

Newcome Corporation, dba)	CASE No. 97-M-320
Newcome Electronic Systems,)	
)	(PERSONAL PROPERTY TAX)
Appellant,)	
)	ORDER
vs.)	
)	
Roger W. Tracy, Tax)	(Re: Discovery)
Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	James J. Chester Roderick H. Willcox Chester, Willcox and Saxbe 17 South High Street Suite 900 Columbus, Ohio 43215
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Phyllis J. Shambaugh Assistant Attorney General State Office Tower-16th Floor 30 East Broad Street Columbus, Ohio 43266-0410

Entered January 23, 1998

This matter is before the Board of Tax Appeals for consideration of certain motions filed by the parties. The original matter is before the Board as a result of an appeal filed by appellant, Newcome Corporation (Newcome), on March 28, 1997. As is pertinent to this Order, Newcome's notice of appeal includes assertions that certain actions of the Tax Commissioner violate federal and state constitutional protections.

Discovery in this matter appears to have proceeded without the need for Board intervention until November 20, 1997, when appellee, Tax Commissioner, filed a "Motion to

Compel Discovery"¹. Appellee requested the Board order Newcome to provide answer to a single interrogatory posed by the Tax Commissioner. The interrogatory is provided in full:

"6. In the Petition for Reassessment, Newcome Corp. admits that it has knowledge of 'others engaged in businesses similar to that of Newcome' who 'are treating computer cabling as personal property and are collecting sales tax' on such transactions. Identify those companies."

On December 5, 1997, appellant responded to appellee's motion to compel. In refusing to provide the information sought by said interrogatory, Newcome acknowledged the response provided appellee when answering the interrogatories propounded. That answer is provided in full:

"Appellant objects to this Interrogatory on the basis that Appellee has refused to provide the identity of computer cabling companies similar to that of Appellant which treat computer cabling as personal property and collected and paid a sales tax. See Appellee's Answers and Objections to Appellant's Interrogatories. In addition, Appellee has informally indicated to counsel for Appellant that, even if such companies referenced in this Interrogatory 6 are disclosed to Appellee, Appellee will not turn over to Appellant tax returns or other information with regard to such companies. Under these circumstances,

¹ At that time a merit hearing was scheduled for December 12, 1997. Appellee requested an expedited hearing on the discovery matter so the hearing could proceed. The merit hearing was continued by the Board in order to give full consideration to the discovery request. However, discovery issues are generally considered by this Board upon the record and affidavits presented by the parties or counsel. The parties were informed that a hearing on the discovery issues would not be scheduled.

there is no apparent reason that Appellee needs this information other than to perform additional audits and prevent Appellant from making its equal protection argument in the instant action. Counsel for Appellant has suggested disclosure of such companies, in return for their tax information from Appellant pursuant to a confidentiality agreement, but this request was informally denied by counsel for Appellee."

(Appellee's Motion to Compel, Response to Interrogatory No. 6)

Thereafter, on December 18, 1997, Newcome filed a "Motion to Compel", seeking an Order requiring the Commissioner's response to the interrogatories referred to in its answer above. Those interrogatories are provided in full:

"1. For the time periods consisting of Appellant's audit (July 1, 1991 to March 31, 1995) and the current tax year (January 1, 1996 to December 30, 1997), identify all computer cabling companies similar to that of Appellant, or companies in the business of providing or installing computer cabling, that were subject to, or paid use tax rather than sales tax.

"2. For the time periods consisting of Appellant's audit (July 1, 1991 to March 31, 1995), and the current tax year (January 1, 1996 to December 30, 1997), identify all computer cabling companies similar to that of Appellant, or companies in the business of providing or installing computer cabling, that treated computer cabling as personal property and collected and paid a sales tax."

In considering the parties' requests, the Board refers first to Ohio Adm. Code 5717-1-11, which provides that discovery disputes are governed by the Ohio Rules of Civil

Procedure. Civ.R. 26 delineates the general provisions governing discovery. As is relevant herein, Civ.R. 26 provides:

"(B) Scope of discovery. Unless otherwise ordered by the court in accordance with these rules, the scope of discovery is as follows:

"(1) In general. Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence."

As the motions upon which the Board is asked to rule relate to propounded interrogatories, a review of Civ.R. 33 is appropriate. That section provides:

"(A) Availability: procedures for use. Any party may serve upon any other party written interrogatories to be answered by the party served. ***

"(B) Scope and use at trial. Interrogatories may be related to any matters which can be inquired into under Rule 26(B), and the answers may be used to

the extent permitted by the rules of evidence.

"The party calling for such examination shall not thereby be concluded but may rebut it by evidence."

Thus, interrogatories may be propounded upon any issue relevant to the action or which may lead to relevant information and must be answered unless a privilege exists which protects the answering party from answering. Privileges may arise by constitutional edict, legislative action or judicial decree. See Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emp., Local 530 (1990), 106 Ohio App.3d 855. While the rules encourage liberal discovery, significant judicial oversight of the discovery proceedings is provided through Civ.R. 26(C), which generally authorizes a tribunal to control the timing, terms and conditions of discovery to prevent harassment or undue burden.

The Board first addresses the interrogatories propounded by the Tax Commissioner. Said interrogatories relate to specific claims of error made by appellant in its notice of appeal. Appellant's eleventh and twelfth claims of error are as follows:

"11. Appellee's determination that Appellant's computer cabling fails to qualify as personal property and is therefore subject to use tax while not having made a similar determination for Appellant's competitors violates Appellant's rights of due process and equal protection under the fourteenth Amendment to the United States Constitution and Article I, Section 2 and Section 16 of the

Constitution of the State of Ohio and is contrary to Article XII, section 5 of the Constitution of the State of Ohio."

"12. Appellee's determination that Appellant's computer cabling fails to qualify as personal property and is therefore subject to use tax while not having made a similar determination for Appellant's competitors, and without applying specific uniform standards to make such determination, violates Appellant's rights of due process and equal protection under the Fourteenth Amendment to the United States Constitution and Article I, Section 2 and Section 16 of the Constitution of the State of Ohio and is contrary to Article XII, Section 5 of the Constitution of the State of Ohio."

The Board of Tax Appeals has no ability to consider constitutional claims. MCI Telecommunications Corp. v. Limbach (1994), 68 Ohio St.3d 195. See, also, Bd. of Edn. of the City of Dublin School Dist. v. Tracy (Feb. 14, 1996), B.T.A. Case No. 95-K-692, unreported. However, this Board serves as a record-making body. Allegations of constitutional infirmities must be raised in a notice of appeal and evidence must be presented at the Board's evidentiary hearing. MCI, supra; Cleveland Gear Co. v. Limbach (1988), 24 Ohio St.3d 184.

The Tax Commissioner's interrogatory is a request for names of other taxpayers who appellant claims have been afforded different treatment when classifying tangible personal property as personalty or realty for purposes of the collection of sales and/or use tax. Such information appears to be relevant to the issues which must be raised before this Board.

Having raised the possibility of constitutional violations, the appellant, upon request, must make available that information it believes supports its claim. Such information is relevant to the issues presented. Further the discovery of such information allows the Commissioner to explore potential weaknesses in his position, one of the justifications for liberal discovery encouraged by the Civil Rules. Civ.R. 26, Staff Notes.

Appellant does not appear to argue that such information is not relevant to the claims raised. Instead, as a defense to discovery, appellant argues that the Tax Commissioner has also refused to answer certain interrogatories. Appellant apparently believes that it should not be forced to meet its discovery obligations until some assurances that the Tax Commissioner will also respond have been given.

The appellant has failed to provide this Board with any specific rule or holding which would permit it to withhold discoverable material merely because it believes its adversary has failed to meet its discovery obligations. Therefore, this Board does not find appellant's objection to disclosure well-taken.

The Board next considers appellant's motion to compel. Appellant has requested this Board order the Commissioner to answer two interrogatories seeking the names of other taxpayers

similarly situated to the appellant, and their methods for accounting for the purchase and sale of computer cabling.

We initially note that neither party has provided this Board with copies of the actual interrogatories propounded to the Commissioner or his responses thereto. In response to the motion to compel, the Commissioner has argued three alternative grounds for his refusal to respond. First, the Commissioner insists that the requested information is not available from the records created by the tax department. The Commissioner indicates that a use tax application does not include a standard format for consumers to describe their type of business. Turning to the application for a vendor's license number, the Commissioner points out that, while "industrial codes" are requested, those codes are general categories, not specific enough to identify "computer cabling" operations. In other words, the Commissioner asserts that he is unable to identify companies which are similarly situated to the appellant or the manner of reporting sales and use of computer cabling.

Next, the Commissioner argues that, even if available, such information is not likely to lead to the discovery of admissible evidence. Finally, the Tax Commissioner argues, that the information sought by the appellant is not a public record pursuant to R.C. 149.43 and disclosure is barred by R.C. 5703.21.

This Board has been provided with no evidence which calls into question the Commissioner's assertion that his records are not kept in a manner which would allow him to provide the names of the companies the appellant has requested. Sales tax is imposed upon consumers by statute but collected by the vendors as required by law. R.C. 5739.03. Consumers are, similarly, obligated to pay use tax on those items of personalty upon which use tax is imposed. R.C. 5741.04. The forms upon which sales and use information is transmitted to the department of taxation are simple forms requesting cumulative information. It appears likely that the information requested by appellant is not readily available from the records retained by the Commissioner.

This Board also questions whether the appellant's requests will likely lead to the discovery of admissible evidence. In Boothe Financial Corp. v Lindley (1983), 6 Ohio St.3d 247, the Court, citing Hillsborough v. Cromwell (1946), 326 U.S. 630, the Court described the application of the Equal Protection Clause to tax cases as follows:

"The equal protection clause of the Fourteenth Amendment protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class. The right is the right to equal treatment. *** "

Thus, to successfully argue an equal protection claim, the appellant must show state action which selects it for

discriminatory treatment. Further, the appellant must prove that there is no rational basis for such treatment. Allied States of Ohio, Inc. v. Bowers (1959), 358 U.S. 522.

As stated above, the sales and use tax reports received by the Commissioner are based upon sales and purchases which are self-reported. The existence of such returns, which may contain invalid conclusions made by other users/vendors of computer cabling as to the tax consequences of purchase/sale, are not an aid to appellant in presenting an equal protection claim. Considering the standards imposed upon the parties and the tribunal's interest in controlling discovery, the Board finds that the disclosure of such information, even if the Commissioner were able to cull such returns from his records, will not likely lead to the discovery of admissible evidence.

The Board finds the Commissioner's defenses to discovery well-taken. However, because the Commissioner will now obtain information on specific companies the appellant believes are similarly situated and, further, that he may have a potential obligation to supplement his responses, the Board will address the Commissioner's final claim that R.C. 5703.21 prohibits the disclosure of tax information. That section provides:

"(A) *** 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 of 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 disqualified from acting as an officer of employee or any other capacity under appointment or employment of the department."

This Board has repeatedly held that R.C. 5703.21 does not bar disclosure of discoverable material when a request has been made pending hearing before this Board. Sprint Communications Co. Ltd. Ptnrshp. v. Limbach (May 24, 1991), B.T.A. No. 89-F-423, unreported. While the Tax Commissioner urges a revisit of earlier orders wherein this Board considered the effect of R.C. 5703.21, see The Pullman Co. v. Limbach (May 17, 1991), B.T.A. No. 90-D-427, unreported and The Rex Pipe & Supply Co. v. Limbach (Sept. 18, 1992), B.T.A. No. 90-S-230, unreported, he does not suggest any case law which would require this Board to reconsider those orders. The Board does not find such a comprehensive review of earlier holdings is warranted.

However, R.C. 5703.21 has been balanced against general discovery principles. In that regard, neither The Pullman Co. nor Rex Pipe are relevant to the issues herein. The Pullman Co. specifically required the Commissioner to disclose evidence which he considered in making a determination therein. Rex Pipe related to a finding by this Board that the Commissioner was required to disclose whether some other party had paid tax upon specific transactions which would negate the obligation of the appellant to again remit. See, also, Aero Trucking, Inc., v. Lindley (Aug. 7, 1978), B.T.A. No. 78-D-150, unreported.

Neither factual situation is evident in the present appeal. Herein, the appellant seeks information on separate vendors/consumers neither related to the transactions in issue nor upon which the Commissioner relied in making his determination.

Once again, this Board weighs the appellant's need for such information to present its appeal against the apparent hardship upon the Commissioner in obtaining such information as well as the privacy expectations of taxpayers not related to this appeal. In this regard, it is the Order of this Board that, when the Commissioner receives the information requested, if the records held by the tax department indicate that the vendors/consumers disclosed by the appellant have reported sales/purchases in a manner inconsistent with the position now propounded by the Commissioner, and the Commissioner, upon audit, accepted that report as properly classifying the sales/use of such materials, such information is discoverable by the appellant, and, upon proper request must be provided. However, the self-assessing reports of such persons or companies, without more, are not discoverable.

Accordingly, it is the Order of the Board of Tax Appeals that appellant shall respond to the written interrogatory in issue within fourteen days following service of this Order.

The matter will be scheduled for hearing in the ordinary course of the Board's business.