of an estate who helped with the transfer of decedent’s business to beneficiaries was not liable under R.C. 5739.33 because he had no interest in the business and was not employed by it).

Even if we were to assume that Mr. Fetchet was an employee of the underlying corporation, this alone does not impose liability under R.C. 5739.33. There

are two elements that must be present before a person may be assessed under the statute. First, the person must be an employee or officer of the corporation. Second, the person must have the requisite control of, or supervision over, the corporation's sales tax obligations. *Heddleston v. Lindley* (Apr. 7, 1986), BTA No. 1983-C-236, unreported. See, also, *Weiss and Spithogianis*, supra; *DeLassus v. Tracy* (1994), 70 Ohio St.3d 218; *Smith v. Limbach* (1992), 64 Ohio St.3d 473.

Here, the record clearly establishes that Mr. Fetchet was not a person who had control over Ann & Andy's sales tax obligations during the assessment period. While Mr. Fetchet did take over the filing of returns and remittance of the sale tax in the last half of 1996, Mr. Fetchet's activity between January 1995 and the end of May 1996 was limited to janitorial, bartending, and similar duties.

We also reject the commissioner's suggestion that we rely upon our decision in Frank Fetchet's appeal to this board as evidence that Laurence Fetchet was a person entrusted with meeting Ann & Andy's sales tax obligations. See *Fetchet v. Wilkins* (Jan. 25, 2008), BTA No. 2006-K-276, unreported. Initially, we note that we made no finding regarding personal liability in that decision, having found that Frank Fetchet failed to specify as error in his notice of appeal that he was not a party capable of being held liable under R.C. 5739.33. *Id.* at 5. Additionally, although it appears that Frank Fetchet asserted in his petition for reassessment that his son was responsible for the day-to-day operations of Ann & Andy's, there is nothing specific in that record as to what Laurence Fetchet's role was in the corporation. Frank Fetchet admitted that he had check-signing authority and that he signed checks. *Id.* at 3. If anything, this is

corroboration of Laurence Fetchet's testimony in the matter now before us. Next, we note that Frank Fetchet failed to appear at the evidentiary hearings held before either this board or the commissioner. *Id.* at 5-6. Thus, there was no specific evidence before us as to his son's corporate activity. In fact, we expressly excluded from the record some factual allegations raised in letters authored by Frank Fetchet and sent to the attorney general's office because they were unsworn statements made outside the board's hearing record. *Id.* at fn.1. Finally, we find it fundamentally improper for this board to base a finding of liability upon unsworn statements made by a non-party to this appeal. Mr. Fetchet has had no opportunity to review those statements. He has been provided no opportunity to challenge, through cross-examination or otherwise, any possible allegations that may have been asserted by Frank Fetchet. In this regard, we note that the commissioner had the ability to compel Frank Fetchet's attendance at the hearing in this matter. R.C. 5703.03 and Ohio Adm. Code 5717-1-13.

In conclusion, we find that Mr. Fetchet has demonstrated, through competent and probative evidence, that he is not among that class of persons who may be held liable for the unpaid sales tax of Ann & Andy's, Inc. Accordingly, we reverse the Tax Commissioner's final determination.

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