

OHIO BOARD OF TAX APPEALS

Penny Sisson,)	
)	CASE NO. 99-L-1352
Appellant,)	
)	(SALES TAX)
vs.)	
)	
James J. Lawrence,)	DECISION AND ORDER
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES: **Dismissed on Appeal May 1, 2002 Ohio Supreme Court.**

For the Appellant -	Penny Sisson, <i>pro se</i> New Notice Jan. 17, 2003 Box 266 Dismissed Apr. 2, 2003 Spencer, Ohio 44275
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For the Appellee -	Betty D. Montgomery, Esq. Attorney General of Ohio By: Richard C. Farrin, Esq. Assistant Attorney General State Office Tower, 16th Floor 30 East Broad Street Columbus, Ohio 43215
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ENTERED: November 30, 2001

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

This cause and matter came on to be considered by the Board of Tax Appeals upon the notice of appeal filed by Penny Sisson (hereinafter Appellant or property owner) from a final journal entry of the Tax Commissioner. The Appellant seeks a refund of the sales tax she paid in the amount of \$3,453.02 on the purchase of a

manufactured home from High Touch Homes, Inc. The Tax Commissioner denied the refund request, and the Appellant filed the instant appeal.

The Appellant's notice of appeal provides as follows:

"Now comes Claimant/Appellant/Petitioner, Penny L. Sisson, to respectfully file this Notice of Appeal of the Tax Commissioner's decision issued May 4, 1999 (See Exhibit A and B, hereto) is (sic) in error, citing the tax commissioner statement of 'No exemption applies here., Page 1, paragraph 4 of Tax Commissioner decision' pursuant to Ohio Revised Code 5739.01(B), and, citing Ohio Revised Code 5739.01, Note 20 pursuant to 'real property,' and citing BTA F-300 (sic) (1977) and O.R.C. 5739.01 pursuant to no part (emphasis added) of this sale retained its status as tangible personal property and was 'fully understood to be 'real property' at the time of sale, as is evidenced by the purchase agreement.(sic) Jurisdiction is timely filed with this court, stating the Tax Commissioner decision was dated May 4, 1999 and not mailed to Appellant/Petitioner until July 30, 1999 and the Appeal is filed well within the 30 days allowed by law. Exhibit C"

The Tax Commissioner, in his journal entry, denied the refund finding that the sale of the manufactured home was not exempt from sales tax. The final determination of the Tax Commissioner provides as follows:

"On behalf of its customer, Penny Sisson, the claimant sought refund of tax paid in the amount of \$3,453.02, contending the tax was erroneously paid on the purchase of a manufactured home.

"The claimant alleges that the manufactured home has been incorporated into real property subsequent to the purchase. It concludes that the manufactured home should not have been subject to sales or use tax. The argument is without merit. A manufactured home sold with a manufacturer's statement of origin is considered a motor vehicle. A motor vehicle is subject to sales tax unless some statutory exemption applies to the purchase. No exemption applies here. The subsequent

recharacterization of the motor home as real property has no bearing to the imposition of sales or use tax on the original transaction.

“The claimant also argues that because the manufactured home is subject to annual real estate tax, it would constitute double taxation if it is also subject to sales tax on the initial purchase. The objection is not well taken. After a manufactured home is purchased and installed, the owner may choose to retain the certificate of title of the manufactured home. In such a case, the manufactured home remains personal property, subject to the annual trailer tax based on a depreciating value. On the other hand, if the owner elects to incorporate the manufactured home into real property and abandons the certificate of title, the manufactured home becomes real property, subject to the annual real property tax. In both of the above instances, sales or use tax is imposed on the initial transaction, the transfer of tangible personal property. The trailer tax or real property tax is imposed on the valuation of the property. This situation can be analogized with the situation of an individual who purchases material to improve his/her home. He/she will be required to pay sales or use tax on the purchase of materials to improve his/her home. He/she will be required to pay sales or use tax on the purchase of materials as the consumer. Once the improvement is completed, the added value of the real estate is subject to real property tax.

"Therefore, it is the order of the Tax Commissioner that the refund claim be denied." (ST. at 1-2)

A hearing on the instant appeal was scheduled and held. At the time of the scheduled hearing, the Appellant telephoned the Board's Attorney Examiner and waived her appearance at the hearing. The Appellant requested a briefing schedule and the same was set by the Board. The matter is now considered by the Board of Tax Appeals pursuant to R.C. 5717.02 upon the notice of appeal, the statutory transcript of the

proceedings below as certified by the Tax Commissioner (ST.), the record (R.) of the hearing before this Board, and the briefs submitted on behalf of the parties.

The issue before this Board is whether the Tax Commissioner properly denied the Appellant's request for refund of sales tax paid on a contract for the purchase of a manufactured home. We acknowledge, at the outset, the affirmative burden that is borne by an appellant in an appeal taken from a final determination of the Tax Commissioner. In *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, the Supreme Court stated:

"Absent a demonstration that the commissioner's findings are clearly unreasonable or unlawful, they are presumptively valid. Furthermore, it is error for the BTA to reverse the commissioner's determination when no competent and probative evidence is presented to show that the commissioner's determination is factually incorrect. ***" *Id.* at 124. (Citation omitted.)

Consequently, it is incumbent upon a taxpayer in challenging a decision of the Tax Commissioner to rebut the presumption and establish a clear right to the relief requested. *Maxxim Med. Inc. v. Tracy* (1999), 87 Ohio St.3d 337; *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Bird & Son, Inc. v. Limbach* (1989), 45 Ohio St.3d 76, at 78; *Federated Department Stores v. Lindley* (1983), 5 Ohio St.3d 213; *May Company v. Lindley* (1982), 1 Ohio St.3d 6; *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69. Where no competent and probative evidence is developed and presented to this Board by the Appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's

findings. *Kern v. Tracy, supra*; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp. v. Limbach, supra*. When sufficient competent and/or probative evidence is developed and presented to this Board to support an allegation that the Tax Commissioner's final determination is "clearly" unreasonable or unlawful, the Tax Commissioner's final determination must be overturned. *Kroger Co. v. Limbach, supra*; *Alcan Aluminum Corp. v. Limbach, supra*.

It is also observed that all sales made within this state are subject to tax until the contrary is established. R.C. 5739.01; R.C. 5739.02; *Maxxim Med. Inc., supra*; *National Tube v. Glander* (1952), 157 Ohio St. 407. As a result of the basic presumption that all sales made within the state are subject to tax, the courts have determined that exceptions and exemptions from taxation are to be strictly construed in favor of taxation. *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Highlights for Children, Inc. v. Collins* (1977), 50 Ohio St.2d 186. Therefore, all sales of tangible personal property, as well as the provision of many services, are taxable unless an exception or exemption to the collection of sales tax has been provided by the legislature.

Mindful of the Appellant's burden and the presumption that all sales are subject to taxation, we proceed with our determination of whether the Appellant's purchase of a manufactured home is entitled to exemption from sales tax. The relevant facts in the instant appeal are not in dispute. The record before the Board establishes that in December 1997, the Appellant signed a contract for the purchase of a new three-bedroom manufactured home from High Touch Homes, Inc., a licensed vendor. (ST. 9, 22-33) Pursuant to the purchase contract, the base price of the new manufactured home

was \$60,345. In addition, the purchase contract provided for the materials and construction of a foundation including a full basement with interior wooden steps and handrail, lag to sill plates, the grading of excess dirt, the connection of the water well, the installation of a 2000 gallon septic sewer system with 450 foot leach bed and septic sewer hook-up through the foundation, a natural gas hook-up through the foundation, and the installation of culvert pipe, gutters and downspouts. *Id.* The Appellant owned the real property where the manufactured home and the various improvements were installed or constructed. High Touch Homes, Inc. charged the Appellant an additional \$29,900 for the specified construction work. (ST. 9) In addition the Appellant was charged \$1,500 for the installation of central air-conditioning. No additional sales tax was charged for the construction work. The construction costs were added to the base price of the manufactured home by High Touch Homes, Inc. for a total contract price of \$91,745.

The contract reflects the assessment of \$3,401.48 in sales tax for Medina County on the purchase of the manufactured home. *Id.* The Board presumes from the record that the sales tax dollar amount was arrived at by applying the stated 5.5% Medina County sales tax rate as indicated on the contract document to the manufactured home purchase price of \$61,845 (the base price of \$60,345 plus \$1,500 for the central air conditioning). An additional \$15 was charged for “fees and insurance.” The total “cash purchase price” as reflected on the High Touch Homes, Inc. purchase contract was \$95,161.48. *Id.*

At the direction of the Department of Taxation and the request of the Appellant, High Touch Homes, Inc. submitted the refund claim on behalf of the

Appellant. (ST. 3-5) The Appellant based her sales tax refund request for the purchase of her manufactured home on R.C. 5739.01(B)(5), which provides in relevant part as follows:

“Except as provided in section 5739.03 of the Revised Code, a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property ***.”

Citing 5739.01(B) and *Cargill, Inc. v. Lindley*, 4 Ohio St.3d 210, the Appellant argues at page 2 of her memorandum attached to her notice of appeal that she has satisfied the three criteria for the transfer of tangible personal property to be exempt from sales tax:

“(1) the property must be transferred pursuant to a construction contract,

“(2) the transferred property must be incorporated into a structure or improvement on real property, and

“(3) the transferred property must become real property for tax purposes, (citations omitted).”

The Appellant asserts that the manufactured home she purchased from High Touch Homes, Inc. was incorporated into and became a part of the real estate, and therefore, the purchase was exempt from sales tax as provided in R.C. 5739.01(B)(5). The Appellant further argues that her contract with High Touch Homes, Inc. evidences that they acted as the general contractor, supplied the manufactured home and performed all of the

construction work as previously detailed which resulted in the manufactured home being incorporated into the real estate. The Appellant concludes that because she relinquished her title to the manufactured home to the Medina County Auditor's office on June 23, 1998, roughly 6 days after it was issued by the Medina County Clerk of Courts, the purchase of the manufactured home was exempt from sales tax. (ST. 25)

While we may be sympathetic to the Appellant's arguments, they ignore the express language of several statutory provisions as they existed at the time the Appellant purchased her manufactured home. We begin with R.C. 4505.01(A)(2) which provided as follows:

“‘Motor Vehicle’ includes **manufactured homes** and recreational vehicles, and trailers and semitrailers whose weight exceeds four thousand pounds.” (Emphasis added.)

R.C. 4505.03 further provides:

“**No person**, except as provided in section 4505.05 of the Revised Code, **shall sell** or otherwise dispose of **a motor vehicle without delivering to the buyer** or transferee thereof **a certificate of title** with such assignment thereon as is necessary to show title in the buyer or transferee; nor shall any person, except as provided in section 4505.11 of the Revised Code, buy or otherwise acquire a motor vehicle without obtaining a certificate of title for it in the person's name in accordance with this chapter.” (Emphasis added.)

Finally, R.C. 4505.06 provides in relevant part as follows:

“(A) Application for a certificate of title shall be made upon a form prescribed by the registrar of motor vehicles, and shall be sworn to before a notary

public or other officer empowered to administer oaths. ***

“In the case of the sale of a motor vehicle by a dealer or a manufactured home broker to a general buyer or user, the certificate of title shall be obtained in the name of the buyer by the dealer or the manufactured home broker upon application signed by the buyer, and shall be issued within five business days after the application for title is filed with the clerk. ***

“(B) The clerk, except as provided in this section, shall refuse to accept for filing any application for a certificate of title and shall refuse to issue a certificate of title unless the dealer or manufactured home broker or the applicant, *, submits with the application payment of the tax levied by or pursuant to Chapters 5739. and 5741. of the Revised Code by cash, certified check, draft, or money order payable to the clerk. ***.”**
(Emphasis added.)

The foregoing statutory language, in effect in 1997 and 1998, is specific and makes it clear that the sale of a manufactured home was considered to be the sale of a motor vehicle. At the time of Appellant’s purchase, the existing statutes clearly required the payment of sales tax and the issuance of a certificate of title in order to acquire ownership of the manufactured home under the law. This is the plain meaning of the statutory language that this Board and the Tax Commissioner are required to follow. R.C. 1.42; R.C. 1.49.

Although the Appellant correctly states the criteria for exemption of personal property that is incorporated into the real property pursuant to a construction contract, the Appellant ignores the statutory requirements of R.C. Chapter 4505 as set forth above.

The statutory provisions that the Appellant relies upon in her brief are the statutory basis by which High Touch Homes, Inc. did not collect sales tax on the additional \$29,900 in materials and construction work that High Touch provided and performed for the Appellant. The sales tax that was charged and collected on the Appellant's purchase of her manufactured home remained statutorily required pursuant to R.C. Chapter 4505, despite the provisions of R.C. 5739.01(B)(5).

After January 1, 2000, the effective date of the enactment of R.C. 5739.0210, manufactured and mobile homes were specifically declared not to be motor vehicles for the purposes of collecting sales tax. However, R.C. 5739.0210(F) still permits the manufactured home dealer to pass any sales tax liability the dealer incurs through to the purchaser as part of the dealer's cost. Although there has been a statutory change in the classification of manufactured and mobile homes, this change cannot be applied to the instant appeal. All statutes are presumed to be prospective in application unless expressly made retrospective. R.C. 1.48. The relevant legislation creating the new statutory provisions regarding the classification of manufactured and mobile homes did not contain such "retroactive" language.

The Appellant also asserts that because the manufactured home was actually built in Indiana, and not in Ohio, her purchase is not subject to Ohio sales tax pursuant to R.C. 5739.01. It is observed, however, that the purchase of items from outside the state of Ohio that are then brought to Ohio for use are exempt from Ohio sales tax but are subject to the equivalent Ohio use tax pursuant to R.C. 5741.02. *Cargill, supra* at 211.

Giving plain meaning to the foregoing statutes as they existed at the time of the Appellant's purchase, the Board of Tax Appeals finds that the transaction involved the sale of a manufactured home by High Touch Homes, Inc. to the Appellant that was clearly a taxable sale of personal property, a "motor vehicle" as defined by R.C. Chapters 4505 and 5739. To interpret otherwise would be contrary to the plain meaning of the relevant statutes.

For all of the foregoing reasons, the Board of Tax Appeals concludes that the Appellant has failed to establish by a preponderance of the evidence her right to exemption from sales tax for the purchase of the manufactured home. The Appellant purchased her manufactured home pursuant to R.C. Chapter 4505. The Appellant was only charged sales tax on the price of the manufactured home, not on the additional construction work that resulted in the affixing of various building materials permanently to the land. Therefore, it is the Decision and Order of the Board of Tax Appeals that the final determination of the Tax Commissioner relative to the denial of the Appellant's request for refund must be, and the same hereby is, affirmed.

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