



The Tax Commissioner conducted an audit of the appellant's purchases for its Ashtabula, Ohio paper manufacturing facility for the period in question and determined the subject use tax assessment as follows:

“This is the final determination of the Tax Commissioner on a petition for reassessment under R.C. 5739.13 and R.C. 5741.14 concerning the following use tax assessment:

|               | <b>Amount</b> | <b>Penalty</b> | <b>Total</b>     |
|---------------|---------------|----------------|------------------|
| “Use Tax      | \$208,854.58  | \$31,328.19    | \$240,182.77     |
| Preassessment |               |                |                  |
| Interest      | 58,709.07     | 0.00           | <u>58,709.07</u> |
| Total         |               |                | \$298, 891.84    |

“The petitioner is a manufacturer of paper for home and office uses. This assessment arose from an audit of purchases for the petitioner’s manufacturing facility and distribution center in Ashtabula, Ohio, during the period from July 1, 1997 through December 31, 2000. The petitioner objected to the entire amount of tax assessed and requested remission of the penalty and preassessment interest. A hearing was held on this matter in Columbus, Ohio on October 7, 2002. The petitioner’s objections are addressed below.

“The petitioner objects to assessment of tax on various parts of a waste handling system that it describes as a “baler line.” The petitioner says that waste paper is baled and sold, and hence argues that the items in question are equipment used in manufacturing a product for sale. At the hearing the petitioner’s representative submitted copies of documents intended to show sale of the waste paper. However, the documents do not support that argument. Rather, they show accounting adjustments that record transfers of materials among facilities owned by the petitioner. The documents bear handwritten notes “Broke sold to Hamilton Mill. Intercompany Charge”. According to the Internet site for International Paper, the Hamilton Mill is one of 15 facilities operated by the company in Ohio. The Examiner’s Remarks in the file indicate that “All waste is then baled and sent back to taxpayer’s raw materials supplier in Hamilton, Ohio. Since the waste trim

is not sold or recycled by International Paper at the same manufacturing facility, the baler, handling equipment and vacuum system are taxable.” The objection is denied.

“The petitioner asserts that certain items assessed are qualified for exemption as air pollution control equipment. However, the petitioner has provided no evidence that the items in question have been certified under R.C. 5709.21 by the Ohio Environmental Protection Agency. Indeed, the petitioner has failed to provide evidence of application for such certification. Thus the objection must be denied. If the petitioner applies for and receives an appropriate pollution control certificate, it may be eligible for refund of tax on the certified items. An application for refund must be filed within four years of the date the tax was paid.

“The petitioner objects to assessment of tax on a jogger-aerator and its foundation, contending that this is exempt manufacturing equipment. The function of the jogger-aerator is to align stacks of finished paper before they are placed in packages. Pursuant to R.C. 5739.011(A)(6), handling of finished goods prior to packaging does not qualify for exemption. The objection is denied.

“The petitioner objects to assessment of tax on a pallet load-centering device, which it contends is packaging equipment. The objection is allowed. Deduct \$4,326.34 in use tax.

“The request for remission of the preassessment interest cannot be considered. The Tax Commissioner lacks jurisdiction to abate preassessment interest added to an assessment pursuant to R.C. 5739.133(B) and R.C. 5741.14.

“The request for remission of the penalty is allowed conditionally as noted below.

“If the total assessment is paid within sixty days after receipt of this final determination, the penalty shall be abated in full. In this circumstance, the assessment is adjusted as follows:

|               | <b>Amount</b> | <b>Penalty</b> | <b>Total</b>     |
|---------------|---------------|----------------|------------------|
| “Use Tax      | \$201,754.45  | \$ 0.00        | \$201,754.45     |
| Preassessment |               |                |                  |
| Interest      | 57,828.81     | 0.00           | <u>57,828.81</u> |
| Total         |               |                | \$259,583.26”    |

Appellant’s notice of appeal reads as follows:

“Appellant, International Paper Company, hereby gives notice of its appeal from a final order of the Tax Commissioner, a copy of which is attached hereto and incorporated herein as though fully rewritten, pursuant to the pertinent provisions of Revised Code Section 5717.02.

“The final order is dated April 21, 2003 and involves Tax Commissioner’s assessment number 8020400470, Use Tax, Account Number 97-140262.

“Pursuant to revised (sic) Code Section 5717.02 the Appellant hereby states that the final order hereby appealed is unreasonable and unlawful in the following respects.

- “1. Appellant states that the final order is unreasonable and unlawful in that it subjects to Ohio Use Tax tangible personal property which packages tangible personal property for sale, contrary to law.
- “2. Appellant states that the final order is unreasonable in that it subjects to taxation tangible personal property, referred to in the final order as a “bailer line” (attached at 000478) which packages tangible personalty for sale.
- “3. Appellant states that the final order of the Tax Commissioner is unlawful and unreasonable in that tangible personalty referred to as a “Jogger Aerator” is assessed when such personalty is an exempt packaging device.
- “4. The final Order of the Commissioner is unlawful and unreasonable in that it subjects to taxation tangible personalty which qualifies for exemption as air pollution control equipment.”

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner, the evidence adduced at this board's evidentiary hearing, and the briefs submitted by the parties.

In reviewing appellant's appeal, we 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 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* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. 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* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. 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* (1990), 53 Ohio St.3d 245; *Alcan Aluminum Corp.*, supra.

Before we begin our review of the matter before us, a preliminary issue must first be addressed. At the board hearing, counsel for the appellant contended that the issues before the board were as follows:

“Mr. Petkovic: Yes, very brief. The cause and matter before this Board involves certain sales and/or use taxes

assessed with regard to various items of tangible personal property. It is the claim of the taxpayer with regard to those items and they generally fall in four or five different categories.

“These items are either used directly in manufacturing or are used directly in packaging and, therefore, exempt within the boundaries of Revised Code Section 5739.02.” H.R. at 5.

The Tax Commissioner asserts<sup>1</sup> that appellant did not claim entitlement to a manufacturing exemption in its notice of appeal and is therefore precluded from raising this as an issue before this board.

We agree with the Tax Commissioner’s assertion. Pursuant to R.C. 5717.02, the jurisdiction of the Board of Tax Appeals is restricted to the consideration of only those specifications of error contained in a notice of appeal. See *Moraine Hts. Baptist Church v. Kinney* (1984), 12 Ohio St.3d 134. *Ellwood Engineered Castings Co. v. Zaino* (2003), 98 Ohio St.3d 424. “[A] notice of appeal does not confer jurisdiction upon the Board of Tax Appeals to resolve an issue, unless that issue is clearly specified in the notice of appeal.” *Cleveland Elec. Illum. Co. v. Lindley* (1982), 69 Ohio St.2d 71, 75. See, also, *Kern v. Tracy* (1995), 72 Ohio St.3d 347. In *Queen City Valves, Inc. v. Peck* (1954), 161 Ohio St. 579, the court determined that the term “specify” means to “mention specifically, to state in full and explicit terms.” *Id.* at 583.

Accordingly, our jurisdiction is limited to those issues raised in the notice of appeal. These are enumerated 1 through 4 and do not include the issue

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<sup>1</sup> At this board’s hearing and in its February 23, 2004 written motion to exclude. H.R. at 7, 8.

of entitlement to a manufacturing exemption. Therefore, the board finds that it has no jurisdiction to consider this alleged error.

Turning to the issues properly before us today, the record reflects that the appellant owns and operates about 15 facilities in Ohio which manufacture paper products for home and office use. It grows trees, manages forests, cuts trees, delivers trees to paper mills, and converts the wood into pulp and the pulp into paper. Reels of paper ranging in size from 72 to 200 inches wide are sliced into rolls and sent to the appellant's subject facility located in Ashtabula, Ohio for additional cutting according to customer specifications. The cut paper is wrapped in ream packages, labeled, and placed into cartons. The cartons are then placed on pallets and strapped together with other cartons. H.R. at 50-56. It is from this facility that the subject assessment originates.

The Ashtabula facility generates a paper waste factor of about 8%. H.R. at 35. It crushes about 85% of this waste paper, called "broke paper," and wraps the broke paper with five strings of wire, utilizing a "baler." H.R. at 38, 57.

The resulting bales of broke paper are shipped to the Hamilton, Ohio mill ("Hamilton") or to a location of Hamilton's customer at Hamilton's direction for an intercompany credit of \$200 a ton. H.R. at 36, 37, 39, 40. Hamilton is owned by appellant. Hamilton either recycles this paper and ships it back to the Ashtabula facility or sells it.

Appellant contends that the "baler line" is not subject to taxation as tangible personal property because it packages tangible personalty for sale.

R.C. 5739.02 levies a sales tax upon all retail sales made in Ohio. A similar use tax is imposed by R.C. 5741.02. If a transaction is not subject to sales tax, it follows that the transaction, if made within Ohio, is also not subject to use tax. R.C. 5741.02(C). Since our analysis of the relevant sales and use tax provisions is essentially identical in the context of this appeal, we shall refer only to the applicable sales tax provisions, unless circumstances require otherwise.

We disagree with appellant's contention. From July 1997 to September 2000,<sup>2</sup> the applicable packaging exemption, R.C. 5739.02(B)(15), read as follows:

“(B) The tax does not apply to the following:

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“(15) Sales to persons engaged in any of the activities mentioned in division (E)(2) or (9) of section 5739.01 of the Revised Code, to persons engaged in making retail sales, or to persons who purchase for sale from a manufacturer tangible personal property that was produced by the manufacturer in accordance with specific designs provided by the purchaser, of packages, including material and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale by or on the order of the person doing the packaging, or sold at retail. ‘Packages’ includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, and ‘packaging’ means placing therein.”

To qualify for exemption from taxation in this section, it is fundamental that appellant must be engaged in the “packaging” of tangible personal property, herein broke paper, produced for sale. The “credit,” in this

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<sup>2</sup> In September 2000, an exception for labels was added which does not affect our discussion herein.

situation, does not constitute a sale. It is a book entry reflecting property transfers between divisions of the same company.

The Ohio Supreme Court has previously rejected appellant's interdivisional sale theory in *R.W. Sidley, Inc. v. Limbach*, (1993), 66 Ohio St.3d 256. In that case, the taxpayer cast and prestressed concrete construction components for buildings and bridges. The company utilized these components in the performance of construction contracts and also sold the components to outside contractors.

The commissioner assessed purchases used by Sidley in the manufacture of the concrete components. Sidley argued that its primary purpose was to manufacture components for sale, either to its construction division or to outside contractors. The court held:

“Sidley presents an imaginative argument, relative to its vertically integrated manufacturing, that suggests that concrete products produced by its manufacturing division are ‘sold’ within the contemplation of the statute when transferred to its construction contract division. It argues that the refusal to apply the manufacturer’s exception to a vertically integrated manufacturer and contractor discriminates against those who engaged in both manufacturing and the performance of construction contracts using their own manufactured products. Therefore, Sidley says:

‘This court should remedy the inherent inequities of R.C. 5739.01(E)(2) as it is being applied and implement the “direct use” exemption in a neutral manner to permit Appellant an exemption for items in the precast concrete plant used directly in manufacturing tangible personal property.’

“Sidley thus asks this court to engage in blatant judicial fiat: to eliminate the words ‘for sale’ from the applicable statute, in order to avoid purported discrimination. This we cannot do. The Ohio General Assembly has selected the language of the statute and our obligation is to employ it as written. *Wheeling Steel Corp. v. Porterfield* (1970), 24 Ohio St.2d 24.”

See, also, *Erie Blacktop, Inc. v. Tracy* (Mar. 7, 1997), BTA No. 1995-M-893, unreported.

Such is the case before us today regarding the “baler line.” Therefore, we reject this specification of error.

To the extent that appellant may argue that the Ashtabula facility’s direct deliveries of broke paper to Hamilton’s customers constitute a sale, we would note that even if we were to accept such a position, there is no evidence in the record upon which to quantify this aspect. This contention is rejected by the board. H.R. at 65.

Appellant’s next specification of error is that the “jogger-aerator” is an exempt packaging device.

The jogger-aerator’s function is described by the appellant’s controller, Johnnie Smith, as follows:

“The factory in Ashtabula serves as a converting facility originally for five other paper mills. The paper would be shipped in roll form and weighing anywhere from 1,000 to a ton or more. These rolls would be moved into storage and from there, as our orders come up, we move the rolls into the equipment stage. The equipment stage is what we take over and they actually convert it into sheets.

“These rolls are moved by heavy equipment and cranes into position, sheeted. Then once it leaves the sheeter, it’s

inspected to make sure that it is prepared properly to go on to the packaging equipment.

“If there are any irregularities as to the line of the paper, we put it on what we call a jogger-aerator. What it does is it shuffles paper, presses down and shoots air into the paper and jogs it into position for stacking before it can go on to packaging. Then from the packaging, it either goes into cartons or into what we call skid packaging.

“From there, it goes down the line, and it’s stretch wrapped. It’s labeled, and it’s on the conveyor lines. We have what we call automatic guided vehicles that pick up the product once it’s finished and takes it to the warehouse.” H.R. at 24, 25.

Under cross-examination, Mr. Smith testified as to the jogger-aerator’s location in the process as follows:

“Q: Okay. Now, Mr. Smith, I would like to refer your attention to Exhibit B and if you can just kind of help me understand, again, kind of getting a perspective on the chain of what’s occurring here.

“Where is the jogger-aerator in relationship to this pallet centering device? Is it like to the left of the picture which would be prior to the centering device or is it somehow – well, after the picture which would be after the centering device?

“A: Behind – If I could draw you a picture, I would, but if you could visualize, this is coming off toward you here (indicating). This is being packaged on the machine here. The jogger-aerator that sits on here before you even get to the packaging line (indicating).

“Q: So you testified, I believe, that the jogger-aerator is way behind the machinery that does the packaging?

“A: That is correct.” H.R. at 54.

It is not known how many skids would be diverted to the jogger-aerator. H.R. at 33.

R.C. 5739.02(B)(15), the applicable statute, states as follows in relevant part:

“‘Packages’ includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, and ‘packaging’ means placing therein.”

We do not find the jogger-aerator to be equipment used in packaging or to be an integral part of the packaging line. The jogger-aerator is “way behind the machinery that does the packaging” and is described by appellant’s witness as a stage before the packaging which is only sometimes used (the extent of which is not in evidence). H.R. at 33, 54.

Further, there is no evidence that the jogger-aerator fulfills the requirement of a “placing therein.” The jogger-aerator simply shuffles, presses, aerates and jogs paper into position. It does not place the product into any package of any sort.

Appellant’s reliance on *Newfield Publications, Inc. v. Tracy* (1999), 87 Ohio St.3d 147 is misplaced, as that court held the exempted machinery “conveyed the products to the packages and placed the products in packages.” *Id.*, at 154. (Emphasis added.) There is no such evidence of a placing into a package by the jogger-aerator in any regard here.

For the reasons stated above, we deny this specification of error.

Finally, we turn to appellant's last specification of error<sup>3</sup> which argues that certain tangible personal property qualifies for exemption as air pollution control equipment.

The evidence before us indicates that the Ohio Department of Taxation did not receive the appellant's Application for Air Pollution Control Certificate, dated January 16, 2003, until June 5, 2003. Exh. G.

The Tax Commissioner's final determination is dated April 12, 2003 and the appellant's appeal to this board was filed on June 11, 2003. Thus, it appears that appellant filed its aforesaid application after the Tax Commissioner's final determination and only six (6) days prior to the filing of its notice of appeal with this board.

Therefore, we determine that appellant's appeal in this regard is premature. Indeed, the commissioner's decision states that "the petitioner has provided no evidence that the items in question have been certified under R.C. 5709.21 by the Ohio Environmental Protection Agency ... the petitioner has failed to provide evidence of application for such certification. Thus, the objection must be denied. If the petitioner applies for and receives an appropriate pollution control certificate, it may be eligible for refund of tax on the certified items. An application for refund must be filed within four (4) years of the date the tax was paid." S.T. at 1, 2.

Certainly, the decision of the commissioner was not issued with contemplation of an appropriately filed application. A request for such proof

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<sup>3</sup> Appellant withdrew its contention that cranes were entitled to an exemption. Appellant's brief, at 4.

rendered no evidence of such and the commissioner denied the petition for reassessment based on no application before him.

We acknowledge that appellant filed a copy of a letter with this board on August 31, 2004 from the Ohio Department of Taxation dated “Thursday, August 2” (no year written, presumably 2003) stating that it received an “air” application for the Ashtabula facility and that it would be notified when the commissioner issues a proposed finding on the application. The “Date Application Filed” is listed as “01/16/2003” – the same date as handwritten on Exhibit G. However, we also note the filed date stamped on the application is June 5, 2003. Considering the commissioner’s request for evidence of application at this hearing and lack thereof, and the fact that this letter came to this board outside its evidentiary hearing, this document must be disregarded by the board. *Columbus Bd. of Edn. v. Franklin Cty. Bd. of Revision* (1996), 76 Ohio St.3d 13.

Therefore, the Tax Commissioner’s denial of appellant’s claim, in this regard, was correct and proper. Appellant’s application remains subject to further review and modification by the commissioner. We deny appellant’s final specification of error.

Accordingly, it is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner must be, and hereby is, affirmed.

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