

OHIO BOARD OF TAX APPEALS

International Business Machines Corporation and IBM Credit Corporation,)	CASE NOS. 2007-Z-1140
)	2007-Z-1141
)	2007-Z-1143
)	
Appellants,)	(SALES AND USE TAX)
)	
vs.)	DECISION AND ORDER
)	
Richard A. Levin, Tax Commissioner of Ohio,)	Appeal Filed July 17, 2009
)	Ohio Supreme Court # 09-1296
)	
Appellee.)	

APPEARANCES:

For the Appellants	-	Baker & Hostetler LLP Edward J. Bernert 65 East State Street, Suite 2100 Columbus, Ohio 43215
For the Appellee	-	Richard Cordray Attorney General of Ohio Sophia Hussain Assistant Attorney General 30 East Broad Street, 25 th Floor Columbus, Ohio 43215

Entered June 23, 2009

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

These matters come on to be considered by the Board of Tax Appeals upon three notices of appeal filed with this board on October 15, 2007, by appellants, International Business Machines Corporation and IBM Credit Corporation (“IBM”), from three final determinations of the Tax Commissioner, appellee. Said final determinations were issued on September 13, 2007 and approved certain applications

for refund of sales and use tax filed pursuant to R.C. 5739.071 and 5741.10. Each final determination includes a reference to a “resolution” and an indication that the amount of the refund claim was approved in connection with the resolution. S.T. at 1.¹ Accordingly, the amount of the refunds is not at issue herein. Rather, the sole issue herein is whether the appellants are entitled to interest on such refunds. Each of the final determinations includes the following language or similar language with respect to interest on the refunds:

“[T]he claimant does dispute the denial of interest on the refund claim which is not paid by this resolution. The Commissioner hereby denies any interest because R.C. 5739.071 does not allow the claimant such interest.”

In their notices of appeal, the appellants object to the non-payment of interest on the refunds and claim that the denial of interest on the refunds is contrary to R.C. 5739.071, especially when that section is read in *pari materia* with, or by reference to, R.C. 5739.07 and 5739.132. Cf. R.C. 5741.10. The parties waived hearing before this board and submitted their respective arguments in written briefs filed with this board. Accordingly, these matters are submitted to the board upon the notices of appeal, statutory transcripts, and written briefs filed with this board.

By way of background, the appellant, International Business Machines Corporation, paid sales and use taxes for tax years 1998 through 2007 and the appellant, IBM Credit Corporation, collected sales and use taxes for tax years 1997 through 2006. The IBM companies applied for and were granted seven refunds pursuant to R.C. 5739.071, which reads, in its entirety, as follows:

¹ The statutory transcripts certified to this board by the Tax Commissioner consist only of the final determinations issued by the Tax Commissioner on September 13, 2007.

“(A) The tax commissioner shall refund to a provider of electronic information services twenty-five per cent of the tax it pays pursuant to this chapter or Chapter 5741. of the Revised Code on purchases made on or after July 1, 1993, of computers, computer peripherals, software, telecommunications equipment, and similar tangible personal property, primarily used to acquire, process, or store information for use by business customers or to transmit or disseminate such information to such customers, the services of installing or repairing such property, and agreements to repair or maintain such property. *Applications for a refund shall be made in the same manner and subject to the same time limitations as provided in sections 5739.07 and 5741.10 of the Revised Code.*

“(B) An electronic information service provider that maintains direct payment authority under section 5739.031 of the Revised Code may list on the return and pay tax on seventy-five per cent of the price of equipment, services, and agreements described under division (A) of this section in lieu of seeking a refund as provided in that division.” (Emphasis added.)

As stated above, R.C. 5739.071(A) provides for the refund of 25% of sales and use tax paid on the purchase of property used to provide electronic information services (“EIS”). While the Tax Commissioner granted the refunds under R.C. 5739.071(A), he denied the payment of interest.

The appellants argue that they are entitled to interest on the refunds because R.C. 5739.071(A) specifically references R.C. 5739.07, and subsection (F) of R.C. 5739.07 explicitly requires payment of interest. R.C. 5739.07(F) in turn references R.C. 5729.132, which provides for the payment of interest on all refunds of sales and use tax for purchases made after December 31, 2007.

R.C. 5739.07 reads, in its entirety, as follows:

“(A) When, pursuant to this chapter, a vendor has paid taxes to the treasurer of state or the treasurer of state’s agent, or to the tax commissioner or the commissioner’s agent, the commissioner shall refund to the vendor the amount of taxes paid if the vendor has refunded to the consumer the full amount of taxes the consumer paid illegally or erroneously or if the vendor has illegally or erroneously billed the consumer but has not collected the taxes from the consumer.

“(B) When, pursuant to this chapter, a consumer has paid taxes directly to the treasurer of state or the treasurer of state’s agent, or to the tax commissioner or the commissioner’s agent, and the payment or assessment was illegal or erroneous, the commissioner shall refund to the consumer the full amount of illegal or erroneous taxes paid.

“(C) The commissioner shall refund to the consumer taxes paid illegally or erroneously to a vendor only if:

“(1) The commissioner has not refunded the tax to the vendor and the vendor has not refunded the tax to the consumer; or

“(2) The consumer has received a refund from a manufacturer or other person, other than the vendor, of the full purchase price, but not the tax, paid to the vendor in settlement of a complaint by the consumer about the property or service purchased.

“The commissioner may require the consumer to obtain or the vendor to provide a written statement confirming that the vendor has not refunded the tax to the consumer and has not filed an application for refund of the tax with the commissioner.

“(D) An application for refund shall be filed with the tax commissioner on the form prescribed by the commissioner within four years from the date of the illegal or erroneous payment of the tax, unless the vendor or consumer waives the time limitation under division (A)(3) of section

5739.16 of the Revised Code. If the time limitation is waived, the refund application period shall be extended for the same period as the waiver.

“(E) On the filing of an application for a refund, the commissioner shall determine the amount of refund to which the applicant is entitled. If the amount is not less than that claimed, the commissioner shall certify that amount to the director of budget and management and the treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code. If the amount is less than that claimed, the commissioner shall proceed in accordance with section 5703.70 of the Revised Code.

“(F) *When a refund is granted under this section, it shall include interest thereon as provided by section 5739.132 of the Revised Code.*” (Emphasis added.)

R.C. 5739.132 reads, in its entirety, as follows:

“(A) If a tax payment originally due under this chapter or Chapter 5741. of the Revised Code on or after January 1, 1998, is not paid on or before the day the tax is required to be paid, interest shall accrue on the unpaid tax at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax was required to be paid until the tax is paid or until the day an assessment is issued under section 5739.13 or 5739.15 of the Revised Code, whichever occurs first. Interest shall be paid in the same manner as the tax, and may be collected by assessment.

“(B) For tax payments due prior to January 1, 1998, interest shall be allowed and paid upon any refund granted in respect to the payment of an illegal or erroneous assessment issued by the department for the tax imposed under this chapter or Chapter 5741. of the Revised Code from the date of the overpayment. *For tax payments due on or after January 1, 1998, interest shall be allowed and paid on any refund granted pursuant to section 5739.07 or 5741.10 of the Revised Code from the date of the overpayment.* The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code.” (Emphasis added.)

R.C. 5741.10 reads, in its entirety, as follows:

“Refunds of taxes paid pursuant to this chapter by a seller or consumer illegally or erroneously shall be made in the same manner as refunds are made to a vendor or consumer under section 5739.07 of the Revised Code.”

The appellants argue that R.C. 5739.071(A) makes explicit reference to the manner of refunds made pursuant to R.C. 5739.07 and 5741.10 and that R.C. 5741.10 requires that use tax refunds be made in the same manner as refunds under R.C. 5739.07. Appellants’ Brief at 3. The appellants further argue that said reference to R.C. 5739.07 and 5741.10 in R.C. 5739.071 substitutes for a repetition of all of the terms of R.C. 5739.07 and 5741.10. *Id.* Also, the appellants argue that the cross-reference reflects the intention of the General Assembly to incorporate into R.C. 5739.071 the applicable refund provisions set forth in R.C. 5739.07, including the payment of interest set forth in R.C. 5739.07(F). *Id.* The appellants’ contention is “[s]tated simply, the provisions of R.C. 5739.07 and R.C. 5739.132 are fully incorporated into R.C. 5739.071 except to the extent inapplicable.” *Id.*

The appellants argue that R.C. 5739.07(F) provides that when a refund is granted under R.C. 5739.07, interest thereon shall be paid as provided by R.C. 5739.132. Because R.C. 5739.132(B) provides for interest on refunds granted under R.C. 5739.07 and 5741.10 and refunds pursuant to R.C. 5739.071 are to be granted in the same manner as R.C. 5739.07 and 5741.10, the appellants contend that the General Assembly expressed the intent that interest be paid on refunds under R.C. 5739.071. Appellant’s Brief at 4. In support of this argument, the appellants explain that

statutory enactments which address the same general subject matter should be read in pari materia to give them force and effect. *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369. R.C. 5739.07 and 5741.10 are referenced in R.C. 5739.071 and R.C. 5739.07 and 5741.10 address the refund of sales and use tax, respectively. Because R.C. 5739.071 provides for sales and use tax refunds, R.C. 5739.07 and 5741.10 address sales and use tax refunds, and R.C. 5739.071 and 5741.10 specifically refer to R.C. 5739.07, the appellants contend that these provisions, along with R.C. 5739.132, must be construed in pari materia. Appellant's Brief at 4. Also, the appellants contend that the General Assembly could have expressly prohibited the payment of interest but did not do so.

In summary, the appellants argue that R.C. 5741.10 provides that refunds shall be made in the manner prescribed by R.C. 5739.07, and R.C. 5739.071 provides that refunds shall be made in the manner prescribed by R.C. 5739.07 and 5741.10. By referring to R.C. 5739.07 in both R.C. 5741.10 and 5739.071, the appellants argue that the General Assembly intended for the refunds of sales and use tax to purchasers of EIS products to be treated in a single manner under R.C. 5739.07. Since R.C. 5739.07(F) refers to R.C. 5739.132 and R.C. 5739.132(B) provides for the payment of interest on refunds, the appellants submit that they are entitled to interest on their refund.²

In contrast, the appellee Tax Commissioner argues that he granted the refunds applied for under R.C. 5739.071 and in doing so, he applied the plain meaning

² Appellants acknowledge that they are not entitled to interest on payments made prior to January 1, 1998. See R.C. 5739.132(B); Appellants' Reply Brief at footnote 3.

of said statute. The Tax Commissioner contends that the General Assembly has not provided him with the express authority, under R.C. 5739.071 or elsewhere, to pay interest on refunds granted under R.C. 5739.071. The Tax Commissioner argues that in order for a taxpayer to recover interest on a tax refund, the General Assembly must have affirmatively authorized, by statute, such an award of interest. In the instant matters, the Tax Commissioner contends that the taxpayers applied for a refund under R.C. 5739.071 and said statute does not expressly provide for the payment of interest.

Furthermore, the Tax Commissioner argues that the statutes identified by the appellants do not provide for the payment of interest on refunds granted under R.C. 5739.071. The Tax Commissioner explains that R.C. 5739.071 provides for the 25% refund of previously paid taxes on qualifying EIS products, R.C. 5739.07 provides for payment of interest on the “illegal or erroneous payment” of sales or use tax, R.C. 5741.10 provides for the refund of “illegally or erroneously” paid use taxes, and R.C. 5739.132 provides for the rate of interest applicable to refunds granted under R.C. 5739.07 and 5741.10. The Tax Commissioner argues that none of said statutes provide for the payment of interest on refunds granted under R.C. 5739.071.

The Tax Commissioner also argues that under the sales and use tax statutes, the General Assembly has authorized the payment of interest on sales and use tax refunds only where the refund is the result of previous “illegal or erroneous” payments. More specifically, with respect to R.C. 5739.07 and the payment of interest on the “illegal or erroneous payment” of sales or use tax, the Tax Commissioner argues that the refunds at issue herein were not and did not relate to the payment of

“illegal or erroneous” sales or use tax by the appellants but rather were the result of taxes which were lawfully and correctly paid by the appellants.

In response to the appellants’ contention that R.C. 5739.071 should be read in pari materia with R.C. 5739.07, the Tax Commissioner argues that the appellants are not entitled to interest even if the statutes are read in pari materia. The Tax Commissioner explains that R.C. 5739.071 incorporates the provisions of R.C. 5739.07 in two limited ways only, how an application for refund is to be made and the applicable statute of limitations. Notwithstanding reading R.C. 5739.071 in pari materia with R.C. 5739.07, the Tax Commissioner argues that express authority from the General Assembly to award interest on refunds granted under R.C. 5739.071 is lacking.³

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

³ Subsequent to the filing of the appellants’ reply brief with this board, the appellee Tax Commissioner filed a motion for leave to file a surreply or for alternative relief. In his memorandum in support of said motion, the Tax Commissioner argued that a surreply was necessary because the appellants had submitted a “brand-new argument” in their reply brief. Appellee Memorandum in Support of Motion for Leave to File a Surreply at 1. Specifically, the Tax Commissioner argued that the appellants submitted arguments regarding R.C. 5739.132 and 5739.071(B) in their reply brief that were not included in their initial brief and that he has had no previous opportunity to address and refute said newly raised arguments. In the event we deny the Tax Commissioner’s motion, he then asks this board to strike the appellants’ reply brief. We note that the Tax Commissioner filed with this board his surreply brief. We also note that the appellants filed a response to the Tax Commissioner’s motion and surreply. In an effort to consider all of the arguments of the parties in these matters, the Tax Commissioner’s motion for leave to file a surreply is hereby granted.

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.

We note that the Supreme Court considered R.C. 5739.071 in *Key Servs. Corp. v. Zaino* (2002), 95 Ohio St.3d 11. While interest on refunds pursuant to R.C. 5739.071 was not at issue, the court's analysis of said statute is nevertheless insightful. The narrow issue before the court in *Key Servs.* was whether a taxpayer who provided EIS to its affiliate qualified as a provider of EIS and was entitled to a refund pursuant to R.C. 5739.071. In its consideration of R.C. 5739.071, the court explained:

“Key [Services] is not seeking the return of an illegal or erroneous payment. The *refund provision of R.C. 5739.071 is more analogous to a tax exemption than it is to an illegal or erroneous payment.* ‘We read exemption statutes strictly ***.’” (Emphasis added.)

The court explained that the refund provision of R.C. 5739.071 was more akin to a tax exemption than it was to an illegal or erroneous payment. With respect to tax exemption statutes, it is well-established law that such statutes “are to be strictly construed.” *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, 409; *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. “[E]xemption is in derogation of the rights of all other taxpayers and necessarily shifts a higher burden upon the non-exempt.” *Parma Hts. v. Wilkins*, 105 Ohio St.3d 463, ¶10. Accordingly, we find that we must strictly construe R.C. 5739.071, the statute at issue in the instant matters.

Moreover, the Supreme Court has consistently denied the right to receive interest from the state where the statute does not expressly provide for the payment of

interest. See *Gen. Elec. Co. v. DeCourcy* (1979), 60 Ohio St.2d 69; *Chicago Freight Car Leasing Co. v. Limbach* (1992), 62 Ohio St.3d 489; *State ex rel. Cleveland Concession Co. v. Peck* (1954), 161 Ohio St. 31. In *Cleveland Concession*, the court explained as follows:

“The great weight of authority on this question supports the rule established by the Supreme Court of the United States *** ‘[i]nterest, when not stipulated for by contract, or authorized by statute, *** is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its [l]egislature, or by a lawful contract of its executive officers.’” *Id.* at 34-35 (quoting *Schlesinger v. State* (1928), 195 Wis. 366, 218).

The court in *Cleveland Concession* held:

“Since a recovery against the state for sales taxes illegally or erroneously assessed and paid can be had only by virtue of the legislative enactment authorizing such recovery, the recovery is limited by the provisions of the statute and cannot be extended beyond those provisions. *Since the enactment in Ohio does not provide for the payment of interest on a refund of such taxes *** and since there is no provision for the payment of interest on the amount recovered, relator is not entitled to recover such interest.*” *Id.* at 37. (Emphasis added.)

Thus, in the absence of express statutory language providing for the entitlement to interest on refunds granted pursuant to R.C. 5739.071, we find that such entitlement does not exist. Based upon our review of the statutes at issue herein, we cannot find express statutory language providing for the entitlement to interest on refunds granted pursuant to R.C. 5739.071.

We acknowledge that R.C. 5739.071(A) references R.C. 5739.07 and that R.C. 5739.07(F) provides for the payment of interest. The express language of

R.C. 5739.07(F), however, provides for payment of interest “when a refund is granted under this section.” The refunds at issue herein were not granted under R.C. 5739.07 but rather were granted under R.C. 5739.071. Similarly, R.C. 5739.071(A) references R.C. 5741.10, and R.C. 5741.10 references R.C. 5739.07, and R.C. 5739.07(F) provides for the payment of interest. Again, the express language of R.C. 5739.07(F) provides for the payment of interest “when a refund is granted under this section” and the refunds at issue herein were not granted under R.C. 5739.07. Moreover, the express language of R.C. 5741.10 provides that “[r]efunds of taxes paid pursuant to this chapter by a seller or consumer illegally or erroneously shall be made in the same manner as refunds are made to a vendor or consumer under section 5739.07” and the Supreme Court has found that refunds under R.C. 5739.071 are more analogous to a tax exemption than to illegal or erroneous payments. See *Key Servs.*, supra.

Notwithstanding the references and cross-references noted by the appellants, we cannot find that the references to R.C. 5739.07 and 5741.10 in R.C. 5739.071 substitute for a repetition of all of the terms of R.C. 5739.07 and 5741.10 because that is not what is expressly stated in R.C. 5739.071. We likewise cannot find that the cross-reference reflects the intention of the General Assembly to incorporate into R.C. 5739.071 the applicable refund provisions set forth in R.C. 5739.07, including the payment of interest set forth in R.C. 5739.07(F). If the General Assembly had intended that result, then it would have expressly stated it. Finally, we cannot find that the provisions of R.C. 5739.07 and R.C. 5739.132 are fully

incorporated into R.C. 5739.071 because that is not what the General Assembly expressly stated in R.C. 5739.071.

Refund of interest on overpaid taxes is a matter of legislative grace. *Gen. Elec.*, supra; *Brown and Williamson Tobacco, Corp. v. Tracy* (Sept. 6, 1996), BTA No. 1995-M-1008, unreported. It was within the General Assembly's power to identify those statutes which would entitle the claimant to interest. We find that the General Assembly did not identify R.C. 5739.071 as a statute pursuant to which a claimant is entitled to interest.

Thus, considering the statutes and case law, this board finds that the Tax Commissioner correctly denied the appellants' claim for interest on the refunds issued pursuant to R.C. 5739.071. Therefore, it is the decision and order of the Board of Tax appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

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