

Paul D. Jones, DBA)
Porap Associates,)
)
Appellant,) CASE NO. 96-L-225
)
vs.) (SALES TAX)
)
Roger W. Tracy,) DECISION AND ORDER
Tax Commissioner of Ohio,)
) Affirmed on Appeal - Sept. 23, 1998
Appellee.)

APPEARANCES:

For the Appellant - J. Vincent Buchanan, Esq.
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For the Appellee - Betty D. Montgomery, Esq.
Attorney General of Ohio
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Entered: March 20, 1998

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

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on March 8, 1996, by Appellant, Paul D. Jones, dba Porap Associates. Appellant is engaged in the business of selling bingo game supplies, games of chance and gambling paraphernalia primarily to social clubs, churches and not-for-profit organizations which in turn conduct the various games of chance with their members and patrons. The games

of chance are promoted by the Appellant as a fund raising tool for the various organizations. Appellant also sells candy and novelties that can be used as prizes. The instant appeal is being taken from the final determination of the Tax Commissioner in which that official affirmed the original sales tax assessment as issued.

The subject assessment arose from an audit of Appellant's sales for the period from January 1, 1990 through April 30, 1993. The Tax Commissioner initiated the audit as part of a targeted investigation of bingo supply sellers. Initial contact with the Appellant by an agent of the Tax Commissioner was on June 2, 1993. A letter and brochure advising the Appellant of what was expected and the rights of an Ohio taxpayer were presented. The letter requested that the Appellant produce his general ledgers, purchase and sales journals, books, records, invoices, exemption certificates, memoranda, worksheets, accounts and other business documentation for the purpose of determining sales and use tax liability.

The Appellant initially asked for thirty days to assemble the records. The Appellant's information was subsequently presented in three boxes with no particular order or organization to the Tax Commissioner's agent on July 20, 1993. The Appellant did not have a valid vendor's license during the entire audit period. Additionally, only Appellant's 1991 federal tax return was made available for verification against his sales records. Neither the Appellant's sales nor his purchase records matched the amounts reported on the Appellant's Federal Schedule C for 1991. No federal tax information was provided for 1990, 1992, or 1993.

The sales invoice and transaction information provided by the Appellant was compiled by the Tax Commissioner's agent chronologically on ledgers to develop a total sales record. These individual transactions are recorded on audit sheets 21 through 39, and appear in the statutory transcript at pages 121 through 139. A review of the available invoices indicated sales made to customers with potential tax liability. Appellant presented only one certificate of exemption and it was not properly completed. Based on the foregoing, an "Official Notice of Intention to Levy a Sales and Use Tax Assessment," or "60-day letter" was issued to the Appellant on August 31, 1993.

Thereafter, the Appellant presented the requested "replies" or letters of usage for review by the Tax Commissioner's agent. Each reply was reviewed to determine if the same was acceptable pursuant to R.C. 5739.03. Most of the transactions previously determined to be taxable by the Tax Commissioner's agent remained taxable because no reply or letter of usage was received by the Appellant from the respective customer. The Tax Commissioner's agent did exempt some transactions based upon his knowledge of the identified customer. Invoices noting entries with "baskets" or "candy baskets" were not excluded as exempt food sales by the Tax Commissioner's agent because no other information regarding the sales were provided by the Appellant and other invoices listed "pickles" and "biscuits" which the Appellant stated were names of games of chance. The details and agent's conclusions for each of the replies or 60-day letters reviewed are included in the statutory transcript.

The Tax Commissioner's audit of Appellant was concluded by using the 1991 Federal Tax Return information and the known 1991 sales from the Appellant's records to determine a percentage of completeness for the sales records presented for the audit for tax year 1991. That percentage was calculated at 82.06%. The calculated completeness percentage for 1991 was applied to the other audit years including the partial 1993 audit year due to the Appellant's lack of additional records or verifiable information including federal tax returns for those periods.

The Tax Commissioner's agent noted that the Appellant did not hold an active vendor's license for the entire audit period. Based upon the lack of a vendor's license, sales invoices, federal income tax returns, or exemption certificates for the audit period, the agent concluded that no compliance was made by the Appellant with respect to the collection and remission of sales tax. The Tax Commissioner's agent further determined that monthly filings were required for the audit period. Additional late charges based upon the failure to file sales tax returns were calculated for each month and the fifty percent (50%) penalty was applied to the total for each month of the audit period.

Appellant filed a petition for reassessment including a request for remission of penalties and the additional charges. Appellant claimed that the charges were not accurate as to the initial amounts owed and/or the penalties charged. Appellant further claimed that some charges were billed for nontaxable items or against customers that were tax exempt. A hearing was scheduled before the Tax Commissioner to consider the Appellant's petition

for reassessment. The statutory transcript reflects that the Appellant argued that he was a wholesaler, not a retailer, and as a result the entire tax assessment was in error. Appellant was given an opportunity to submit additional documentation but none was received.

Upon review, the Tax Commissioner rejected the Appellant's claim that he was a wholesaler rather than a retailer, and therefore his sales were not subject to sales tax. The Tax Commissioner also rejected the Appellant's petition for reassessment due to the lack of any verifiable evidence to support the Appellant's claim of additional exempt sales. The Tax Commissioner issued his final determination letter affirming the original assessment including sales tax, penalty, and preassessment interest for a total amount of \$38,326.41 plus additional interest as prescribed by law from the thirty-first day after service of the notice of assessment to the date of payment.

The Appellant timely filed its notice of appeal with this Board. Said notice reads as follows:

"Now comes the appellant, Paul D. Jones, dba Porap Associates, by and through his attorney J. Vincent Buchanan and hereby appeals the Final Determination of the Tax Commissioner of the State of Ohio, Department of Taxation, dated January 31, 1996, and received by the Appellant on the 7th day of February, 1996.

"ISSUES APPEALED:

1. The primary issue that appellant raises to this board is that the tax commissioner is incorrect in finding that the appellant is a retailer rather than a wholesaler. The bulk of the appellant's business is the sale of 'tip books'. The appellant sells these books, which

generally contain 20 individual slips, in bulk to various organizations. These organizations at their various specific locations then sell the individual slips to their customers for a profit. The slips are in no manner altered, changed or modified from the original condition that the appellant sold them to the various organizations. There can be no question under Ohio law that these are wholesale sells (sic) and not retail sales.

"The tax commissioner cites no case law or statute to support his position. Rather the commissioner engages in the unrealistic thought process that the clubs are selling 'chance' and not the slips or tip books themselves. If this thinking were confirmed it would be similar to the tax commissioner arguing that a wholesaler of beer is not a wholesaler because what is really being sold is the opportunity of the ultimate consumer to become intoxicated. The fact of the matter is that the product appellant sells to the various clubs is resold in its identical condition as it is sold to the clubs by the appellant. Appellant is clearly a wholesaler and the tax commissioner's position must be reversed.

"Ohio Revised Code section 5739.01 and 02 control this situation. O.R.C. 5739.01(E) state the following:

'Retail sale' and 'sales at retail' include all sales except those in which the purpose of the consumer is:

(1) To resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be received by him.

'Sale', 'Business' and 'Consumer' are also defined in O.R.C. 5739.01. The organizations to which the taxpayer makes his bulk sales to are clearly in business and are consumers who engage in the business of selling the tips to the ultimate consumers, as these terms are so defined.

"O.R.C. 5739.02 states that an '...excise tax is levied on each retail sale made in this state.' The tax commissioner is attempting to collect sales tax from the appellant because it is

clearly easier and more enforceable to assess the appellant rather than attempt to do so from every club and organization. Nevertheless, the appellant as the law clearly defines (sic) is a wholesaler and therefore exempt from the assessment of sales tax. The sales tax must according to the law be assessed against the clubs who are the retailers and not this appellant.

"2. Appellant hereby makes specific request for a hearing in which he may present additional evidence to this board. The appellant believes that additional evidence in the nature of what he sells to the various clubs and organizations and how they resell the same would be of assistance to the board in making a proper and lawful decision regarding this appeal.

"WHEREFORE, appellant requests that the decision of the tax commissioner be reversed in full and that a hearing be held hereon in which appellant be granted the opportunity to submit additional evidence."

This matter was set for an evidentiary hearing and the Appellant was again afforded the opportunity to present evidence relating to the validity of the Tax Commissioner's assessment and the nature of the sales it claims to be exempted or excepted from sales tax. Mr. Paul D. Jones, a sole proprietor, dba Porap Associates, appeared with counsel and testified at the hearing before the Board. Mr. Jones stated that he purchased the games of chance and other gambling paraphernalia in multiple lots from several different manufacturers and then sold the individual games to the various social clubs and organizations. The various games are sometimes known as pickles, biscuits, jar tickets, pull tabs, rip offs, or soft tickets. Mr. Jones also testified that he sold bingo paper and supplies.

Mr. Jones testified that his customers use the individual games and supplies to conduct games of chance. The jar tickets, pickles, or pull tab games are packaged in a sealed bag with a warning that the product is not to be accepted if opened or tampered with. Mr. Jones testified that he did not pay sales or use tax on his purchases of the game sets from the various manufacturers. He further testified that his customers do not resell the various games as a complete unit in the same bundled bag that they are purchased. Mr. Jones testified that he believes that the purchaser opens the sealed bag for the individual game and

places the entire game set in an appropriate container. Mr. Jones further testified that the clubs or social groups would then sell the individual tickets or chances from the game to their members and patrons. The club or organization would also keep track of the prizes and the odds of winning based on the various tickets sold. Mr. Jones testified that he never sold a partial game or a quantity of individual tickets to his customers.

Although the games may be shipped by the manufacturer to the Appellant in multiple sets to the case, each game set that the Appellant sells must be in a sealed bag or it is considered to be a damaged good and not marketable to customers due to potential tampering. In addition, Mr. Jones testified that the various games can not be divided, reapportioned or mixed together because to do so ruins the odds and confuses the tracking of the winners for the purchasers of the individual chances.

Mr. Jones admitted that he did not have a vendor's license during the entire time of the audit period and did not file returns or pay any sales or use taxes. The statutory transcript establishes that the Appellant did not keep complete records of his transactions during the audit period and did not have any properly executed exemption certificates. At the hearing before the Board, Appellant did not present any business records, computerized ledgers, or federal tax returns to refute the Tax Commissioner's calculations as to the Appellant's tax liability for the audit period. Appellant also failed to present any witnesses to substantiate his claim that his sales were exempt pursuant to 5739.01(E)(1). In addition the Appellant presented no evidence

regarding the tax exemption claimed for the sale of candy. The Appellant admitted at the hearing that the candy was sold with the games of chance as prizes and not for general consumption. The Appellant did not have any other business records to present in support of his position.

This matter is now considered by the Board of Tax Appeals pursuant to R.C. 5717.02, upon the notice of appeal, the statutory transcript certified to this Board by the Tax Commissioner, and the testimony and evidence presented at the hearing before this Board. Legal briefs were submitted on behalf of the respective parties in this matter.

Initially it must be noted that the findings of the Tax Commissioner are presumptively valid. Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St.3d 121. It is incumbent upon a taxpayer challenging a decision of the Tax Commissioner to rebut the presumption and establish a clear right to the relief requested. Kern v. Tracy (1995), 72 Ohio St.3d 347; Belgrade Gardens, Inc. v. Kosydar (1974), 38 Ohio St.2d 135; Ohio Fast Freight v. Porterfield (1972), 29 Ohio St.2d 69; Midwest Transfer Co. v. Porterfield (1968), 13 Ohio St.2d 138; National Tube v. Glander (1952), 152 Ohio St. 407. The burden is on the taxpayer to present credible evidence to support its claim that an assessment is in error. Kern v. Tracy, supra; May Company v. Lindley (1982), 1 Ohio St.3d 6; Federated Department Stores, Inc. 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, then the Board of

Tax Appeals must affirm the Tax Commissioner's findings. Kern v. Tracy, supra; Kroger Co. v. Limbach (1990), 53 Ohio St.3d 245; Alcan Aluminum Corp., supra.

The Board has reviewed Appellant's allegations of error in the notice of appeal set forth above in conjunction with what constitutes the record in this cause and the applicable law. Pursuant to R.C. 5739.02, there is a basic presumption that every sale or use of tangible personal property in Ohio is taxable. Furthermore, the laws relating to exemption or exception from taxation are to be strictly construed. Highlights for Children, Inc. v. Collins (1977), 50 Ohio St.2d 186.

The Appellant claims exemption from all taxation based upon the assertion that the Appellant is a wholesaler and not a retailer, and that because all of his sales are for resale, they are tax exempt pursuant to R.C. 5739.01(E)(1). R.C. 5739.01(E)(1) provides as follows:

"(E) 'Retail sale' and 'sales at retail' include all sales except those in which the purpose of the consumer is:

"(1) To resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by him;"

A review of the evidence and testimony presented to the Board at the hearing, and contained in the statutory transcript establish that the Appellant is engaged in the business of selling games of chance, also known as "pull tabs" or "pickles" or

"biscuits" to social clubs and various not-for-profit organizations. The games of chance were sold to Appellant's customers in sealed bags or envelopes that were clearly marked on the outside as to what the contents were and the number of tickets enclosed. Each bag of tickets also had a printed warning not to accept said product if the product was opened as the same may have been tampered with rendering the product damaged.

The Appellant testified that his various customers purchased the games of chance as a complete set and that his customers then sold the tickets individually to their patrons in order to buy a "chance" to win a prize as listed on the individual tickets. Appellant testified that the sealed bags of tickets were not being resold. The Appellant testified that he took orders from his various customers for the various games and delivered the requested product with packing slips. Appellant testified that sometimes the gambling supplies were sold with prizes such as candy or candy baskets. Appellant further testified that about five days after the orders were taken or filled, the Appellant would send an invoice to the customer for the purchases. The Appellant asserts that the tickets were being resold by his customers in the same form that he sold the tickets to them and therefore said sales should be exempt from tax pursuant to R.C. 5739.01(E)(1).

In the instant case, R.C. 5739.03 requires that a vendor, such as the Appellant, must obtain a certificate of exemption specifying the reason the sale is not subject to tax. If no certificate is provided, then the vendor must provide evidence that establishes he is entitled to the claimed tax exemption within

sixty days after notice by the Tax Commissioner of intention to levy an assessment. Frankelite Co. v. Lindley (1986), 28 Ohio St.3d 29; Canton Structural Steel Co. v. Lindley (1982), 69 Ohio St.2d 33; The Union Metal Mfg. Co. v. Kosydar (1974), 38 Ohio St.2d 53. Initially, the Appellant was unable to produce any legally sufficient exemption certificates as required by R.C. 5739.03. Thereafter, the Tax Commissioner issued the sixty-day notice in order to allow the Appellant the opportunity to obtain letters of usage from his customers. Such letters of usage were necessary to establish that Appellant's customers were in fact using the products in an exempt manner. All replies or letters of usage presented by the Appellant were reviewed by the Tax Commissioner's agent for sufficiency to exclude the respective sales as exempt from sales tax. Absent the required exemption certificates or the appropriate letter of usage, the sales by the Appellant must be considered taxable retail sales pursuant to R.C. 5739.02, and not exempt as a sale for resale pursuant to R.C. 5739.01(E)(1).¹ Frankelite Co., supra; The Union Metal Mfg. Co., supra.

Appellant has not presented sufficient evidence of the identity of his customers which would support a finding that these transactions are not subject to tax, or that such items would never be subject to tax when sold. Although given the opportunity, the

¹The Board of Tax Appeals will decline to rule on the issue of whether the transfer of individual tickets by Appellant's customers to evidence participation in a game of chance is a sale as contemplated by the language in R.C. 5739.01(B) and R.C. 5739.01(E)(1).

Appellant's customers apparently declined to provide the Appellant with the requisite letters of usage identifying any exempt use or statutory exception from sales tax that the purchases qualified under. Therefore, there exists a taxable retail sale when the Appellant makes his sale of the "games of chance" or other gambling paraphernalia and supplies to his customers pursuant to R.C. 5739.02.

Accordingly, it is the finding and determination of the Board of Tax Appeals that, based upon a consideration of the evidence and record before the Board, the assessment of the Tax Commissioner challenged herein is correct, and should be, and hereby is, affirmed. ohiosearchkeybta