

OHIO BOARD OF TAX APPEALS

New World Communications of Ohio, Inc.,)
)
 Appellant,) CASE NOS. 2003-A-1732,
) 2003-A-1733
 and)
) (CORPORATION FRANCHISE
) TAX)
 WJW License, Inc.,)
)
 Appellant,)
)
 vs.)
)
 Thomas M. Zaino, Tax Commissioner of)
 Ohio,) **Dismissed on Appeal July 13, 2005**
) **Ohio Supreme Court**
)
 Appellee.

APPEARANCES:

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For the Appellee -Jim Petro
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Entered March 18, 2005

Ms. Margulies and Mr. Eberhart concur. Ms. Jackson not participating.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed by appellants New World Communications of Ohio, Inc. (“New World”) and WJW License, Inc. (“WJW”) from final determinations of the Tax Commissioner. In the determinations, the commissioner considered

appellants' petitions for reassessment, relating to corporate franchise tax assessments against appellants for tax years 1995-1997 for New World and 1995-1998 for WJW, and ultimately affirmed the subject assessments. Specifically, the commissioner disallowed the deduction taken for goodwill on both appellants' franchise tax returns, which appellants now contest.

The matter was submitted to the Board of Tax Appeals upon the notices of appeal, the statutory transcript certified to the board by the Tax Commissioner, the stipulated¹ exhibits B, 1, and 2, and the briefs of counsel. A hearing on the merits was waived by all parties.

In reviewing appellants' appeals, 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 taxpayers 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, taxpayers are 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.

The commissioner's final determinations indicate that New World "is a

¹ The parties jointly stipulated that certain exhibits (Exs. B, 1, 2) may be considered true and correct documents and may be admitted into evidence, subject to the right of any party to object to such exhibits, by way of brief, on grounds of relevance only. Appellants objected to the receipt of Exhibits 1 and 2 into evidence in the post-hearing brief; however, such exhibits will be received, for what value, if any, they may have, noting the years to which they are directed.

domestic corporation that operates the television station WJW-Cleveland” and WJW “is a domestic corporation that owns, maintains and administers the Federal Communication Commission (‘FCC’) license and network affiliation agreement of a VHF television station located in Cleveland, Ohio.” In the final determination issued to New World, the commissioner sets forth, in pertinent part, the underlying facts of both appeals. Specifically:

“SCI, Inc. was formed in 1987 and owned several television stations and their FCC licenses, including WJW-Cleveland. Pursuant to a Chapter 11 reorganization plan confirmed by the United States Bankruptcy Court for the District of Delaware, SCI, Inc. n.k.a. New World Television, Inc. formed a separate entity for each station to hold the FCC license of that station. WJW License, Inc. was incorporated, and 100% of its outstanding stock was transferred to New World Communications of Ohio, Inc. (Taxpayer/[Parent]), in exchange for \$1,000 and the FCC license of WJW-Cleveland. WJW License, Inc. owned the FCC broadcast license, but the physical assets of the station were owned by the taxpayer, which operated the station.

“The taxpayer [Parent] filed certified financial statements with the Securities and Exchange Commission using ‘fresh start’ reporting in accordance with the American Institute of Certified Public Accountants’ Statement of Procedure (SOP) 90-7. SOP 90-7 prescribes ‘fresh start’ reporting for entities in and emerging from bankruptcy with a change in control. These entities must report their reorganization value, which is the fair market value of the entity as a going concern immediately after the restructuring. Any portion of the reorganization value that cannot be attributed to specific tangible or identified intangible assets of the emerging entity is reported as an intangible asset called ‘Reorganization value in excess of amounts allocable to identifiable assets.’ SOP 90-7 requires that this asset be amortized according to Opinion 17 of the Accounting Principles Board (‘APB-17’)(August 1970). SOP 90-7 does not label this

intangible asset as goodwill. The taxpayer reported the account 'Intangible assets and excess reorganization value' at \$693 million, which included \$47 million attributable to the FCC license of WJW-Cleveland and carried as the asset 'FCC & Goodwill.'

"For the tax years in question, both WJW License, Inc. and the taxpayer excluded the unamortized value of the FCC license as goodwill on their Ohio corporate franchise tax returns pursuant to former R.C. 5733.05(A)(4).

"R.C.5733.05(A) requires corporations paying tax on their net worth to pay tax on 'the total value, as shown by the books of the company, of its capital, surplus, whether earned or unearned, undivided profits, and reserves.'

"Former R.C. 5733.05(A)(4) provided an exclusion for 'goodwill, appreciation, and abandoned property as set up in the annual report of the corporation, provided a certified balance sheet of the company is made available upon the request of the tax commissioner.'" S.T. at 1-2.

In his final determination, the Tax Commissioner went on to find that "[t]he taxpayer's exclusion was not proper under former 5733.05(A)(4) ***. Under the Ohio corporate franchise tax exclusion, a tangible or intangible asset does not belong in goodwill if it can be separately purchased and sold and has a separately identifiable value. *GCC Beverages, Inc. v. Limbach* (August 25, 1989), BTA No. 87-H-1278." Based upon the foregoing, the assessments against appellant were affirmed.

In their notices of appeal to this board, New World and WJW contend that "[t]he Commissioner's determination disallowing taxpayer's claimed goodwill deduction is erroneous because the books properly contained an account for goodwill under generally accepted accounting principles, and an item, such as the item comprising the deduction at issue here, is goodwill under the net worth tax if it cannot

be sold or purchased separately or be separately valued.” Notices of Appeal at 3. New World and WJW went on to indicate that “[l]ongstanding FCC policy prohibits the assignment or transfer of an FCC license unaccompanied by the station’s physical assets.” Notices of Appeal at 5. Appellants went on to state that “[t]he FCC’s bare license doctrine is deeply-rooted in FCC policy prohibiting property rights in licenses” and, as such, “[t]he Commissioner’s conclusion that FCC licenses may be purchased and sold separately from other assets of a company is erroneous.” Notices of Appeal at 5, 8.

At the outset of our consideration of this matter, we acknowledge that the Supreme Court adheres to the general proposition that statutes granting exclusions, exemptions, or deductions from taxation must be strictly construed. *Vought Industries, Inc. v. Tracy* (1995), 72 Ohio St.3d 261; *Mutual Holding Co. v. Limbach* (1990), 50 Ohio St.3d 102; *Beckwith v. Kosydar* (1977), 49 Ohio St.2d 278; *National Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus. “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.

Specifically, the subject assessments resulted from the commissioner’s denial of the deduction taken by New World and WJW in the calculation of their net worth base for each of the tax years in question. In each instance, the taxpayer deducted an amount for goodwill which was attributed to WJW’s FCC license. Appellants contend that the deduction in question was taken pursuant to the provisions

of R.C. 5733.05, which, during the tax years under consideration, provided in pertinent part that:

“The annual corporation report determines the value of the issued and outstanding shares of stock of the taxpayer, which under division (A) or (B) of this section is the base or measure of the franchise tax liability. ***

“(A) The total value, as shown by the books of the company, of its capital, surplus, whether earned or unearned, undivided profits, and reserves, but exclusive of:

“***

“(4) Good will, appreciation, and abandoned property as set up in the annual report of the corporation, provided a certified balance sheet of the company is made available upon the request of the tax commissioner. ***”

Thus, the question for this board is whether appellants properly classified the FCC license as goodwill. We have previously considered what does (and does not) constitute goodwill, pursuant to R.C. 5733.05(A)(4). In *GCC Beverages, Inc. and Alpert's Warehouse Showrooms, Inc. v. Limbach* (Aug. 25, 1989), BTA Nos. 1987-H-1278, 1987-B-1279, unreported, we stated that, consistent with generally accepted accounting principles, “[i]t would appear to be Ohio law that a tangible or intangible asset does not belong in ‘goodwill,’ for purposes of the franchise tax, if it can be separately purchased and sold and has a separately identifiable value.” Considering the foregoing, and for the following reasons, we affirm the commissioner’s finding that appellants’ deduction of the FCC license as goodwill was not appropriate.

First, we find that an FCC license is an identifiable intangible asset which is capable of being assigned a specific value. Arguably, the taxpayers

recognized this because New World identified that asset and assigned it a specific value. Further, when Fox acquired WJW's holding company, it allocated a specific part of the purchase price to the FCC license and considered goodwill separately from the FCC license in its detail of its account for intangible assets. S.T. at 132, 391, 393. See *The Savings Bank v. Limbach* (Nov. 2, 1990), BTA No. 1987-C-733, unreported.

Further, government licenses, in general and including FCC licenses, have previously been recognized as identifiable intangible assets separate from goodwill. See *Jefferson-Pilot Corp. v. Commissioner* (1992), 98 T.C. 435, aff'd (4th Cir. 1993), 995 F.2d 530; IRC §197(d)(1)(D); *Atlantic Business and Community Development Corp. v. Subranni* (3d Cir. 1993), 994 F.2d 1069. Cf. *West Bay Manor Co. v. Cuyahoga Cty. Bd. of Revision* (1995), 73 Ohio St.3d 568. For example, in *Jefferson-Pilot*, supra, the United States Tax Court recognized that an FCC license had a value separate and apart from other assets involved in the sale of several radio stations, including real property, personal property, goodwill, trade names, and all other intangibles. Thus, while an FCC license may not be able to be transferred without the related assets of a broadcasting facility, per FCC regulations, its value can be quantified, as it is valued independently from the other assets included in such a transaction. Also, in *Atlantic Business*, supra, the FCC did not object to the sale of the FCC license issued to the debtor under the supervision of the bankruptcy court, but instead, approved it. In both cases, the subject FCC licenses were appraised/valued by experts in the valuation of broadcast communication properties.

Appellants contend that “an asset is goodwill for purposes of Ohio’s net worth tax if it cannot be purchased or sold separately *or if it cannot be valued separately* or if it constitutes goodwill under generally accepted accounting principles, which classify unidentifiable assets as goodwill.” Appellant Reply Brief at 1. (Emphasis added.) Based upon the foregoing case law, we find that an FCC license can be valued separately, regardless of how it may be transferred, i.e., only with other related broadcast station assets.

Accordingly, based upon the foregoing, this board finds that appellants have not overcome the presumption of validity of the Tax Commissioner’s determination. See *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66. It is therefore the decision and order of the Board of Tax Appeals that the decisions of the Tax Commissioner must be and hereby are affirmed.

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