

Jean E. Endicott, dba)	
Frankie's Best,)	CASE NO. 96-T-281
)	
Appellant)	
)	
vs.)	(SALES TAX)
)	
Roger W. Tracy, Tax)	
Commissioner of Ohio,)	
)	DECISION AND ORDER
Appellee.)	

APPEARANCES:

For the Appellant-	William E. Clark Drake, Phillips, Kuenzli & Clark 301 South Main Street Suite 3 Findlay, Ohio 45840
For the Appellee-	Betty D. Montgomery Attorney General of Ohio By: Richard C. Farrin Assistant Attorney General State Office Tower, 16th Floor 30 East Broad Street Columbus, Ohio 43215

ENTERED: February 7, 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 March 26, 1996, by appellant, Jean E. Endicott. Ms. Endicott appeals from a Final Determination of the Tax Commissioner, which was issued on November 24, 1995. Therein, the Tax Commissioner affirmed a sales tax assessment previously issued for the period of January 1984 through December 1984. The assessment is in the amount of \$15,169.85, including sales tax and penalties.

Ms. Endicott's notice of appeal lists the following specifications of error:

"2.(A) The Tax Commissioner failed to recognize the innocent spouse doctrine.

"(B) The Tax Commissioner's claims of amounts due are based upon records not made available for cross-examination at the trial and which are only available to the Tax Commissioner as a result of a seizure of records.

"(C) The Tax Commissioner is barred by the statute of limitations.

"(D) The decision of the Tax Commissioner is not supported by the evidence."

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, and the record of the evidentiary hearing. Ms. Endicott failed to appear at the duly scheduled hearing. The Tax Commissioner was represented by counsel, who moved the Board to affirm the Tax Commissioner upon the record.

Before reviewing Ms. Endicott's assignments of error, we must address the Tax Commissioner's claim, raised at the evidentiary hearing, that we lack jurisdiction to consider all of the issues raised by Ms. Endicott. Specifically, the Tax Commissioner asserts that Ms. Endicott failed to raise in her petition for reassessment all of the errors now specified in the notice of appeal. Therefore, argues the Tax Commissioner, this Board is limited to considering only those issues specifically

raised in both the petition for reassessment and the notice of appeal.

R.C. 5739.13 contains the provisions for the filing of a petition for reassessment and the Tax Commissioner's consideration thereof. At the time the petition for reassessment was filed, R.C. 5739.13 read, in part, as follows:

"(B) Unless the party to whom the notice of assessment is directed files with the commissioner within thirty days after service of the notice of assessment, either personally or by certified mail, a petition for reassessment in writing, signed by the party assessed, or by his authorized agent having knowledge of the facts, the assessment shall become conclusive and the amount of the assessment shall be due and payable from the party assessed to the treasurer of state. The petition shall indicate the objections of the party assessed, but additional objections may be raised in writing if received prior to the date shown on the final determination by the commissioner."

In CNG Development Co. v. Limbach (1992), 63 Ohio St. 3d 28, the Court found that the specificity requirement of R.C. 5739.13 runs to the core of procedural efficiency. The Court determined that "a taxpayer has not substantially complied with the statute, so as to invoke the right to review of a particular error, if he has not set forth that error" in the petition for reassessment. Id. at 32. Thus, under CNG, neither the Tax Commissioner nor this Board has jurisdiction to consider issues which are not raised in a petition for reassessment or are not advanced, in writing, prior to the date upon which the Tax Commissioner issued his Final Determination.

Ms. Endicott's petition for reassessment raises only two specific claims of error: (1) that the amount of tax assessed is incorrect, and (2) that "Jean E. Endicott was not the vendor in this matter." (S.T. 21 & 22.) Additionally, we observe that Ms. Endicott also submitted to the Tax Commissioner, prior to the issuance of the Final Determination, a copy of the Supreme Court's decision in Daiquiri Club, Inc. v. Peck (1953), 159 Ohio St. 52. This case addresses the applicability of a statute of limitations to a sales tax protest. This case suggests that Ms. Endicott did present the statute of limitations claim to the Tax Commissioner. However, we are unable to find that the copy of the case, in and of itself, satisfies the "raised in writing" requirement of R.C. 5739.13.

Nevertheless, we also note that the Tax Commissioner addressed the applicability of the statute of limitations in his Final Determination. We have previously held that the purpose of limiting appeals to this Board to only those errors claimed in a petition for reassessment is to ensure that the Tax Commissioner is sufficiently apprised of the errors claimed so that he may conduct an informed review and correct any error at the earliest possible stage of proceedings. Hazen v. Tracy (Apr. 8, 1994), BTA Case No. 91-K-1424, unreported, at page 4. In the instant matter, we find that the Tax Commissioner was made aware of the statute of limitations claim by the submission of the Court's Daiquiri Club decision. Again, this is not, in itself, sufficient to meet the "raised in writing" requirement; however, since the Tax

Commissioner has also made a specific finding regarding the application of the statute of limitations, we find that the issue was properly raised before him. We see no prejudice in the fact that the claim was not initially raised in the petition for reassessment, and we find that we may review his determination of the issue. Hazen, supra, at 5.

Based upon all of the foregoing, we determine that we may review the specifications of error that refer to the application of the statute of limitations and that challenge the correctness of the amounts assessed. Ms. Endicott's claim regarding the "innocent spouse doctrine" was neither raised in the petition for reassessment nor addressed by the Tax Commissioner in his Final Determination. We therefore have no jurisdiction to consider the issue. CNG, supra. Additionally, we note that the claim challenging Ms. Endicott's status as the vendor in this matter was raised only in the petition for reassessment. It was not subsequently specified in the notice of appeal. Consequently, the issue has become conclusive, and we shall not address it herein.

In reviewing Ms. Endicott's contentions of error, we first observe 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 that the Tax Commissioner's

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

Ms. Endicott first contends that the assessment is barred by the applicable statute of limitations. The notice of appeal does not detail this claim, nor has Ms. Endicott offered this Board any other support for it. Our own review of the record, however, indicates that the Tax Commissioner issued two estimated assessments in May of 1985 to cover the period in question. Thereafter, in April of 1993, agents for the Tax Commissioner audited the records of Frankie's Best. The agents determined that the estimated assessments under-reported the amount of sales tax due. As a result, the assessment now before this Board was issued on June 26, 1993.

Presumably, Ms. Endicott now claims that the assessment is barred by the statute of limitations because it was issued not only more than four years after the period assessed but also more than four years after the estimated assessments.

R.C. 5739.16 provides a four-year statute of limitations for sales tax assessments. R.C. 5739.16(A) reads:

"(A) No assessment shall be made or issued against a vendor or consumer for any tax imposed by or pursuant to section 5739.02, 5739.021, 5739.023, 5739.026, or 5739.10 of the Revised Code more than four years after the return date for the period in which the sale or purchase was made, or more than four years after the return for such period is filed, whichever is later. This division does not bar an assessment:

"(1) When the tax commissioner has substantial evidence of amounts of taxes collected

by a vendor from consumers on retail sales which were not returned to the state;

"(2) When the vendor assessed failed to file a return as required by section 5739.12 of the Revised Code;

"(3) When the vendor or consumer and the commissioner waive in writing the time limitation."

The agent's audit remarks are contained in the statutory record. They state that "Department of Taxation records indicates [sic] that no sales tax returns had been filed for 1984 * * *." (S.T. 24.) (See, also, S.T. 25: "there was no record of these [returns] in the department files.") Ms. Endicott has come forward with no evidence to challenge these statements or any other part of the record. We must therefore find that no sales tax returns were filed for the 1984 period. ¹ As R.C. 5739.16(A)(2) provides that the four-year period does not apply where a vendor has failed to file the sales tax returns, the statute of limitations had not yet been triggered in this case. Consequently, the Tax Commissioner had authority to issue the subject assessment. See Boberg v. Lindley (Oct. 8, 1980), BTA Case No. 78-F-205, unreported (where a vendor fails to file sales tax returns and payments, the Tax Commissioner is empowered to make assessments without restriction by the usual time limitations contained within R.C. 5739.16(A)).

¹ The auditing agent eventually prepared and filed the returns in February of 1993. (S.T. 47-52.)

Ms. Endicott next argues that the amounts due are based upon records not made available to her. Implicit in this contention is the claim that the amount of the assessment is in error. The record indicates that the business in question was operated by Mr. Frank R. Fraley since 1983. However, Frankie's Best continued to be operated under both a vendor's license and a liquor permit issued to Ms. Endicott, the previous proprietor of the restaurant. The vendor's license was finally transferred on August 7, 1985. The liquor permit was subsequently transferred to Mr. Fraley in June 1986.

With regard to the subject assessment, Department of Taxation documents indicate that Ms. Endicott had no records for the restaurant's 1984 sales tax liability. The information was later obtained from Mr. Fraley with a search warrant. The records consisted of monthly sales totals and some daily sales records. The monthly records were retrieved from Mr. Fraley's computer records. (S.T. 24.)

While it is apparent that Ms. Endicott did not have sales records in her possession, there is nothing in the record to indicate that she has been unfairly denied access to information concerning her liability, or that the assessed amounts are in error. During the period assessed, Frankie's Best operated under a valid vendor's license, issued to Jean E. Endicott. Based upon a review of Frankie's Best's records, an assessment was issued to Ms. Endicott as the holder of the license.

We note that Ms. Endicott did not appear at this Board's evidentiary hearing. By not appearing, she forfeited her opportunity to present evidence which may have been beneficial to her claim. Information regarding the operation of the business, the actual ownership of the license, or the events surrounding the transfer of the business may have provided us with the ability to conduct a more thorough review of Ms. Endicott's contentions. However, without any evidence to contradict the Tax Commissioner's determination, we are unable to find that the Tax Commissioner acted unreasonably or unlawfully. In short, Ms. Endicott has failed to meet her burden of coming forward with evidence sufficient to overcome the presumption in favor of the Tax Commissioner. Alcan, supra. As we can find no support for her contention of error in the record before us, we are constrained thereby to find that the Tax Commissioner is correct.

In conclusion, we find that Ms. Endicott has failed to prove the contentions of error set forth in her notice of appeal. 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