

2017 Ohio Tax LEXIS 296

State of Ohio -- Board of Tax Appeals

January 19, 2017, Entered

CASE NO(S). 2016-563 (SALES AND USE)

Reporter

2017 Ohio Tax LEXIS 296 *

BEITZEL CORPORATION, (et. al.), Appellant(s), vs. JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.), Appellee(s).

Core Terms

notice of appeal, commissioner's findings, additional information, final determination, rebut a presumption, probative evidence, motion to dismiss, written argument, refund claim, natural gas, use tax, reliability, incorrect, refund, revise, drill, sworn, lake, oil

Counsel

[*1] APPEARANCES:

For the Appellant(s) - BEITZEL CORPORATION, SHELDON E. MAUST

For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, DANIEL G. KIM, ASSISTANT ATTORNEY GENERAL

Opinion

DECISION AND ORDER

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

This matter is before the Board of Tax Appeals pursuant to an appeal filed by Beitzel Corporation ("taxpayer") from a final determination of the Tax Commissioner. It is decided upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the commissioner, and any written argument of the parties, as no hearing before this board was requested.

Before considering the merits of taxpayer's appeal, we must address the commissioner's motion to dismiss, first raised in his written argument to this board. The commissioner contends that because the subject notice of appeal was filed by the taxpayer's non-attorney corporate officer, i.e., its treasurer, it has not vested jurisdiction in this board, as its filing "constitutes the unauthorized practice of law." Motion at I. For the reasons set forth in [The Dukester, LLC v. Testa \(Interim Order, July 28, 2016\), BTA No. 2015-2168, 2016 Ohio Tax LEXIS 1619](#), unreported, which **[*2]** discusses a filing of an appeal by a member of a limited liability company on its behalf, the commissioner's motion to dismiss is denied.

Specifically herein, taxpayer filed an application for refund of use tax in the amount of \$ 266.55; the commissioner initially denied the request. Upon receipt of the denial, taxpayer filed additional information, however, the

commissioner again denied the refund claim. The commissioner concluded that taxpayer's descriptions did not indicate that the purchases in question were "directly used in actual drilling activities," S.T. at 2, and therefore, they were not exempt from taxation, pursuant to *R.C. 5739.02(B)(42)(a)*, "as used directly in the exploration for, and production of, crude oil and natural gas." S.T. at 1.

Through the notice of appeal, taxpayer seeks review of the commissioner's denial of its use tax refund claim. In its notice, taxpayer described how all of the materials purchased were used during the production of and drilling for oil and natural gas. Further, in the alternative, taxpayer argued that the materials purchased were resold.

The findings of the Tax Commissioner are presumed valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 537 N.E.2d 1302 (1989). [*3] It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135, 311 N.E.2d 1 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138, 235 N.E.2d 511 (1968). Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy*, 72 Ohio St.3d 347, 650 N.E.2d 428 (1995); *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St. 3d 213, 5 Ohio B. 455, 450 N.E.2d 687 (1983). Where no competent and probative evidence is 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, supra*; *Kroger Co. v. Limbach*, 53 Ohio St.3d 245, 560 N.E.2d 192 (1990); *Alcan, supra*.

In *Cunagin v. Tracy (Mar. 31, 1995), BTA No. 94-P-1083, 1995 Ohio Tax LEXIS 486, unreported at *3*, this board held that a notice of appeal "is not an adequate substitute for reliable documentary and testimonial evidence. The Notice of Appeal merely constitutes unsworn, unproven [*4] statements, claims and allegations. Evidence presented at a hearing is accepted only upon conditions designed to insure its reliability. Appellants must first be sworn on oath. Their sworn testimony is then scrutinized and subjected to cross-examination. Documentary evidence is also subjected to the scrutiny of the parties and their counsel." See also *Powderhorn v. Lake Cty. Bd. of Revision*, 11th Dist. Lake No. 2007-L-071, 2008-Ohio-1024. Thus, taxpayer's statements in the notice of appeal do not rise to the level of evidence upon which we can rely in making our determination herein, as they constitute mere contentions, submitted outside this board's hearing process. See *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision*, 76 Ohio St.3d 13, 1996 Ohio 432, 665 N.E.2d 1098 (1996); *Executive Express, Inc. v. Tracy (Nov. 5, 1993), BTA No. 92-P-880, 1993 Ohio Tax LEXIS 1837*, unreported. Without corroborating testimony from taxpayer, it is impossible to determine, for example, the competency and probity of the representations made. In sum, the overall credibility of the taxpayer's position cannot be effectively judged.

"We will not engage in the reweighing of evidence ***, nor will we require the appellees to resubmit [*5] evidence, or gather additional information/data in an effort to demonstrate, the propriety of the commissioner's findings which are presumptively correct. Appellant seeks to have this board disregard the 'presumptive validity' accorded the commissioner's findings, as well as his own responsibility to present 'competent and probative evidence *** show[ing] that the commissioner's determination is factually incorrect.' Accordingly, we must conclude appellant has failed to affirmatively demonstrate error in the commissioner's findings or in his affirmation of his findings that the information before him" was insufficient to prove that additional refund was due. *Gifford v. Levin (Apr. 8, 2014), BTA Nos. 2010-716, et al., 2014 Ohio Tax LEXIS 2149*, unreported.

In consideration of the foregoing, this board concludes that appellant has failed to rebut the presumption of correctness accorded the findings of the Tax Commissioner. *Alcan, supra*. Therefore, it is the decision of the Board of Tax Appeals that the final determination of the Tax Commissioner must be affirmed.

Kathleen M. Crowley, Board Secretary