

OHIO BOARD OF TAX APPEALS

Wiedt and Wiedt Tavern, Inc.,)	
dba Kenilworth Tavern,)	
)	CASE NO. 98-T-97
Appellant,)	
)	
vs.)	(SALES TAX)
)	
Roger W. Tracy, Tax)	
Commissioner of Ohio,)	DECISION AND ORDER
)	
Appellee.)	

APPEARANCES:

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ENTERED: December 10, 1999
Ms. Jackson and Mr. Manoranjan concur. Mr. Johnson not participating.

This matter is before the Board of Tax Appeals pursuant to a notice of appeal filed by Wiedt and Wiedt Tavern, Inc. (“Wiedt”) Wiedt appeals from a final determination of the Tax Commissioner, wherein the Commissioner affirmed a sales tax assessment issued against Wiedt for sales made during the period of July 1992 through December 1995. The Commissioner further granted a partial and conditional remission of

the penalty levied on the sales tax. The assessment, as modified, totals \$23,358.13, including tax, penalty, and preassessment interest. The Board of Tax Appeals now considers this matter upon the notice of appeal and the statutory transcript certified to this Board by the Tax Commissioner. Both parties waived an evidentiary hearing and submitted this matter to the Board upon the record.

Wiedt is an Ohio corporation that operated a tavern in Lakewood known as the “Kenilworth Tavern.” Kenilworth sells beer, wine, liquor and a limited menu of food items. Wiedt owned and operated Kenilworth throughout most of the audit period. Toward the end of 1995, Wiedt sought to sell the Kenilworth. As a result of those efforts, Wiedt entered into an “Interim Management Agreement” with a group of purchasers. The agreement called for the purchasers to manage the business and its assets from the closing date of the purchase until the liquor permits were transferred. This management agreement was in effect during the final portion of the audit period.

In May 1996, the Department of Taxation undertook a sales and use tax audit of the Kenilworth Tavern for the period of July 1992 through December 1995. The auditing agent used 1995 as a test year to determine compliance. The agent considered various documents, including price lists, sales ledgers, register tapes, canceled checks, and purchase invoices from the tavern’s suppliers. From his review, the agent determined a percentage of error of approximately 52.8 percent. Wiedt now raises several challenges to the audit’s conclusions.

We begin our review of Wiedt's contentions of error by observing that the findings of the Tax Commissioner are presumptively valid. Consequently, it is incumbent upon any 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.*

First, Wiedt argues that the Commissioner erred in using a sample period of January through December 1995 for the basis of the assessment. That period covered operation of Kenilworth by two entities, Wiedt and the third party manager. Wiedt alleges that the third party manager's operation is not reflective of Wiedt's operation. Initially, we note that Wiedt has not alleged that it is not liable for sales made by the manager during the final three months of the audit period. See *Captain Frank's, Inc. v. Limbach* (1991), 76 Ohio App.3d 438. (seller of a business with a liquor permit, under an uncompleted executory contract, held liable for sales tax incurred by the purchaser operating the premises under a management agreement) As there was a management agreement in place, and as the vendor's license and liquor permit were still in Wiedt's name, Wiedt remained liable for sales tax.

What Wiedt does object to is the fact that the test period covered the operations of both Wiedt and the third party manager. Wiedt implies that the business carried out under the management agreement is not comparable to that carried out by Wiedt itself.

Thus, Wiedt suggests that the Commissioner has overstated the amount of tax due by holding the final three-month period to the same standards as used for the first portion of the test period.

Wiedt waived its opportunity to provide additional evidence in this matter, and we are unable to find support from the available record that the change in management led to an overstatement of sales tax liability. The record does show that the Commissioner's agent had in his possession register tapes and similar records from both Wiedt and the third party manager. These records were utilized in the determination of liability and suggest, without evidence to the contrary, that the agent was in a position to take any change in business into consideration. Without more, we must find that the presumption in favor of the Commissioner has not been rebutted on this issue. *Alcan, supra.*

Wiedt next argues that the Commissioner erred in overstating the prices for products sold. We can find no support for this contention. The statutory transcript indicates that the agent was in possession of the price lists used at Kenilworth from 1992 through 1995, including any changes brought about by the third party manager. These lists were used by the agent in determining liability, and Wiedt has provided nothing to support its contention that reliance on its own records was in error. Attached to the petition for reassessment is a document that purports to offer an adjustment in price. (S.T. 9.) Wiedt evidently submitted this as support for a different price structure. However, Wiedt has not provided us any information as to the source of this summary

document, how this adjustment was calculated, or who prepared the document, or why it is more reliable than the price lists supplied to the agent. Upon review, we must conclude that Wiedt has failed to demonstrate how the Commissioner's reliance upon the price lists supplied by Wiedt and the third party manager resulted in an overstatement of price.

Wiedt also challenges the method used in the audit in that Wiedt believes that the Commissioner overstated the quantities sold by failing to make proper adjustments for spillage, breakage, theft, personal use, giveaways, and ending inventories. Again, Wiedt has not come forward with evidence to adequately support this assertion. Moreover, the auditing agent's comments indicate that he was willing to consider such adjustments in the audit but that Wiedt failed to supply him with any information to quantify such losses. (S.T. 23.)

Wiedt also argues that the Commissioner improperly relied upon sales invoices supplied by Kenilworth's supplier. Wiedt argues that prior to 1995 drivers for its beer and wine distributors were making personal sales of products to unrelated third parties but were nevertheless invoicing Wiedt for the products. The record indicates that the auditing agent did rely upon invoices retrieved from the suppliers. This was done because the agent determined that several of invoices were missing from Wiedt's records.

We have previously considered the argument of invoiced alcohol being sold by delivery drivers to third parties. In *T&D Tavern, Inc. v. Tracy* (Aug. 6, 1999), BTA No. 97-S-1179, unreported, we found that the auditing agent's reliance upon a distributor's

invoices was appropriate in the absence of evidence specifying which invoices represented sales to which the taxpayer was not a party. Here, Wiedt has not come forward with evidence that would enable us to determine which invoices included sales not made to Wiedt, nor has Wiedt provided us with other records to support its assertion that the amount of alcohol purchased has been overstated in the audit. We additionally note that where a taxpayer's records are incomplete, as is the situation here, R.C. 5739.13 provides that the Commissioner may assess a "vendor based upon information in the commissioner's possession." See, also, Ohio Adm. Code 5703-9-02(B). This would include those invoices supplied by the distributor.

Wiedt next claims that the Commissioner erred in not remitting the entire penalty. The Commissioner granted only a partial remission, contingent upon timely payment of the amount due. Pursuant to R.C. 5739.13(A), the Tax Commissioner may issue an assessment against a vendor that fails to remit the proper amount of tax required by R.C. Chapter 5739. R.C. 5739.133(A) mandates that the Commissioner impose a penalty whenever an assessment for unpaid sales tax, or the failure to file sales tax returns, is issued.

R.C. 5739.13 and 5739.133(C), however, provide that the Commissioner may remit any penalties. The decision to remit a penalty under R.C. 5739.133(C) is discretionary. *Columbia Gas of Ohio, Inc. v. Limbach* (1994), 69 Ohio St.3d 462. As a result, once the Commissioner determines there is an absence of reasonable cause to abate the penalties, we may not reverse his determination unless an abuse of discretion is

specifically demonstrated. *Gen. Motors Corp. v. Tracy* (1995), 73 Ohio St.3d 29, cert. granted 116 S.Ct. 1349, affirmed 117 S.Ct. 811; *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67; *Coleman Young Motors, Inc. v. Limbach* (1988), 51 Ohio App.3d 117.

Relative to what constitutes an abuse of discretion, we note the Supreme Court's decision in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83:

""[A]n abuse of discretion involves far more than a difference in *** opinion ***. The term discretion itself involves the idea of choice, of an exercise of the will, of a determination made between competing considerations. In order to have an 'abuse' in reaching such determination, the result must be so palpably and grossly violative of fact and logic that it evidences not the exercise of will but perversity of will, not the exercise of judgment but the defiance thereof, not the exercise of reason but rather of passion or bias. ***""
State v. Jenkins (1984), 15 Ohio St. 3d 164, 222." *Id.* at 87.

Wiedt has come forward with no evidence to support a claim that the Commissioner's decision to partially remit the penalties was an abuse of discretion. Moreover, the decision to partially and conditionally remit a penalty does not, in and of itself, constitute an abuse of discretion. See *Dunhall Pharmaceuticals, Inc. v. Tracy* (Oct. 27, 1995), BTA No. 94-T-1340, unreported.

Finally, Wiedt argues that the Commissioner's determination violates Wiedt's right to due process of law under the Fifth and Fourteenth Amendments to the United States Constitution and its right to due course of law under Article I, Section 16, of the

Constitution of the State of Ohio. Such issues, however, lie beyond the scope of this Board's jurisdiction *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195 ;*Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, at paragraph three of the syllabus *S.S. Kresge Co. v. Bowers* (1960), 170 Ohio St. 405, at paragraph one of the syllabus.

In conclusion, we find that Wiedt has failed to meet its burden to prove, by competent an probative evidence, the contentions of error raised in its notice of appeal. Therefore, it is the decision and order of the Board of Tax Appeals that the Tax Commissioner's final determination must be, and the same hereby is, affirmed.