

OHIO BOARD OF TAX APPEALS

Ohio Edison Co.,)	CASE NO. 97-K-322
)	
Appellant,)	PUBLIC UTILITY PROPERTY TAX
)	
vs.)	ORDER
)	
Roger W. Tracy, Tax)	(Overruling Motion to
Commissioner of Ohio,)	Partially Dismiss)
)	
Appellee.)	

APPEARANCES:

For the Appellant

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Entered July 11, 1997

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

This matter is now considered by the Board of Tax Appeals upon a motion filed by the Tax Commissioner on June 6, 1997 requesting that a portion of

appellant's appeal be dismissed. The Tax Commissioner's motion provides as follows:

"In accordance with O.A.C. 5717-01-12, Rules of the Board of Tax Appeals, the appellee, Roger W. Tracy, Tax Commissioner of Ohio, moves the Board for an order dismissing numbered paragraphs 9 and 10 of the notice of appeal filed with the Board on March 28, 1997, for the reason that they fail to set forth with specificity any claimed error, as required under R.C. 5717.02. Numbered paragraph 10 should be dismissed for the additional reason that the claim made therein was not raised before the Tax Commissioner in accordance with the requirements of R.C. 5727.47. The reasons for this motion are more fully discussed in the attached memorandum which is incorporated herein by reference. "

The portions of appellant's notice of appeal which are at issue provide as follows:

"9. Violation of Appellant's Due Process and Equal Protection Rights: The Tax Commissioner's assessment, and the final determination affirming it, violate Appellant's constitutional guaranteed rights under the Fourteenth Amendment Due Process and Equal Protection Clauses of the United States Constitution and article I, [section] of the Ohio Constitution.

"10. Violation of Appellant's Commerce Clause Rights: The Tax Commissioner's assessment, and the final determination affirming it, violate the Commerce Clause, article I, [section] 8, cl. 3 of the United States Constitution and Appellant's rights thereunder."

The thrust of the Tax Commissioner's motion to dismiss the above-quoted paragraphs is twofold. First, he asserts appellant has not adequately "specified" error in either of the above-referenced paragraphs. The Tax Commissioner posits that appellant's references to "[t]he Tax Commissioner's assessment, and the final determination affirming it," are so broad as to encompass

any of the wide variety of activities performed by him in the assessment of public utility property. Such failure to identify the specific action of the Tax Commissioner which allegedly violates the protections accorded by the United States and Ohio Constitutions warrants dismissal of these two paragraphs of appellant's notice of appeal.

Second, with respect to paragraph ten, the Tax Commissioner argues that such claim is not timely raised. The Tax Commissioner insists that it is a taxpayer's obligation to raise all of its claims in writing when before him, either in its initial petition for reassessment or in writing prior to the issuance of his final determination. Failure to do so, as in this case when appellant raises for the first time a claim of a violation of the Commerce Clause, is contrary to the applicable statute and case law and precludes this Board from having jurisdiction over the alleged error.

On June 20, 1997, appellant filed its response to the Tax Commissioner's motion. In doing so, appellant insists that its notice of appeal satisfies the "general" specificity requirement imposed by R.C. 5717.02 in that it adequately: (1) specified the actions of the Tax Commissioner to which it objected; (2) recited the applicable statutory authority under which such objections were made; and (3) asserted the treatment which it believes it should have received. Appellant maintains that the first eight paragraphs of its notice of appeal specify the errors claimed and the facts necessary to preserve such claims. Appellant further asserts that paragraphs nine and ten of its notice of appeal were not only intended to relate to the prior eight specifications of error, which identify specifically the action to which objection is made, but that they were intentionally left general so as to allow appellant to preserve

its right to assert any infringement of its constitutional guarantees of which it may become aware during discovery before this Board. It is therefore appellant's position that, at least with respect to constitutional allegations, it would be inappropriate to require any greater specificity because the Board of Tax Appeals presents the first forum in which a taxpayer may gather information from the Tax Commissioner regarding his treatment of other "similarly situated" taxpayers.

Responding to the Tax Commissioner's argument that it failed to timely raise the argument set forth in paragraph ten of its notice of appeal, appellant maintains that the Supreme Court has expressly held that constitutional claims of the kind set forth in the contested specification are appropriately raised for the first time in a notice of appeal to the Board of Tax Appeals. Despite the Tax Commissioner's suggestion to the contrary, appellant insists that the statutory language regarding petitions for reassessment in no way displaces the Supreme Court's holding with respect to challenges that statutes are being applied in an unconstitutional manner.

In considering the first aspect of the Tax Commissioner's motion, and appellant's response thereto, reference is first made to R.C. 5717.02, the statute which sets forth those requirements necessary to perfect an appeal to the Board of Tax Appeals from a final determination of the Tax Commissioner. This statute provides in pertinent part:

"The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner *** to the taxpayer *** of the final determination *** complained of, and shall also specify the errors therein complained of *** ."

In Moraine Hts. Baptist Church v. Kinney (1984), 12 Ohio St. 3d 134, the Supreme Court reviewed its prior decisions regarding this specificity requirement imposed by R.C. 5717.02:

"This court has consistently held that '[u]nder R.C. 5717.02, a notice of appeal does not confer jurisdiction upon the Board of Tax Appeals to resolve an issue, unless that issue is clearly specified in the notice of appeal.' Cleveland Elec. Illum. Co. v. Lindley (1982), 69 Ohio St. 2d 71, 75; *** Lenart v. Lindley (1980), 61 Ohio St. 2d 110 ***; Abex Corp. v. Kosydar (1973), 35 Ohio St. 2d 13 ***. Moreover, in Gochneaur v. Kosydar (1976), 46 Ohio St. 2d 59, 66 ***, it was stated that '*** this court will not reverse a decision of the board where the notice of appeal to the board does not enumerate in definite and specific terms the precise errors claimed.' See, also, Queen City Valves Inc. v. Peck (1954), 161 Ohio St. at 579." Id. At 138. (Parallel citations omitted)

In considering an argument that this Board may be without jurisdiction to consider an issue due to a claimed failure to adequately specify error, this Board remains cognizant of the Supreme Court's admonitions we should avoid a "hypertechnical reading" of notices of appeal which would deprive an appellant of the opportunity to have its claims considered. For example, in Goodyear Tire & Rubber Co. v. Limbach (1991), 61 Ohio St. 3d 381, 382-383, the Court determined that the taxpayer had adequately specified its claimed error when it identified the action of the Tax Commissioner which it questioned, cited the statute upon which its objections were based and asserted the treatment which it believed should have been applied to the contested income. See, also, Buckeye Internatl., Inc. v. Limbach (1992), 64 Ohio St. 3d 264, 267-268 (holding that a taxpayer's claim of whether certain of its property had been improperly "double-counted" had been sufficiently specified in the taxpayer's notice of appeal so as to constitute an alternate argument and, further, that

evidence was presented to support such a claim which should not have been ignored by this Board).

Nevertheless, the preceding cases cannot be construed so as to suggest that the specificity requirement of R.C. 5717.02 is to be disregarded. In reaffirming its pronouncement of forty years earlier, the court stated as follows in Kern v. Tracy (1995), 72 Ohio St. 3d 347, 349:

"On an appeal from an order of the Tax Commissioner to the Board of Tax Appeals, Section 5611, General Code (Section 5717.02), 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 *** is insufficient to meet the demands of the statute ***.' (Emphasis sic.) Queen City Valves, Inc. v. Peck (1954), 161 Ohio St. 579 ***, syllabus.

"Moreover, we said, 'The statute requires in plain language that the errors complained of be specified. The word, "specify" according to Black's Law Dictionary (4 Ed.) means "to mention specifically; to state in full and explicit terms ***.'" Id. at 583 ***." (Parallel citations omitted.)

In reviewing the Tax Commissioner's motion and the paragraphs toward which it is directed, appellant suggests that this Board review the first eight paragraphs of its notice of appeal so as to place paragraphs nine and ten in an appropriate context:

"Paragraphs 9 and 10 of the Notice of Appeal are intended to not only allege that the Commissioner's actions as specified in paragraphs 1 through 8 have denied Ohio Edison its constitutional rights,¹ but are also intended to preserve Ohio

¹ Without quoting the errors specified in their entirety, several paragraphs of appellant's notice of appeal are captioned in a manner so as to describe the type of property and/or transaction whose taxable status is at issue:

- "1. Property Sold to OES Nuclear, Incorporated ***
- "2. Engineering Drawings ***
- "3. Intangibles
- "4. Data Processing and Communications Equipment ***

Edison's right to assert any infringement of those rights that Ohio Edison becomes aware of during the discovery phase of the proceedings before the Board. ***" Appellant's Memorandum in Opposition at 7. (Footnote omitted.)

Despite the Tax Commissioner's assertions to the contrary, we find paragraphs nine and ten, when considered in relation to appellant's notice of appeal in its entirety, to have sufficiently specified error for purposes of invoking the jurisdiction of this Board to receive evidence regarding the constitutional violations alleged. Although this decision is reached in part due to the restricted role which the Board of Tax Appeals has in resolving specifications of error which raise a constitutional violation, see discussion, *infra*, in order to avoid a hypertechnical interpretation being accorded any portion an appeal, under such circumstances as herein presented, it appears appropriate to consider the notice of appeal in its entirety.

With respect to the Tax Commissioner's position that the specificity with which an appellant must identify claimed error is equally applicable to errors of a constitutional nature, we find persuasive appellant's argument that some latitude must be accorded a taxpayer asserting certain constitutional violations. The Department of Taxation is statutorily precluded from releasing taxpayer information except under limited circumstances. See R.C. 5703.21.² See also, R.C. 159.42(A)(1) (excepting from the definition of "public record" those "records the release of which is

"7. Non-Utility Property and Equipment Leased to Non-Utilities ***

"8. Property Not Used in Business ***." (Emphasis supplied.)

² R.C. 5703.21 provides in pertinent part:

"(A) Except as provided in divisions (B), (C), and (D) of this section, no agent of the department of taxation, except in the agent's report to the department or when called on to testify in any court or proceeding, shall divulge any information acquired by the agent as to the transactions, property, or business of any person while acting or claiming to act under orders of the department. Whoever violates this provision shall thereafter be

prohibited by state or federal law.”) In those instances when a taxpayer asserts a claim of unequal treatment, it may be difficult, if not impossible, for that taxpayer to have within its knowledge or possession at the time of the filing of its notice of appeal the specific information which would necessarily support certain of its claims. It therefore appears reasonable to allow greater latitude under such circumstances.

In support of his argument that appellant has waived its opportunity to raise the claim set forth in paragraph ten of its notice of appeal, the Tax Commissioner relies upon R.C 5727.47. This statute, which prescribes the manner by which a public utility may object to an assessment issued to it, provides in pertinent part:³

"If a public utility objects to any assessment certified to it pursuant to such sections [i.e., 5727.23, 5727.231 [5727.23.1], or 5727.38], it may file a petition for reassessment with the tax commissioner. The petition must be made in writing ***. *** The petition also shall indicate the utility's objections, but additional objections may be raised in writing if received prior to the date shown on the final determination by the commissioner."

The Tax Commissioner argues that the Supreme Court's decision in CNG Dev. Co. v. Limbach (1992), 63 Ohio St. 3d 28, further supports his position. In that case, the Supreme Court concluded, prospectively, that the failure of a taxpayer to

disqualified from acting as an officer or employee or in any other capacity under appointment or employment of the department.”

³ Prior to January 15, 1993, the effective date of the above-quoted portion of R.C. 5727.47, this statute provided for the filing of either an "application for review and redetermination," as became effective December 31, 1989, or a "petition for reassessment," as became effective December 22, 1992. Under these earlier versions of the statute, while indicating that a public utility's initial application or petition was to be made in writing, it simply allowed that "additional objections may be raised prior to the final determination by the commissioner." As is apparent from a review of these statutes, the most recent amendment made to R.C. 5727.47 was for the purpose of specifically requiring a public utility to raise its objections to an assessment in writing. Cf. Loral v. Tracy (Apr. 5, 1996), B.T.A. Case No. 95-M-394, unreported (holding that a similar amendment to R.C. 5711.31, the statute allowing for objections to be made regarding personal property tax assessments, required taxpayers, after January 15, 1993, to reduce objections to an assessment to writing).

raise issues in a petition for reassessment precluded such issues from being raised for the first time on appeal before the Board of Tax Appeals.

Appellant responds by referring to the Supreme Court's earlier decision in Cleveland Gear Co. v. Limbach (1988), 35 Ohio St. 3d 229, in which the court held in paragraph three of its syllabus:

"The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional. (Bd. of Edn. of South-Western City Schools v. Kinney [1986], 24 Ohio St. 3d 184, *** construed.)" (Parallel citations omitted.)

It is clear that the Board of Tax Appeals, a statutorily created administrative agency is without jurisdiction to declare a given statute unconstitutional. S. S. Kresge Co. v. Bowers (1960), 170 Ohio St. 405, paragraph one of the syllabus; Herrick v. Kosydar (1975), 44 Ohio St.2d 128, 130; Roosevelt Properties Co. v. Kinney (1984) 12 Ohio St.3d. 7, 8; Cleveland Gear, supra, paragraph one of the syllabus. This Board has also concluded, relying upon the Supreme Court's decision in MCI Telecommunications Corp. v Limbach (1994), 68 Ohio St 3d 195, that it is equally without jurisdiction to consider whether a statute has been applied in a manner which is unconstitutional. See, e.g. Valvoline Instant Oil Change Inc. v. Tracy (Dec.8, 1995), B.T.A. Case No. 94-B-1179, unreported, affirmed (1997), 78 Ohio St. 3d, 53;⁴ Bd. of Edn. of the City of Dublin School Dist. v. Tracy (Feb. 14,

⁴ Released the same day as Valvoline Instant Oil Change, and collectively affirmed by the Supreme Court on appeal, were decisions in Ashland Branded Marketing, Inc. v. Tracy (Dec. 8, 1995), B.T.A. Case No. 94-B-1180, unreported, and SuperAmerica Group, Inc. v. Tracy (Dec. 8, 1995), B.T.A. Case No. 94-B-1181, unreported.

1996), B.T.A. Case No. 95-K-692, unreported, appeal pending, Franklin App. No. 97APHO6-780; NACCO Industries v Tracy (June 7, 1996), B.T.A. Case No. 95-K-1210, unreported, appeal pending, Sup. Ct. Case No. 96-1535. Like this Board, the Tax Commissioner is deprived of authority to render a determination regarding issues of a constitutional nature.⁵

However, as pointed by the court in Cleveland Gear, supra, a fundamental distinction exists between proceedings before the Board of Tax Appeals and those conducted by the Tax Commissioner. The Supreme Court specifically held that the Board of Tax Appeals is the appropriate forum in which parties are to present evidence regarding an alleged unconstitutional application of a statute:

"When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

"To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder. Since it need not receive evidence upon issues not raised in the notice of appeal to it ***, the question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, even though

⁵ In fact, the Tax Commissioner himself on several occasions has acknowledged that he lacks the ability to render a determination regarding the constitutionality of a statute or its application. See, e.g., Schmidt v. Tracy (Feb. 8, 1995), B.T.A. Case No. 94-R-697, unreported, at 2 (in which this Board quoted from the Tax Commissioner's final determination as follows: "The petitioner also raised a constitutional issue. The Tax Commissioner is without jurisdiction to determine constitutional issues. ***"); Simmons v. Tracy (Jan. 12, 1996), B.T.A. Case No. 95-A-97, unreported, at 3 (quoting the Tax Commissioner's final determination as follows: "With regard to the equal protection contention, the Tax Commissioner has no authority to address issues of constitutionality. Therefore, this contention cannot be addressed on its merits. ***").

the Board of Tax Appeals may not declare the statute constitutional." Id. at 232. (Citations omitted.)

The court reaffirmed its decision in Cleveland Gear when it held as follows in MCI Telecommunications, *supra*:

"The BTA understood its role to be a receiver of evidence for constitutional challenges. Accordingly, it did so, giving the parties wide latitude in presenting the evidence. The BTA determined no facts on the constitutional questions. The commissioner, however, in her Proposition of Law No. IV, contends that the BTA not only receives evidence in this type of case, but must weigh the evidence and determine the facts necessary for the court's review of the constitutional questions. Since the BTA did not make findings of fact, the commissioner asserts that we should remand the case for the BTA to comply.

"In Cleveland Gear Co. v. Limbach (1988), 35 Ohio St. 3d 229, ***, paragraph three of the syllabus, we held:

“ The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning the question if presented, even though the Board of Tax Appeals may not declare the statute unconstitutional (Bd. of Edn. of South-Western City Schools v. Kinney [1986], 24 Ohio St.3d 184, *** construed.)’

"We explained the process , 35 Ohio St. 3d at 232 ***:

"‘When a statute is challenged on the basis that it is unconstitutional in its application, this court needs a record, and the proponent of the constitutionality of the statute needs notice and an opportunity to offer testimony supporting his or her view.

""To accommodate this court's need for extrinsic facts and to provide a forum where such evidence may be received and all parties are apprised of the undertaking, it is reasonable that the BTA be that forum. The BTA is statutorily created to receive evidence in its role as factfinder.'

"Under Cleveland Gear, the BTA need only receive evidence for us to make the constitutional finding. This is because the BTA accepts facts but cannot rule on the question. On the other hand, we can decide the constitutional questions but have limited ability to receive evidence. Thus, the BTA receives evidence at its hearing, but we determine the facts necessary to resolve the constitutional question." Id. at 197-198. (Parallel citations omitted.)

Since this Board's role involving constitutional issues is clearly distinct from that of the Tax Commissioner, and since it is the action of the Department of Taxation and the Tax Commissioner which is alleged to have been the cause for the violation of certain constitutional guarantees, we conclude that the Supreme Court's pronouncement in Cleveland Gear is dispositive of when a challenge regarding the unconstitutional application of a statute must be raised rather than R.C. 5727.47 and the rule announced in CNG Dev., supra. Accordingly, the Tax Commissioner's motion to partially dismiss appellant's appeal is not well-taken and it is hereby overruled.