

**OHIO BOARD OF TAX APPEALS**

Cozy Meats, Inc., dba Cozy Meats,	)	
	)	
Appellant,	)	Case No. 98-J-991
	)	
vs.	)	(SALES TAX)
	)	
Roger W. Tracy,	)	DECISION AND ORDER
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

For the Appellant	- Levine & Levine By: David L. Levine 1200 Illuminating Building 55 Public Square Cleveland, Ohio 44113
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For the Appellee	- Betty D. Montgomery Attorney General of Ohio By: Janyce C. Katz Assistant State Office Tower 30 East Broad Street 16 <sup>th</sup> Floor Columbus, Ohio 43215
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Entered December 3, 1999

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

The Board of Tax Appeals is considering this matter pursuant to a notice of appeal filed herein by Cozy Meats, Inc. (“Appellant”) Appellant has appealed from a final determination of the Tax Commissioner that assessed sales tax against the appellant. The body of the final determination provides in pertinent part:

“The petitioner owns and operates a retail food and beverage store. This assessment results from an audit of its sales for the period of April 1, 1993 through October 31, 1996. The petitioner filed a timely petition for reassessment and a request for remission of penalty.

“During the audit period, the petitioner failed to maintain a complete record of sales. Due to the lack of sufficient records, the tax agent utilized the accounts payable invoices for the months of September, November, and December 1996, the only records available and provided by the petitioner, to form a test sample. The amount of taxable purchases was divided by the total purchases to obtain a taxable percentage of 58.35. A 2% allowance was given for the soft drinks sold for food stamps reducing the taxable percentage to 56.35. The percentage of error was then multiplied by the reported gross sales to arrive at taxable sales. The Cuyahoga County rate of 7% was applied to the total taxable sales, which yielded the tax liability. A credit was allowed for sales tax reported and remitted before the final tax liability was assessed.

“The petitioner contends that the taxable percentage of sales of 56.35 was too high. It claims that during the audit period it purchased some exempt items such as baby formula and other nontaxable food items for which no receipts were given. It argues that the total taxable percentage would be lower if these purchases were included in the test sample. The objection is without merit. Other than mere assertion, the petitioner failed to provide any evidence to verify such purchases. For failure to prove its claim, the objection is denied.

“The petitioner next argues that the 2% adjustment made for soft drinks purchased with food stamps was too low. However, the petitioner failed to provide any documents or evidence to substantiate its claim. The objection is denied.”

The notice of appeal challenging the final determination provides:

“In accordance with the provision of Ohio Revised Code 5717.02, Cozy Meats, Inc. hereby gives Notice of Appeal to the Board of Tax Appeals from an order of the Tax Commissioner received September 25, 1998, a copy of which is attached hereto and made a part hereof.

“This appeal is taken upon the following grounds: That the order appealed from is not accurate and does not reflect the ratio of taxable sales to total sales.

“The order further is not supported by reliable, probative and substantial evidence and that the order appealed is not in accordance with law.”

The matter has been submitted to the Board of Tax Appeals upon the notice of appeal, and the statutory transcript certified herein by the Tax Commissioner. Although the parties appeared at the hearing scheduled herein, neither party submitted evidence.

The appellant owns and operates a retail food and beverage market located at 7904 Cedar Avenue, Cleveland, Ohio. For the audit period, April 1, 1993 through October 31, 1996, the appellant had reported taxable sales under 15% of its total sales. The Tax Commissioner determined that this percentage was low for an establishment such as the one operated by the appellant. The Commissioner therefore conducted the audit at issue herein.

The appellant did not have most of the pertinent records on hand. However, appellant's account payable invoices from appellant's vendors were

available. All other records and documents had either been discarded or destroyed.

The auditing agent listed appellant's purchases under the headings; Taxable, Non-Taxable, and Cash-N-Carry (Taxable and Non-Taxable). The total taxable and total cash-n-carry taxable amounts were totaled together to produce a total taxable amount. This amount was divided by the total purchase amount producing a taxable percentage of 58.35%. Because soda can be purchased with food stamps the Commissioner's agent allowed a 2% adjustment for soda purchases with food stamps reducing the taxable percentage to 56.35%.

The appellant has contended that the method used in the audit did not accurately reflect the ratio of taxable sales to total sales. The appellant argues that the only reasonable method to determine taxable sales should be to categorize each of the taxable purchases and apply a reasonable mark up to produce the total taxable sales. Then taxable sales should be divided by the total sales to determine the appropriate ratio of taxable sales to total sales.

With regard to the validity of the test check procedure utilized by the Tax Commissioner, R.C. 5739.03 requires that the vendor collect from the consumer the full and exact amount of the tax payable on each taxable sale. R.C. 5739.11 requires the vendor keep complete and accurate records of sales, together with the record of the tax collected. The appellant did not have records of sales or records of tax collected during the audit period. The Commissioner therefore was

required to perform an audit to determine appellant's tax liability. The assessment was predicated upon an audit of appellant's purchases.

R.C. 5739.13 provides:

“\* \* \* When information in the possession of the commissioner indicates that the amount required to be collected or paid under this chapter is greater than the amount remitted by the vendor or paid by the consumer, the commissioner may audit a sample of the vendor's sales or the consumer's purchases for a representative period, to ascertain the per cent of exempt or taxable transactions or the effective tax rate and may issue an assessment based on the audit. The commissioner shall make a good faith effort to reach agreement with the vendor or consumer in selecting a representative sample period.”

The Commissioner used appellant's account payable invoices from appellant's vendors because all other records and documents had either been discarded or destroyed. R.C. 5739.13 authorizes the Commissioner to make an assessment against a vendor who fails to remit the proper amount of sales tax based upon any information in the Commissioner's possession. *Akron Home Medical Services, Inc. v. Lindley* (1986), 28 Ohio St.3d 107; *McDonald's v. Kosydar* (1975), 43 Ohio St.2d 5; *Russo v. Donahue* (1967), 10 Ohio St.2d 201; *Shadi Food Market, Inc. v. Limbach* (May 10, 1991), B.T.A. No. 89-D-9, unreported. In this instance the only information available was appellant's account payable invoices.

Although the audit procedure was authorized, the appellant is not precluded from contesting the assessment. If it is claimed that the liability for

taxable sales is excessive, the burden is upon appellant to establish its actual tax liability, or any other error in the Commissioner's assessment by competent and probative evidence. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. The appellant has not submitted any evidence demonstrating its actual tax liability, nor has the appellant demonstrated that the Commissioner's determination was unreasonable. The Board there fore finds that the appellant has failed to sustain its burden of proving that the Commissioner's final determination was in error. Accordingly, the final determination is hereby affirmed.