

OHIO BOARD OF TAX APPEALS

Associated Paper Stock, Inc.,)	
)	
Appellant,)	CASE NO. 98-A-390
)	
vs.)	(USE TAX)
)	
Roger W. Tracy, Tax Commissioner of Ohio,)	DECISION AND ORDER
)	
Appellee.)	

APPEARANCES:

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For the Tax
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Entered December 10, 1999

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

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant from a final determination of the Tax Commissioner. Therein, the Tax Commissioner denied appellant's objections to the use tax assessment made against appellant on its purchases and leases of items including, but not limited to trucks, trailers,

forklifts, and parts, for the period of January 1, 1992 through December 31, 1994. Appellant's request for remission of penalty was conditionally allowed in part.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to the Board by the Tax Commissioner, the testimony presented at a hearing before this Board, and the briefs submitted by counsel to both parties.

In reviewing appellant's appeal, we first recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St. 3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut that presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St. 2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St. 2d 138. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St. 3d 213.

This Board acknowledges that the Supreme Court adheres to the general proposition that statutes granting exemption from taxation must be strictly construed. *National Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus; *White Cross Hospital Assn. v. Bd. of Tax Appeals* (1974), 38 Ohio St. 2d 199, 201. "Exemption is the exception to the rule and statutes granting exemptions are strictly construed," *Seven Hills Schools v. Kinney* (1986), 28 Ohio St. 3d 186.

Associated Paper is an Ohio corporation, with its principal place of business in North Lima, Ohio. It was incorporated in 1973 originally to build, sell, and repair corrugated paper balers. In later years, Associated Paper also transported the corrugated paper bales to the paper mills for recycling, which has become its primary business.

As part of its business, with regard to the delivery of the paper to the mills, Associated Paper also inspects, screens, cleans, sorts, and bales the corrugated paper. Specifically, Associated Paper picks up corrugated bales from

its customers, using a specially equipped tractor trailer, which includes an elevator lift and a forklift. When the bales are loaded, Associated Paper leaves a receipt stating the number of bales picked up and whether wire, for baling, was delivered. Associated Paper then delivers the bales to a paper mill, invoicing the mill for the delivery. Depending upon the arrangement in place with a particular customer, Associated Paper then forwards the customer's payment from the mill back to the customer, less Associated Paper's charges/expenses and/or any deductions for bales that were rejected for contamination.

In its notice of appeal, Associated Paper Stock, Inc. (hereinafter "Associated Paper"), specified the following errors:

"1. The Tax Commissioner *erred* in finding, against manifest weight of the evidence, that the property items and transactions assessed are *not* exempted from sales and use taxation as sales, leases, repairs, the maintenance of, parts for, or items attached to or incorporated in motor vehicles that are primarily used for transporting personal property by a person engaged in transportation for hire, within the meaning of R.C. 5739.02 (B)(33).

"2. The Tax Commissioner *erred* in finding, against the manifest weight of the evidence, that the corrugated paper being transported belongs to Appellant rather than the grocery stores, producers and or paper mills for which Appellant is hauling.

"3. The Tax Commissioner *erred*, as a matter of law, in its application of the transportation for hire exemption and in determining that said exemption did not apply to the property items and transactions assessed.

"4. The Tax Commissioner *erred* by failing to find that the vehicles, lift trucks, repair parts and labor assessed were exempt from taxation as being used directly in the rendition of a public utility service, within the meaning of O.R.C. Section 5739.01 (P).

“5. The Tax Commissioner *erred* as a matter of law by failing to find that Appellant qualifies as a Broker/Factor as defined by O.R.C. Section 4711.0

“6. The Tax Commissioner *erred* as a matter of law by failing to find that Appellant’s vehicles, lift trucks, repair parts and labor are necessary equipment for Appellant to function as a Broker/Factor.

“7. The Tax Commissioner *erred* as a matter of law by finding that personal property taxes are subject to use as a tax assessment.

“8. The Tax Commissioner’s Final Determination is manifestly unreasonable and unlawful as a matter of law.

“9. The Tax Commissioner *erred* by abusing its discretion and not remitting the penalties and interest. Said failure to remit is arbitrarily, unreasonable and capricious as a matter of law.” (emphasis in original)

Associated Paper further reduced its specifications of error in its presentation to this Board and its brief¹, wherein it argued only two specifications of error. First, it claimed that it qualified as a “person engaged in highway transportation for hire”, pursuant to R.C. 5739.02 (B)(33). In the alternative, it argued that it acted as a factor in the transportation of corrugated paper bales. Underlying both arguments is the basic premise that Associated Paper did not own the corrugated paper that it was transporting.

We have previously considered appellant’s appeal of similar issues for an earlier audit period, specifically, January 1, 1987 through December 31, 1989. See *Associated Paper Stock, Inc. v. Tracy* (Jan. 20, 1995), B.T.A. Case No. 92-N-572, unreported; *aff’d*, *Associated Paper Stock, Inc. v. Tracy* (March 11,

1996), Mahoning App. Case No. 95 C.A. 34, unreported. In that case, we found that appellant failed to establish any authority to transport property intrastate.

We further found it operated under oral contracts, and the sole written contract offered into evidence by appellant clearly provided for purchase of waste and recyclable property and was not a contract for transportation services.

In the instant matter, with regard to appellant's first contention that it is a person engaged in transportation for hire, we must again review the applicable code provisions, including, specifically, R.C. 5739.02 (B)(33), which provides that sales tax does not apply to:

“(33) The sale, lease, repair, and maintenance of; parts for; or items attached to or incorporated in motor vehicles that are primarily used for transporting tangible personal property by a person engaged in highway transportation for hire;”

R.C. 5739.01 (Z) provides that:

“(Z) ‘Highway transportation for hire’ means the transportation of personal property belonging to others for consideration by any of the following:

“(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

“(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless he was the holder of a permit or certificate of the types described in division (Z)(1) of this section;

¹ We assume that appellant has abandoned its remaining specifications of error since they were either not addressed at hearing or in the post-hearing brief, and therefore, we will not devote further discussion to them in this opinion.

“(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.”

In order for a taxpayer to claim entitlement to the exemption set forth in R.C. 5739.02 (B)(33), the provisions of the statutory definition of “highway transportation for hire” must be satisfied: the taxpayer must transport personal property, belonging to others, for consideration. In addition, the taxpayer must be registered with the Public Utilities Commission or the federal government to engage in the transportation of personal property.² The foregoing statutory provisions are clearly stated and do not evoke any ambiguity.

As we review the evidence and testimony presented, we note that the company president testified that approximately 80% of his company’s business is with Giant Eagle grocery stores and/or their related entities. (R., p. 80) Accordingly, we will focus on Associated Paper’s relationship with Giant Eagle, as their primary customer and the primary use to which its resources are devoted, in our review.

With respect to the first statutory requirement, the evidence clearly demonstrates that the taxpayer transports personal property. In addition, the statutory requirement of proper certification to render such service has also been met and does not appear to be in dispute. (Ex. 11-13)

However, the question of ownership of the property that Associated is transporting is disputed by the parties. In support of its position that Associated Paper transported the property of others and did not own the corrugated paper bales it delivered to the paper mills, Associated Paper offered the testimony of the company president together with several exhibits that were accepted into evidence.

During the audit period in question, there were two different contracts in effect involving the transport of corrugated waste from Giant Eagle and related

stores to a paper mill. Specifically, from March 1, 1991 through February 24, 1994, Giant Eagle (a Topco associated company) contracted directly with The Newark Group, Inc. (Recycled Fibers of Ohio, a paper mill) for the sale of its old corrugated paper tonnage located at the Topco group of supermarket chains and other grocery wholesalers. (Ex. 1) With regard to transportation services, the contract provided, “Newark shall furnish truck trailers* at Topco’s individual store locations on a schedule to be arranged by Newark and Topco member company. Pick ups to be made by Newark or it’s [sic] assigned agent. *from a company selected by Giant Eagle.” (Ex. 1, p. 2) Further, Appendix A of Exhibit 1 lists Associated Paper as the authorized pick-up agent under the Newark/Topco contract. As indicated in Associated Paper’s president’s testimony, there was no written contract in place detailing Associated’s role in this contractual relationship between Giant Eagle and Newark (R., p. 64-65), as most contracts with the paper mills were entered into orally, on a handshake, based on friendship and past working experiences. (R., p. 43, 64) According to Associated’s president, during the period of this contract, all payments were made by Newark to Associated. (R., p. 82-83) Thus, we find that appellant has met its burden of proof with regard to this portion of the audit period as we are convinced from the record before us that Associated transported property belonging to Topco to Newark and was paid for performing such transport. Thus, the statutory criteria for “transport for hire” have been met.

The second contract involving Giant Eagle was between Giant Eagle and Associated directly, and was in effect from May 2, 1994 through March 31, 1996. (Ex. 4, 4a) The contract specifically stated that “Giant Eagle agrees to supply to Associated Paper and Associated Paper agrees to accept from Giant Eagle all the ‘old corrugated’ paper accumulated by Giant Eagle in the course of normal business operations. * * * Ownership of said corrugated paper shall be retained by Giant Eagle at all times under this Agreement until Giant Eagle has

² In the alternative, the taxpayer must be engaged in the transportation of personal property but could not have done so on December 11, 1985, unless the taxpayer was the holder of a permit or certificate described in division (Z)(1) of R.C. 5739.01.

received payment for said corrugated paper.” Further, the contract provides that “Associated Paper shall receive compensation for its services directly from the Paper Mill or other entity to which Associated Paper delivers the ‘old corrugated’ paper. Associated Paper shall then forward to Giant Eagle any excess compensation received from said paper mill or other entity based on Exhibit B.”[compensation schedule]

Based upon the foregoing contractual language, Associated argues that it has met all of the requirements for exemption as “transportation for hire.” The tax commissioner argues, to the contrary, that the bales belonged to Associated since it received payment for them from the paper mill, instead of Giant Eagle. However, in light of the foregoing contractual language, as well as the nature of the paper recycling business, in which the actual amount of bales that are accepted and paid for by the mill cannot be determined until the bales are actually delivered to the mill, it would be impractical to expect that consideration for the transport of such goods would be paid “up front” by Giant Eagle. In essence, Giant Eagle’s compensation of Associated for delivery of the corrugated to the buying paper mill is simply deducted from the proceeds paid to Associated, for Giant Eagle’s benefit, by the paper mill. Thus, Associated has met its burden of proof with regard to the portion of the audit period in which the Giant Eagle/Associated contract was in effect, specifically May 2, 1994 through December 31, 1994.

Having determined that Associated Paper has met its burden of proof with regard to the Topco/Giant Eagle contracts, which constituted approximately 80% of its business during the audit period in question, we need not address any of Associated’s alternative contentions. The evidence and testimony presented sufficiently established that Associated was engaged in “transportation for hire” during the audit period in question.

Accordingly, based upon the foregoing, this Board finds that appellant has overcome the presumption of validity of the Tax Commissioner’s determination. *See Hatchadorian v. Lindley* (1986), 21 Ohio St. 3d 66. Associated has provided clear and convincing proof that it is entitled to the

“transportation for hire” exemption for the entire audit period. *Youngstown Metropolitan Housing Authority v. Evat* (1944), 143 Ohio St. 268, 273. Thus, this Board finds that the Tax Commissioner’s findings were unreasonable and unlawful with regard to the assessment of use tax on items which Associated claimed were exempt from tax as used primarily in “transportation for hire”, e.g., Associated’s leases of trucks, trailers, and forklifts and on its purchases of parts, repairs and other related charges.

It is the Decision and Order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is reversed and remanded for reassessment purposes, consistent with the opinion set forth herein.