

Buchtel Food, Inc.,)	
)	CASE NO. 95-T-393
Appellant,)	
)	
vs.)	
)	(SALES TAX REFUND)
Roger W. Tracy, Tax)	
Commissioner of Ohio,)	
)	
Appellee.)	DECISION AND ORDER

APPEARANCES:

For the Appellant	- James W. Childs Attorney at Law 3350 Yellow Creek Road Akron, Ohio 44333-2218
For the Appellee	- Betty D. Montgomery Attorney General of Ohio By: Duane M. White Assistant Attorney General State Office Tower, 16th Floor 30 East Broad Street Columbus, Ohio 43215

ENTERED: July 18, 1997

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This matter is before the Board of Tax Appeals pursuant to a notice of appeal filed under date of May 11, 1995, by appellant, Buchtel Food, Inc. Buchtel appeals from a final determination of the Tax Commissioner, which was issued on April 4, 1995. Therein, the Tax Commissioner denied Buchtel's request for a refund of \$58,633.71 paid upon several sales tax assessments previously issued by the Tax Commissioner.

Buchtel's notice of appeal reads, in pertinent part:

"Please consider this my request [for] an appeal of the Final Determination for the State of Ohio Department of Taxation's [sic] on my request for tax refund with regard to the following assessments:

Buchtel Food Inc. Assessments 91000227S
and 90009915

"Based on the findings of the Board of Tax Appeals in an earlier hearing we requested a refund of the penalties that were paid by Buchtel Food Inc. in 1991.¹ Our request was denied by the Department of Taxation Refund Department. We are therefore requesting a new hearing on this matter before the Board of Tax Appeals.

"The Facts in this case are very clear:

"1. Our company controller failed to pay sales taxes to the State of Ohio in 1989 for a period of four months. As a corporate officer he then signed off the assessment and our company lost the right to appeal the assessment because 30 days lapsed.

"2. Upon finding what happened we contacted the Attorney General's office to make full payment of the taxes owed. The case was given to Att. John Plough in Ravenna Ohio. Mr. Plough seized our company accounts while we were working out a payment plan with the State. He then forced us to sign a letter agreeing to pay \$58,000 in penalties or he would keep all our accounts. We had no choice if we were to stay in business, but to sign the letter. The taxes owed were in fact only \$86,000.

¹ Buchtel refers to Davidian v. Tracy (Oct. 7, 1994), BTA Case Nos. 93-X-768, 93-X-769, & 93-X-770, unreported. These three cases, however, concerned responsible officer assessments issued against Mr. Edward Davidian, Buchtel's president. Under authority of Rowland v. Collins (1976), 48 Ohio St. 2d 311, we specifically ruled that issues concerning the corporate assessments were not properly before us in the three cases because the assessments had become conclusive. We held that the assessments against Mr. Davidian be canceled as the corporate assessments had been paid.

"3. The Tax Commissioner has used Rowland v. Collins, supra. [sic] as the entire basis for not refunding our \$58,000. We believe that the Attorney General's office allowed Mr. John Plough to collect the monies from our company because Mr. Plough contributed to the campaign of Lee Fisher, not because there was any justification in the amount of penalty to the amount owed the State of Ohio.

"4. We are again requesting a hearing before the Board of Tax Appeals with regard to the fines assessed to Buchtel Food Inc."

This matter is now considered by the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the Board by the Tax Commissioner, the briefs of the parties, and the record of the evidentiary hearing. At the hearing, both parties were represented by counsel, who offered the testimony of several witnesses and introduced numerous documents in support for their respective contentions.

Buchtel Food, Inc., is an Ohio corporation which operates several restaurants in the Northeast part of the state under the name of "Country Manor Family Restaurant." Buchtel is also the parent of two other corporations, Mill Food, Inc., and Willow Food, Inc. Both of these corporations also operated Country Manor restaurants. The corporations are wholly owned by Edward Davidian, who is Buchtel's president. ²

During the periods in question, Buchtel employed Thomas M. Masterson as its comptroller and secretary. According to Buchtel,

² Subsequent to the periods in issue, Willow and Mill merged with Buchtel to form one corporation.

Mr. Masterson engaged in a scheme to steal money from the corporation. To this end, Mr. Masterson appears to have secreted monies which would have otherwise been paid over to the state as sales tax. As a result of this activity, Buchtel, Willow, and Mill were assessed for unpaid sales tax. According to the record, Buchtel was assessed an amount of \$64.84 for unpaid tax for the period of February and March 1989. A second assessment was thereafter issued against Buchtel in the amount of \$197,164.97, including unpaid tax, late charges, penalties, and interest. This assessment, no. 91000227S, covered the period of December, 1987 through January, 1989.

Mill received three assessments. The first covered the period of February and March 1989 and was in the amount of \$61.48. The second, assessment no. 90004516S, covered the period of December 1986 and was in the amount of \$41,913.75. The third assessment was in the amount of \$212.46. Willow was assessed for January 1990 in the amount of \$516.68. Thereafter, a second assessment was issued in the amount of \$64,127.62. This assessment covered the period of December 1987 through November 1989.

Mr. Masterson, Buchtel's comptroller and secretary, evidently acknowledged service of each of the assessments. No petition for reassessment was filed to challenge the assessments within thirty days of their issuance. It does not appear that Mr. Davidian, or any other corporate officer, was made aware of these assessments until after they became conclusive against the corporation.

After these assessments became final, the Tax Commissioner, pursuant to R.C. 5739.13(C), certified them to the clerk of courts in the appropriate counties. The clerk thereafter entered sales tax judgments in favor of the state against Buchtel, Willow, and Mill. The Tax Commissioner also certified these assessments to the Attorney General for collection. A special counsel, appointed by the Attorney General, sought payment of these assessments and ultimately initiated an action in the Stark County Common Pleas to garnish certain bank accounts of one or more of the three corporations, in order to satisfy the sales tax judgments. On April 16, 1992, an agreed judgment entry was entered by the Stark County Common Pleas Court. Pursuant to the entry, Society National Bank issued a check payable to the Attorney General for the Department of Taxation, Sales Tax Division, in the amount of \$86,316.13 and a check payable to the Department of Taxation in the amount of \$24,647.00 in payment of an assessment that had not been certified to the Attorney General for collection. The Buchtel accounts with Society National Bank were then released from the garnishment proceeding.

Buchtel and the Tax Commissioner disagree as to the effect of the judgment entry terminating the garnishment proceedings. According to Buchtel, the two payments of sales tax, \$86,316 and \$24,467 were in settlement of all claims that the Tax Commissioner had against the corporations. After these payments, Buchtel claims the Commissioner sought payment of an additional \$58,633.71 in penalties and late charges. At the hearing, Mr. Davidian testified

that he paid this sum over a fourteen month period, although he continued to protest the state's right to the funds. Once payment was made, Buchtel filed the claim for refund, which was denied by the Tax Commissioner and led to the instant appeal.

The Tax Commissioner, however, claims that the \$58,633.71 in penalties and late charges was part of an agreement. According to the Tax Commissioner, the \$86,316 and \$24,467 payments of tax were required at the time of the agreed judgment entry to authorize the release of the garnished accounts. However, this did not represent the entire payment required by the agreement. The Tax Commissioner claims that Buchtel agreed to later pay the \$58,633.71 in late charges and penalties.

In its notice of appeal, Buchtel raises the issue of the payment of \$58,000 as a penalty pursuant to a forced letter agreement, upon a tax liability of only \$86,000. In its brief, Buchtel raises additional issues: (1) that the agreed judgment entry is res judicata and therefore precludes the Tax Commissioner from collecting further penalties on the assessments; (2) that the Tax Commissioner abused his discretion by not remitting all of the late charges and penalties; and, (3) that Buchtel has been deprived of procedural and substantive due process in that it did not receive proper notification of the assessments. In addition, Buchtel raised at hearing a fourth contention, asserting that the Tax Commissioner tampered with the statutory transcript to remove evidence favorable to the corporation's claims.

Before reviewing Buchtel's claims, we must first address two issues which impact upon our consideration of this appeal. First, Buchtel has continuously referred to the \$58,633 as a "penalty." Our review of the statutory transcript indicates that this characterization is not totally accurate. Instead, the amount in question includes both late charges imposed pursuant to R.C. 5739.12 and penalties issued under authority of R.C. 5739.13 and R.C. 5739.133. Of the amount in issue, \$20,413.48 is for the late charges originally assessed against the corporation. The remaining \$38,220.23 is designated as penalties. It also appears from the statutory transcript that, notwithstanding Buchtel's claim of abuse of discretion, the Tax Commissioner did grant a fifty-percent reduction in the amount of penalties originally assessed and canceled all of the interest due on the assessments. (S.T. 3; S.T. 22-25.)

We further find that our consideration of this appeal is necessarily limited to only those issues properly raised in the notice of appeal. R.C. 5717.02 sets forth the mandatory procedures required for bringing a proper notice of appeal before the Board. R.C. 5717.02 reads, in pertinent part:

"Such appeal shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if his action is the subject of the appeal * * * The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer or enterprise of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and

incorporate it by reference in the notice of appeal does not invalidate the appeal." (Emphasis added.)

Because the Board of Tax Appeals is an administrative agency, the requirements of R.C. 5717.02 must be strictly complied with before the subject matter jurisdiction of the Board may be invoked. Clippard Instrument Laboratory, Inc. v. Lindley (1977), 50 Ohio St. 2d 121; Fineberg v. Kosydar (1975), 44 Ohio St. 2d 1; The Zephyr Room v. Bowers (1955), 164 Ohio St. 287. The Supreme Court has previously reviewed the specificity requirement of R.C. 5717.02 in Queen City Valves, Inc. v. Peck (1954), 161 Ohio St. 579. Therein, the Court held that:

"On an appeal from an order of the Tax Commissioner to the Board of Tax Appeals, Section 5611, General Code (Section 5717.02, Revised Code), requires that the notice of appeal shall specify the errors complained of; a notice of appeal which does not enumerate in definite and specific terms the precise errors claimed but uses language so broad and general that it might be employed in nearly any case is insufficient to meet the demands of the statute; and a decision of the Board of Tax Appeals dismissing for want of jurisdiction an appeal predicated on such a notice of appeal will not be reversed by this court as unlawful or unreasonable." Id. at Syllabus. (Emphasis in original.)

Additionally, the Court determined what the term, "specify," meant in regards to R.C. 5717.02. The Court found that the Board of Tax Appeals was "entitled to be advised specifically of the various errors charged." Thus, R.C. 5717.02 "requires in plain language that the errors complained of be specified. The word, 'specify,' according to Black's Law Dictionary (4Ed.) means

'to mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail * * *.'" Id. at 583.

Recently, in Kern v. Tracy (1995), 72 Ohio St. 3d 347, the Court relied upon Queen City Valves to affirm this Board's determination that it lacked jurisdiction to consider an exemption claim under R.C. 5739.02(B)(14) because that issue was not mentioned in the notice of appeal. See, also, Riss & Co. v. Bowers (1961), 114 Ohio App. 429 (an error not included in a notice of appeal but which is later briefed may not be considered); and CNG Dev. Co. v. Limbach (1992), 63 Ohio St. 3d 28 (items not mentioned in the petition for reassessment may not be considered in a notice of appeal to the Board). But see Lakefront Lines, Inc. v. Tracy (1996), 75 Ohio St. 3d 627 (jurisdiction existed where taxpayer set forth refund claim in notice of appeal and specified the Tax Commissioner's denial of the refund as error).

We observe that both parties have litigated this matter on the basis that the entire \$58,633.71 is in issue. We find, however, that Buchtel failed to properly raise the entire amount of charges and penalties in its notice of appeal. In the instant matter, the record shows that Buchtel filed a refund claim with the Commissioner for the late charges and penalties levied against the corporations in seven assessments. This claim totals \$58,633. The notice of appeal, however, seeks a tax refund only with regard to Buchtel Food, Inc., Assessment Nos. 9100227S and 90009915. Our

jurisdiction is therefore limited to that portion of the \$58,633 related to Assessment Nos. 9100227S and 90009915.

The statutory transcript contains a breakdown of the amounts originally assessed and of the compromise amounts subsequently determined by the Tax Commissioner. (S.T. 22-25.) According to these records, the amount of penalties and late charges attributable to the two remaining assessments amounts to approximately \$31,900. This is the actual amount over which we have jurisdiction, and we shall limit our review thereto. ³

For the same reasons, we have no jurisdiction to consider those issues framed in Buchtel's brief but not specifically raised by the notice of appeal. Riss & Co., supra. The claim that res judicata precludes the Tax Commissioner's collection of additional penalties is not raised, nor are we able to elicit such a contention through any reasonable interpretation of the notice of appeal. Consequently, the issue is not properly before us. Queen City Valves, supra; Kern, supra. The claim that Buchtel has been deprived of procedural and substantive due process in the notification of the assessments is not raised by the notice of appeal. Thus, we may not consider at this point the service of the original assessments. Nevertheless, we point out that service received by a corporate officer at its offices would appear to satisfy the requirements for good service, as suggested by the

³ We note, however, that our disposition of this appeal would apply to the entire amount, had it been properly raised.

Supreme Court in Castellano et al. v. Kosydar (1975), 42 Ohio St.2d 107.

Even if we were to have jurisdiction, we would be unable to find that res judicata applies to this matter. Under res judicata, a "valid, final judgment rendered upon the merits bars all subsequent actions based upon any claim arising out of the transaction that was the subject of the previous action." Grava v. Parkman Twp. (1995), 73 Ohio St. 3d 379 at syllabus; Norwood v. McDonald (1943), 142 Ohio St. 299 at paragraph two of the syllabus. See, also, Restatement of the Law 2d, Judgments (1982), Section 27 ("When an issue of law or fact is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.").

Central to the doctrine is that res judicata precludes a second action on the same cause of action. Norwood, supra. See, also, Restatement of the Law, Judgments (1982), Section 45. The record indicates that the only matter before the Stark County Court of Common Pleas was the garnishment of Buchtel's accounts with the Society National Bank. The proceedings operated to aid in the collection of sales tax judgments of record in Stark County and elsewhere. The proceedings did not address the validity of the assessments, the amount of penalties and late charges assessed, or Buchtel's right to a subsequent refund of the sales tax, penalties, and interest assessed. In short, the garnishment proceedings were

undertaken only as an aid to collection and ultimately resulted in the release of these specific accounts. See, R.C. 2716.21(C)(2) (garnishment proceedings are "limited to a consideration of the amount of money * * * that can be used to satisfy all or part of the debt * * *"). The judgement entry did not purport to release the sales tax judgments; nor did the proceedings in any way consider the validity of the sales tax judgments, the underlying sales tax assessments, or rights of the parties thereunder. Consequently, even if we had jurisdiction, we could not find that res judicata applied because the claims and issues in the garnishment proceedings are not the same issues now before this Board.

To the extent that Buchtel's notice of appeal does make reference to the collection of \$58,000 and a forced letter agreement to make payment of such penalty, we will review the garnishment proceedings to determine if there was an effective compromise and settlement of the amounts claimed by the Tax Commissioner and which gave rise to the court's judgment releasing the Society National Bank accounts.

We begin our review of this issue by observing that the findings of the Tax Commissioner are presumptively valid. Consequently, it is incumbent upon a taxpayer challenging a determination of the Tax Commissioner to rebut that presumption. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St. 3d 121. When no competent and/or probative evidence is developed and properly presented to the Board to establish the Tax Commissioner's

determination as "clearly unreasonable or unlawful," the determination is presumed to be correct. Id.

In undertaking the collection of the assessments, special counsel for the Attorney General finally initiated garnishment proceedings and filed precipes in the Stark County Court of Common Pleas to seize and garnish bank accounts held in the names of the three corporations, which we have collectively referred to as Buchtel. Upon the representation of counsel that a settlement had been reached, the common pleas court entered its judgment entry, releasing the garnishment and ordering certain payments to the state. The entry reads, in pertinent part, as follows:

"The Court being personally advised, the Attorney General, State of Ohio, through its local counsel, John J. Plough, on behalf of the State of Ohio Department of Taxation, Sales Tax Division, that all parties have rendered an agreement and settlement of the assessment and judgment heretofore issued against Buchtel Food, Inc., dba Country Manor, Mill Food, Inc., dba Country Manor Restaurant, Edward H. Davidian, Jr., and Barbara Davidian Heintl, it is therefore agreed that the execution heretofore ordered in this case on April 16, 1992, to Society National Bank, 126 Central Plaza North, Canton, Ohio 44702, as well as to any other holder of funds, is hereby released pursuant [sic] this agreement between the parties and as represented to this Court.

"WHEREFORE, Society National Bank is hereby ordered to release all of said accounts, including but not limited to, Account Nos. 8293667, 8293318, 8164244, and 8138685, and with said release to issue a cashier's check in the amount of \$86,316.13 made payable to Attorney General, State of Ohio for the Department of Taxation, Sales Tax Division, and a check in the amount of \$24,467.00 made payable to the Department of Taxation, c/o Canton Office." (S.T. 17.)

Specifically, the entry states that the parties had entered into an agreement concerning the assessments and judgments. The entry orders the bank to release the accounts and issue checks in the amounts of \$86,316.13 and \$24,467.00 to the Department of Taxation. State of Ohio v. Buchtel Food, Inc. (Apr. 24, 1992), Stark Cty. Comm. Pleas No. EX72-140, unreported. (S.T. 17.) Buchtel claims that the judgment entry sets the total amount necessary to satisfy the assessments. We do not find any implication, as claimed by Buchtel, that the judgment entry itself constitutes the full and complete agreement between the parties.

Buchtel argues that the judgment entry constitutes the complete agreement between Buchtel and the Tax Commissioner, that the only sums required to be paid are those listed in the entry, and the the Tax Commissioner's subsequent request for penalties and charges is in contradistinction to the agreement. The Tax Commissioner counters that the agreement made by the parties, includes Buchtel's additional payment of late charges and the reduced penalties.

The judgment en try states only that an "agreement and settlement" had been reached. It does not indicate what the agreement actually entails. Buchtel interprets the release of accounts and the Court's order that two checks be issued as indicating that the two payments represent the entire amount due. We are unable to accept this interpretation. The entry does not state that the \$86,316.13 and \$24,467.00 payments would completely settle all matters between the parties. This section of the entry,

at best, may be interpreted simply as the Court's order to release certain funds to the State. The entry does, however, make clear reference to an agreement between the parties.

Consequently, we are faced with the following question: what was the agreement, if any, reached between the parties? Initially, we observe that neither party has presented us with a formal contract or other memorandum, signed by all of the parties, that purports to set forth the rights and duties of the parties under an agreement. Nor has any other contemporaneous writing been forthcoming to document any agreement which may have been presented to the court. Based upon the foregoing and the testimony adduced at hearing, we must conclude that we are faced with a parole agreement.

The burden is thus upon Buchtel to demonstrate that the agreement is other than as determined by the Tax Commissioner. The only evidence presented by Buchtel to support its contention is the testimony of Mr. Davidian. Mr. Davidian testified that no agreement was entered into which would demand payment from Buchtel of the \$58,633 in penalties and late charges. He does, of course, make reference in the notice of appeal to a letter which forced him to make the payment. The letter to which the notice of appeal refers has not been identified or offered in evidence.

The Tax Commissioner has presented the testimony of John Plough, the special counsel appointed by the Attorney General to collect the assessments. Mr. Plough testified that the agreement referred to by the court and upon which the court relied included

the payment of \$86,316.13 in taxes outstanding on the assessments, a payment of \$24,467.00 for taxes on assessments that were issued but not yet reduced to judgment, and the payment of late charges and penalties. Mr. Plough indicated that the two checks which the Court ordered to be issued were the amounts the Attorney General demanded to be paid before it would agree to release the bank accounts. Mr. Plough testified that he understood this to be a partial payment and that the amount of penalties and charges would be later determined. Mr. Plough specifically testified that he did not agree to compromise and settle the Tax Commissioner's claims for the amounts listed in the entry. He also stated that he was without authority to make such a compromise. Robert Sicuro, an attorney for the Tax Commissioner, and George Calloway, former Chief of the Attorney General's Revenue Recovery Section, also testified that the Tax Commissioner did not agree to a full remission of the penalties and additional charges in this matter.

Mr. Calloway testified that the actual agreement is reflected in his letter dated April 29, 1992, to Buchtel's counsel. The letter is contained in the statutory transcript and reads, in part:

"The purpose of this letter is to memorialize the arrangements agreed upon to satisfy the outstanding delinquent sales taxes owed to the State of Ohio by Mill Food, Inc., Buchtel Food, Inc., and Willow Food, Inc. (all of which are doing business as Country Manor Family Restaurant), and certified to the Office of the Attorney General to collect. It is agreed that said corporations will immediately tender the full outstanding delinquent sales taxes in the amount of \$86,316.13 to the Office of the Attorney

General. In addition, it is agreed that said corporations will pay all late charges (\$20,413.48) and 25% penalties and additional penalties (38,220.23) which both combine to make the amount of \$58,633.71." (S.T. 40.)⁴

This letter reflects that the 50% statutory penalty assessed under R.C. 5739.133 would be abated to 25%, if payment of the \$58,633.71 was paid within the twelve month period.

We can find nothing in the record from Buchtel which purports to challenge the foregoing memorialization of the earlier parole agreement. On May 7, 1992, Mr. Calloway further sent to Buchtel, at counsel's request, a breakdown of each assessment then certified. (S.T. 21.) The letter sets forth the original amounts assessed and then shows how the assessments were adjusted to conform with the agreement described in the letter of April 29, 1992, supra. Again, nothing appears in the record from Buchtel to challenge the details of the agreement.

In fact, the record indicates a period of silence following Mr. Calloway's letter of May 7, 1992. A letter dated December 10, 1992, from Buchtel's attorney, Lee E. Plakas, to Mr. Calloway is the first evidence of any communication after the May letter. (Appellee's Exhibit O.) Therein, Buchtel's attorney states that by "an agreement confirmed by the attached letter of April 29, 1992, an installment payment plan was entered into whereby the taxpayer would pay the amount of \$58,633.71 in late charges and

⁴ Nothing in the "agreement" appears to foreclose Buchtel from asserting any rights which it may have had, including the filing of the \$58,633 refund claim.

penalties. It should be noted that the aforementioned agreement was entered into under the pressure of total business closure * * *." Although the letter indicates that Buchtel felt pressured into accepting the terms of the agreement, the letter demonstrates that Buchtel was aware of the Tax Commissioner's demand for payment of penalties and interest and did agree. We further note that Buchtel admits in its notice of appeal that it agreed to pay the \$58,000 because the Attorney General would otherwise "keep all our accounts."

Based upon all of the foregoing, we find that Buchtel is unable to meet its burden of showing that no agreement existed between it and the Tax Commissioner with regard to the penalties and late charges. Buchtel has failed to demonstrate that there was an agreement that the payments ordered by the court in the garnishment proceedings constituted a full and complete compromise and settlement of all assessments and sales tax judgments then extant. Accordingly, we find that a preponderance of the evidence supports the existence of an agreement between the parties. The documentary evidence introduced by both parties further leads us to find that the agreement is as set forth in Mr. Calloway's April 29, 1992, letter. (S.T. 40.)

Buchtel next argues that the Tax Commissioner abused his discretion in not remitting the late charges and in not fully remitting the penalties. The Tax Commissioner, however, argues that the request is not proper. We agree with the Tax Commissioner.

Initially, we observe that the refund claim was filed under authority of R.C. 5739.07, which authorizes the Tax Commissioner to refund any taxes paid "illegally or erroneously or paid on an illegal or erroneous assessment[.]" Buchtel, however, does not contend that the tax itself was erroneously or illegally assessed. Instead, Buchtel only challenges the late charges and penalty portions of the assessments.

The late charges were levied pursuant to R.C. 5739.12, which reads, in part, as follows:

"Any vendor who fails to file a return or pay the full amount of tax shown on the return to be due under this section and the rules of the commissioner shall, for each such return he fails to file or each such tax he fails to pay in full as shown on the return within the period prescribed by this section and the rules of the commissioner, forfeit and pay into the state treasury an additional charge of fifty dollars or ten percent of the tax required to be paid for the reporting period, whichever is greater, as revenue arising from the tax imposed by this chapter, and such sum may be collected by assessment in the manner provided in section 5739.13 of the Revised Code. The commissioner may remit all or a portion of the additional charge and may adopt rules relating thereto."

The penalties were assessed pursuant to R.C. 5739.133, which reads, in part:

"(A) A penalty shall be added to every amount assessed under section 5739.13 or 5739.15 of the Revised Code as follows:

"(1) In the case of an assessment against a person who fails to file a return required by this chapter, fifty per cent of the amount assessed;

"(2) In the case of a person whom the tax commissioner believes has collected the tax but failed to remit it to the state as required by this chapter, fifty per cent of the amount assessed; * * * * *

"(C) The commissioner may adopt rules providing for the remission of any penalty provided for under this section."

Under both R.C. 5739.12 and R.C. 5739.133, the assessment of late charges and penalties is mandated by law. The Tax Commissioner must impose them whenever an assessment for unpaid sales tax, or the failure to file the sales tax returns, is issued. R.C. 5739.12 and R.C. 5739.133(C), however, provide a mechanism through which the Tax Commissioner may remit those late charges and penalties and grant the Tax Commissioner the authority to make rules for granting such remission. Pursuant to this authority, the Tax Commissioner has promulgated Ohio Adm. Code 5703-9-05 and Ohio Adm. Code 5703-9-18. Ohio Adm. Code 5703-9-05 reads:

"(A) A person assessed sales or use tax may petition the tax commissioner for the remission of the statutory penalty. The petition must be in writing and must be filed with the tax commissioner * * * within thirty days of the receipt of the notice of assessment. If a petition for reassessment is filed timely contesting the validity or legality of the assessment, the petition for remission of penalty may be included or may be filed separately.

"(B) The commissioner may remit such part of the penalty as is deemed proper. Remission may be conditioned upon payment of the full amount, as finally determined, within thirty days of the receipt of the final determination of the commissioner or the date of decision of the board of tax appeals or other court of appellate jurisdiction."

Ohio Adm. Code 5703-9-18 contains a similar thirty-day filing deadline for those who seek remission of a late charge levied under R.C. 5739.12.

As indicated by the above provisions, the remission of penalties and late charges is discretionary with the Tax Commissioner; nevertheless, the original assessment of them is not. In short, because the imposition of penalties and late charges is mandated by law, they cannot be illegally or erroneously assessed so long as they are made at the statutory levels. Consequently, the penalties and late charges may not be the subject of a R.C. 5739.07 refund claim:

"[W]e do not find that a refund claim therefore is authorized under R.C. 5739.07. And the fact that the Tax Commissioner had authority to remit the penalty under R.C. 5739.133 does not make its assessment 'illegal or erroneous' or give the Tax Commissioner authority to consider remission (per 5739.133 or any other authority) under R.C. 5739.07. If the General Assembly had wanted the Tax Commissioner to have authority to consider remission of penalties on proper assessments under R.C. 5739.07 we believe it would have used other language than that there employed." Stevens v. Tracy (Oct. 20, 1995), BTA Case No. 94-H-1166, unreported, at 3.

See, also, Tenbrink v. Tracy (Dec. 8, 1995), BTA Case No. 95-R-181, unreported; Brown Derby, Inc. v. Lindley (Apr. 4, 1978), BTA Case Nos. 77-E-12 through 77-E-21, unreported. Accordingly, the application for refund is not applicable to this matter. Tenbrink, supra.

Instead, Buchtel was required to follow the procedures outlined in Ohio Adm. Code 5703-9-05 and 5703-9-18. Under this

scheme, Buchtel was required to file a petition for reassessment within thirty days of receiving each original assessment. In accordance with Department of Taxation policies and procedures, an assessment is mailed to a taxpayer as one part of a multi-part form. This form not only contains the assessment but also a petition for reassessment and the instructions for filing the petition. See Tenbrink, supra.

In the instant matter, no petition for reassessment was filed within thirty days of the issuance of any of the assessments in question, as required by R.C. 5739.13(B). The assessments became conclusive against Buchtel and were ultimately reduced to judgment. Thus, Buchtel's opportunity to request the remission of late charges and penalties had passed. VeriFone, Inc. v. Limbach (1994), 69 Ohio St. 3d 699 (petition for remission must be filed in accordance with the Tax Commissioner's duly prescribed and promulgated rules, as these rules have the force and effect of law).

Buchtel nevertheless implies that the requirements of Ohio Adm. Code 5703-9-05 and 5703-9-18 should be waived in this instance because Buchtel's comptroller and secretary received the assessments but did not act to preserve the corporation's appeal rights. Additionally, Buchtel argues that it was the comptroller's criminal activities that led to Mr. Davidian's failure to know about the assessments until they became conclusive. The circumstances to which Mr. Davidian allude reflect particularly egregious conduct on the part of his employee, from which he has

suffered a significant loss. Unfortunately, we have no basis upon which to grant the relief which he now seeks.

Mr. Masterson was a duly appointed officer of Buchtel. He was also the comptroller of the corporation, who had authority to make and file Buchtel's sales tax returns and make sales tax payments. Mr. Masterson was entrusted by Buchtel with these duties; he held himself out as the officer in charge of Buchtel's sales tax matters and indeed had such authority. As a result, the consequences of his failure to properly remit sales tax, and of his subsequent failure to inform other corporate officers of the assessments, must be borne by the corporation. The Tax Commissioner properly served the officer assigned to oversee the corporation's sales tax obligations. While it is unfortunate that this officer may not have been trustworthy, it does not change the fact that the Tax Commissioner served the assessments upon the corporation. See, also, Transcon, Inc. v. Limbach (Apr. 26, 1991), BTA Case No. 89-F-697, unreported (reliance upon accountant cannot excuse a taxpayer from the consequences of his failure to comply with his tax obligations).

Buchtel also maintains that the service of the assessments was not complete because Mr. Davidian, as the principal shareholder and president of Buchtel, did not personally receive them. The original assessments, however, were not issued against Mr. Davidian personally. They were issued against the corporate entity, Buchtel Food, Inc., or the other affiliated companies. The problems that existed within Buchtel may have resulted in Mr. Davidian not being

personally aware of the assessments in a timely manner. However, this occurred as a result of circumstances within the corporation and not due to the fault of the Tax Commissioner.

Moreover, the thirty-day filing deadlines of R.C. 5739.13(B), Ohio Adm. Code 5703-9-05 and 5703-9-18 are mandatory, jurisdictional requirements which cannot be waived by the Tax Commissioner. VeriFone, supra, at 702. See, also Bd. of Edn. of Mentor v. Lake Cty. Bd. of Revision (1980), 61 Ohio St. 2d 332 (Commissioner of Tax Equalization could not waive, by affidavit, his right to a notice of appeal where statute provides a jurisdictional requirement that he be served with such a notice). Thus, even if Buchtel's argument had merit, it would still be bound by the provisions set forth in Ohio Adm. Code 5703-9-05 and 5703-9-18.

Even if we were to find that the refund claim was timely and otherwise properly filed, we can find no basis to overturn the Tax Commissioner's decision to only partially remit the penalties and retain all of the late charges. The decision to remit a penalty under R.C. 5739.133(C) and/or a late charge under R.C. 5739.12, is entirely within the discretion of the Tax Commissioner. Because this authority is discretionary, we may not reverse the Tax Commissioner's determination unless an abuse of that discretion is specifically demonstrated. Frankelite Co. v. Lindley (1986), 28 Ohio St. 3d 29; Jennings & Churella Construction Co. v. Lindley (1984), 10 Ohio St. 3d 67. See, also, Brown Derby, Inc., Route 21 Restaurant, Inc., Litchmill, Inc. v. Tracy (Apr. 2, 1993), B.T.A.

Case No. 91-A-1235, unreported. Relative to what constitutes an abuse of discretion, we note the Supreme Court's decision in Huffman v. Hair Surgeon, Inc. (1985), 19 Ohio St. 3d 83:

""[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. ***" State v. Jenkins (1984), 15 Ohio St. 3d 164, 222." Id. at 87.

In the instant matter, we acknowledge that Buchtel may have been the casualty of its comptroller's purported misdeeds. Had it been within our authority, we might very well have concluded that a total remission of penalties and/or late charges was warranted. But, we cannot simply substitute our judgment for that of the Commissioner. The test is quite stringent -- a taxpayer must prove by competent and probative evidence that the decision of the Tax Commissioner amounts to an abuse of discretion. Hatchedorian v. Lindley (1986), 21 Ohio St. 3d 66.

In making his decision to retain the additional charges and to reduce the penalties to twenty-five percent, the Tax Commissioner may have considered Buchtel's unfortunate situation. We are not persuaded, however, that the Tax Commissioner's refusal to remove the late charges and all of the penalties constitutes an

abuse of discretion. The record shows that the Tax Commissioner had the opportunity to consider the circumstances in this matter and agreed to remove one-half of the penalties. Buchtel has provided nothing which would lead us to conclude that the alleged abuse occurred.

In summary, Buchtel's failure to comply with all of the requirements necessary for filing a petition for remission resulted in both the Tax Commissioner's and this Board's lack of jurisdiction to consider the claim. VeriFone, supra; Akron Std. Div. v. Lindley (1984), 11 Ohio St. 3d 10.

Buchtel next claims in its brief that it has been denied due process because the assessments were not directed to Mr. Davidian, thereby denying him an opportunity to present his objections. Again, this issue was raised in neither the claim filed with the Tax Commissioner nor in the notice of appeal filed with this Board. We thus question our jurisdiction to consider it. Queen City Valves, supra; CNG, supra; Riss & Co., supra.

Additionally, we observe that the Board of Tax Appeals is a quasi-judicial, administrative agency that is without jurisdiction to consider constitutional issues. S.S. Kresge Co. v. Bowers (1960), 170 Ohio St. 405; Cleveland Gear Co. v. Limbach (1988), 35 Ohio St. 3d 229. The Supreme Court has held that the Board of Tax Appeals may accept evidence on constitutional questions; however, it cannot issue rulings upon them. MCI Telecommunications Corp. v. Limbach (1994), 68 Ohio St. 3d 195.

Accordingly, Buchtel's constitutional argument is not properly before us.

Buchtel's final contention is that the Tax Commissioner has intentionally sought to influence this Board by removing certain documents from the statutory transcript and by forging other documents. Because these accusations go to the integrity of the proceedings before the Board, we must respond to them. There is no affirmative evidence which supports such an inflammatory accusation.

Upon review, we can find no evidence of tampering with the record. As to the document that Buchtel claims was forged, we note that our Attorney Examiner refused to permit the document into evidence. It is thus not before us for consideration, nor was it considered in respect in the disposition of this appeal. Moreover, the mere fact that Mr. Davidian stated that he was not familiar with the document does not reflect any illicit purpose on anyone's part. Next, Buchtel claims that an affidavit written by his former comptroller and secretary, Mr. Masterson, was purposefully left out of the statutory transcript. Buchtel argues that the statutory transcript contains only an affidavit made in 1991, which refers to Mr. Masterson's failure to pay federal employment taxes. (Appellant's Brief, page 4.) However, the statutory transcript does contain an affidavit signed by Mr. Masterson on August 11, 1992. This affidavit refers to the sales tax assessments in issue and is the affidavit which Buchtel presumably claims was intentionally withheld from this Board. (S.T. 11.)

Finally, we believe the integrity of the record certified by the Tax Commissioner has been preserved. This appeal has been vigorously tried by both parties over many days and a full and complete record has been made from which we have been able to consider all of Buchtel's contentions properly before us.

To conclude, after a thorough review of the entire record, we find that the errors properly before us are not supported by competent and probative evidence and that Buchtel has failed to sustain the burden placed upon it to establish any errors in the Tax Commissioner's final determination. We thus conclude that the final determination of the Tax Commissioner is supported by a preponderance of the evidence and is in accordance with law. Therefore, it is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and the same hereby is, affirmed ohiosearchkeybta.