

Commissioner, and the testimony and other evidence adduced at this board's hearing ("H.R."), in which Mr. Miller testified.

Mr. Miller owns and operates Miller Lumber Co. ("MLC"), a sole proprietorship. During a portion of the audit period at issue, Mr. Miller was a partner in Miller Bros. Transportation ("MBT"), which was dissolved in 1997. After the dissolution of MBT, Mr. Miller formed Kincaid Trucking, LLC ("Kincaid").

Factual background

The underlying assessment, final determination of the Tax Commissioner, and the notice of appeal filed before this board relate to a variety of business activities of MLC, Kincaid, and MBT. During the audit period before us, MLC was engaged in the preparation and sale of mulch and boiler fuel utilizing byproducts obtained from lumber mills and at least one cabinet manufacturer.

MLC manufactures mulch by purchasing tree bark from sawmills and allowing it to compost over a period of time. The bark is initially allowed to compost in large conical-shaped piles at Mr. Miller's facility. H.R. at 24. In time, MLC then grinds the bark into smaller pieces and allows the composting process to continue. H.R. at 25. Throughout these composting periods, the mulch piles are mixed and re-mixed to allow for the composting to occur evenly, so that the mulch obtains a dark color. H.R. at 26. MLC utilizes a variety of heavy loading equipment, conveyors, a grinder, and water sprinkling equipment to promote the composting process.

A large cabinet manufacturer pays MLC to remove large quantities of sawdust and scrap particleboard from its premises. H.R. at 29. MLC crushes the large

pieces of particleboard with heavy equipment, grinds and mixes the material with the sawdust, mixes in water to achieve between a 30 to 40% moisture content, and eventually sells the material as boiler fuel to various industries. H.R. at 27-28, 42-44.

At hearing before this board, Mr. Miller testified that the same heavy equipment, grinder, conveyors, and water sprinkling system used in the manufacture of mulch are used in the production of boiler fuel. The facility also has a pond with a protective liner and plumbing connections to route water to different areas on the property and to route excess stormwater back to the pond. MLC utilizes equipment and machinery to remove and relocate water lines and drainage ditches to facilitate the water sprinkling system used at the facility.

Initially, we recognize the general proposition that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71. It is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut this presumption and establish a right to the relief requested. *Belgrade Gardens, Inc. v. Kosydar* (1974), 38 Ohio St.2d 135; *Ohio Fast Freight v. Porterfield* (1972), 28 Ohio St.2d 69. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *Federated Department Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Manufacturing Processes

Central to several issues raised in the notice of appeal is whether MLC is engaged in a manufacturing process in its mulch and boiler fuel production and therefore is entitled to the manufacturing exemption.

The sales tax is an excise tax levied on each retail sale made in this state.

However, certain sales are exempted by statute. R.C. 5739.01(E)(9) provides:

“(E) ‘Retail Sale’ and ‘sales at retail’ include all sales except those in which the purpose of the consumer is:

“***”

“(9) To use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale.”

R.C. 5739.01(S) defines a “manufacturing operation” as:

“[A] process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. ***”

In *Bird & Son, Inc. v Limbach* (1989), 45 Ohio St.3d 76, 79, the Ohio Supreme Court held that “[T]angible personal property which is employed in operations preliminary or preparatory to production of the marketable product, *** or employed subsequent to completion of the manufacturing process, *** is not exempt.”

Before this board, the commissioner questions whether the composting of organic material constitutes manufacturing. The commissioner argues that if there is any manufacturing occurring in relation to MLC’s mulch business, it only begins

when the bark is introduced to the grinder. Appellee's brief at 32. In his final determination, he removed the grinder from the assessment. S.T. at 3.

The evidence before us establishes that the conversion of bark to mulch is reliant upon the process of composting, where the material is allowed to physically change and naturally break down. Appellant's manufacturing process begins when the raw bark material is stored in large compost piles at the facility. Appellant utilizes a variety of techniques to speed the natural process, which involves the frequent mixing of material and the addition of water. We further find that the manufacturing process continues through the subsequent mixing, grinding, and watering of the material until it is deemed ready for sale.

As it relates to the production of boiler fuel, the evidence before us indicates that the manufacturing process begins when the large pieces of particleboard are broken into pieces that can be introduced into the grinder. H.R. at 73-74. The particleboard is then ground into smaller pieces and mixed with sawdust. H.R. at 42-44. Water is then added to the material. *Id.* The material is frequently mixed with water (via the facility's sprinkler system) until the material achieves a uniform moisture content. H.R. at 45.

The commissioner rejected MLC's argument that the water sprinkling system was utilized to: (1) add moisture content to the sawdust and scrap wood to meet the customer's boiler fuel specifications; and (2) promote the composting process for the production of mulch. Rather, the commissioner concluded that the water system's primary use was limited to preventing the loss of raw material, i.e.,

exposed sawdust, from being scattered by the wind, relying upon directives from the Ohio Environmental Protection Agency (“EPA”).¹ The commissioner concluded that since the water was not used as an ingredient for the boiler fuel, the sprinkling system components were not entitled to the manufacturing exemption. S.T. at 4-5.

Before this board, Mr. Miller testified as to the dangers of boiler fuel materials that are too dry. He explained that the dry material will combust in the air and that it is necessary for the material to settle to the bottom of the boiler unit so that it burns in a controlled manner.² H.R. at 44-47.

The testimony before this board from Mr. Miller concerning the need for salable boiler fuel to contain moisture in order for it to burn in a safe manner is compelling and uncontroverted. We have no record to determine whether the need for the infusion of water was presented at hearing before the commissioner. Nevertheless, the commissioner in his final determination did not fully contemplate the necessities of moisture.³ We find that water is a component utilized to manufacture salable boiler

¹ On July 15, 1995, the EPA issued to MLC a detailed permit to install a “storm-water management system.” H.R. at 39-41, Ex. 3. As can be gleaned from the permit, no water sprinkling system was in place at the time of the issuance of said permit. Ex. 3, Report on the detail plans for a stormwater management system at the Miller Lumber Recycling facility in Mifflin Township, Pike County, at 2. We find that the EPA permit and report is primarily concerned with the creation of a retention pond to adequately prevent stormwater runoff from polluting a nearby waterway.

“Basis of Design and Description of Treatment/Disposal System: There will be zero discharge of water from the operator to the nearby Kincaid Creek. A collection system intercepting and collecting ditches is proposed which will collect all stormwater runoff and drainage from the facility.” Id.

The report mentions the proposed construction of a “spray gun apparatus” in conjunction with how the accumulated stormwater will be recycled onto the wastewood piles; however, we read no requirement that the spraying system be constructed, nor do we see any connection in the EPA materials between the proposed spraying system and the issue of air emissions from the wastewood piles on the facility.

² Mr. Miller described one scenario where one of his drivers mistakenly delivered dry sawdust to an industrial client, who used the material as boiler fuel. The dry material instantly combusted and caused an explosion inside the boiler, causing damage to the boiler unit. H.R. at 45.

³ The commissioner relies upon wood fuel specifications MLC obtained from one of its customers that vaguely provide that the material “not contain excessive moisture.” S.T. at 5. Based upon said specification, the

fuel. Further, Mr. Miller's testimony concerning the composting, grinding, mixing, and watering of bark to create mulch is equally uncontroverted. In each instance, MLC is manufacturing a tangible personal property for sale. The existence of EPA requirements to ensure that stormwater run-off from the facility does not contaminate the nearby creek is not relevant to the water sprinkling system. Therefore we hold that MLC is engaged in the continuous manufacturing operation of the production of boiler fuel and mulch.

Manufacturing Exemption

R.C. 5739.011 identifies various items and then classifies them as either included or not included in the term "thing transferred" for purposes of the manufacturing exemption found in R.C. 5739.01(E)(9). Items deemed a "thing transferred" and therefore not taxable are listed in R.C. 5739.011(B).

A. Water Sprinkling System

One issue before this board is whether the commissioner's determination that the purchases of materials and equipment attendant to the water sprinkling system are not entitled to exemption under R.C. 5739.01(E)(9) and R.C. 5739.011 was in error. We reverse the commissioner on the water sprinkling system materials. We hold the purchase of these materials to be exempt.

Although the statute provides that the description of items set forth therein which are entitled to exception is not exhaustive, R.C. 5739.011(B)(8)

(footnote continued) commissioner concluded that added moisture is not a requirement. In reaching his conclusion, it appears that the commissioner failed to contemplate the necessity of added moisture to produce salable boiler fuel.

expressly includes: “*** [W]ater, *** used in the manufacturing operation; machinery and equipment used for, *** producing or extracting those substances; machinery, equipment, and other tangible personal property used to treat, filter, pump, or otherwise make the substance suitable for use in the manufacturing operation; ***.”

As discussed above, the evidence before us indicates that water is utilized in the manufacture of mulch and salable boiler fuel. Therefore, the machinery, pumps, pipes, and other items purchased by MLC to create its water sprinkling system are entitled to be removed from the assessment.⁴

B. Material Handling Equipment

Appellant argues that the heavy equipment and machinery used in its mulch and boiler fuel production qualify as a “thing transferred” under R.C. 5739.011(B)(2), which provides:

“(2) Materials handling equipment that moves the product through a continuous manufacturing operation; equipment that temporarily stores the product during the manufacturing operation; or, excluding motor vehicles licensed to operate on public highways, equipment used in intraplant or interplant transfers of work in process where the plant or plants between which such transfers occur are manufacturing facilities operated by the same person.”

The record before us details the specific pieces of equipment and their use.

⁴ The commissioner similarly assessed the tax upon a pond liner, as it is incorporated into the realty and not subject to the manufacturing exceptions. S.T. at 5. We have not received any evidence to suggest that the commissioner’s determination that the pond liner is incorporated into the realty was in error; therefore, the assessment upon the purchase of the pond liner remains taxable. R.C. 5739.011(C)(4).

1. 928G Loader

Mr. Miller testified that 80% of the use of the 928G Loader was associated with loading bark into and unloading bark from the grinder and further mixing the piles of bark in the composting process. H.R. at 101.

2. D5 and D3 Dozier

Mr. Miller testified that these bulldozers were used in the manufacture of boiler fuel. Specifically, Mr. Miller asserts that they were used to breakup larger sheets of particleboard before they were introduced to the grinder, to add sawdust to the ground particleboard, and to mix the boiler fuel material. H.R. at 73-74. Furthermore, the bulldozers were used to grade the road at the facility. H.R. at 73. Mr. Miller testified that the D5 Dozer was used to move sawdust and ground particleboard into piles 50% of the time, whereas the D3 Dozer performed this function 60% of the time. H.R. at 74, 86. Mr. Miller accounted for the remaining use of the D5 Dozer (40%) as being attendant to breaking up particleboard, whereas the D3 Dozer performed this function 30% of the time. Id.

3. 928F1 and 928F2 Loaders

Mr. Miller testified that the 928F1 and F2 Loaders were used 35% of the time to load the grinder with particleboard, 35% of the time to mix the boiler fuel material, and 10% of the time to transport sawdust before being mixed with the particleboard. H.R. at 98.

4. Backhoe and Trencher

Mr. Miller testified that the backhoe was used 80% of the time to mix and turn the boiler fuel material, while the remaining 20% of the time the backhoe was used for removing and burying waterlines for the water spraying system. H.R. at 81. Mr. Miller also testified that the trenching machine was “used mostly to mix sawdust.” H.R. at 178.

The evidence before this board is limited to Mr. Miller’s testimony and verbal estimates of the amount of time the specific pieces of equipment were used in the manufacturing processes. We are mindful of the Supreme Court’s reasoning in *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St.3d 506, which supports the well-established proposition that a taxpayer has the burden of proving its allegations with reliable evidence and that statistical estimates, developed through a myriad of subjective determinations, fail to satisfy such a burden. See, also, *R.K.E. Trucking, Inc. v. Tracy* (May 24, 2002), BTA No. 1998-S-1316, unreported, affirmed sub nom., *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149.

Nevertheless, there is no other information before us to suggest that the above-mentioned heavy equipment was put to any other primary use than for the manufacture of mulch and boiler fuel at the taxpayer’s facility.

Based on the evidence before us, we find that the equipment described above was primarily used to “move the product through a continuous manufacturing operation” as contemplated by R.C. 5739.011(B)(2). All transfers involving the heavy equipment described above, along with the purchases of repair and replacement parts,

are exempt from sales tax under R.C. 5739.01(E)(9). We hereby remand and instruct the Tax Commissioner to remove said equipment and parts from the underlying assessment.

Purchases of Bark

MLC argues that all purchases made from Lowman Lumber were for bark used in the manufacture of mulch. In his final determination, the commissioner removed specific documented purchases of bark; however, the remaining undocumented purchases made from Lowman Lumber remained taxable. S.T. at 3, Ex. 1.

Before this board, Mr. Miller testified that he has known the owner of Lowman Lumber for his entire life, and that the purchase of bark from Lowman Lumber was frequently done without any supporting documentation. Outside the purchase of bark, Mr. Miller testified that two transactions with Lowman Lumber involved commission payments for the sale of land and timber, not at issue today. H.R. at 23-24, 285.

In his final determination, the commissioner removed one payment to Lowman Lumber from the assessment because the check contained a notation that it was for bark. Additionally the commissioner removed a series of items from the assessment that documented that the purchases from another supplier, Lute Lumber, were for bark. S.T. at 3.

With respect to MLC's mulch operation, the purchases of raw bark material incorporated into the tangible personal property are excluded from retail sales

under R.C. 5739.01(E)(2). The issue is whether the remaining unspecified purchases from Lowman Lumber should be removed from the assessment based solely upon the sworn testimony of Mr. Miller.

Although MLC argues that Mr. Miller's testimony on this issue is uncontroverted, it nevertheless fails to overcome the presumption of validity assigned to the final determination of the Tax Commissioner. Throughout this appeal, much has been made of the casual basis by which Mr. Miller has transacted business. The risks associated with said casual business dealings are apparent in this instance. Without sufficient corroboration⁵ we are unable to find that MLC has demonstrated its right to the relief requested. Accordingly, the commissioner's determination concerning those undocumented purchases of "materials" is affirmed.

Transportation for Hire

During the beginning of the audit period, Mr. Miller was a co-owner in MBT, which ceased operations in 1997. MBT operated the fleet of trucks and trailers utilized to meet all of the transportation needs of MLC.

In 1997, Mr. Miller and his wife formed Kincaid upon the advice of his accountant. H.R. at 122-123. MLC executed a master lease agreement (effective January 1, 1998) whereby MLC leased its fleet of transport vehicles⁶ to Kincaid. Ex. 17. Kincaid was responsible for the transportation activities relating to the pick up

⁵ Our inability to rely solely on Mr. Miller's testimony concerning the unspecified purchases from Lowman differs from our previous reliance on Mr. Miller's testimony regarding other issues in our decision today. In the present matter, there is no corroborating evidence to ensure that the unspecified purchases were, on these occasions, limited to bark.

⁶ The vehicles and trailers are specified within the "Master Lease Agreement." Ex. 17.

and delivery of bark, mulch, sawdust, particleboard, and boiler fuel for MLC. MLC argues that no sales tax should apply to the sale, lease, or maintenance of said fleet of transportation vehicles used primarily to provide transportation for hire, pursuant to R.C. 5739.02(B)(32), which exempts the following transactions from sales tax:

“The sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property by a person engaged in highway transportation for hire.”

“Highway transportation used for hire” is defined in R.C. 5739.01(Z),

which provides:

“‘Highway transportation for hire’ means the transportation of personal property belonging to others for consideration by any of the following:

“(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

“(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;

“(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.”

In *Rumpke Container Serv. Inc. v. Zaino* (2002), 94 Ohio St.3d 304, the Ohio Supreme Court denied the taxpayer’s claim that it was engaged in transportation for hire within the meaning of R.C. 5739.02(B)(32) because it did not hold the

requisite state or federal permit or certificate under R.C. 5739.01(Z). Furthermore the court held that the waste transported by Rumpke did not constitute “personal property belonging to others” under R.C. 5739.01(Z)(1).

The record before us indicates that the requisite certificates were obtained from the Public Utilities Commission of Ohio (“PUCO”) for MBT and Kincaid. Exs. 14 and 16.

The next inquiry is whether MBT and Kincaid were transporting personal property belonging to others as used in the statute. The commissioner argues that Mr. Miller, as the sole proprietor of MLC, as a partner in the now defunct MBT partnership, and as an owner of Kincaid, failed to treat the entities as separate, such that any materials transported were not ‘personal property of another.’ The commissioner cites to the evidence that indicates that after the creation of Kincaid, employees operating the motor vehicles still remained on the payroll of MLC. Appellee’s brief at 22. The testimony of Mr. Miller as well as the documentary evidence indicates that the employees of MLC did not switch to Kincaid’s payroll until Kincaid had obtained the necessary workers’ compensation coverage, which did not occur until April 1998. H.R. at 268. We agree with the commissioner’s position that the entities were not truly separate until April of 1998 when the employees were being compensated from Kincaid’s payroll. *Stein, Inc. v. Tracy* (1999), 84 Ohio St.3d 501.

Although Mr. Miller is a principal in all three entities, MBT, Kincaid, and MLC were three separate entities after April of 1998. We fail to see how the

existence of MBT or Kincaid amounts to a “sham,” as claimed by the commissioner, when they have obtained the requisite certificates from the PUCO.

The evidence supporting the transportation services is limited to transactions that occurred in 1998.⁷ Exhibit 18 chronicles payments and invoices demonstrating that Kincaid was engaged in transportation for hire. Nevertheless, there is no evidence to support what, if anything, was hauled by MBT for the remainder of the audit period.

Therefore, we hold that the commissioner’s determination that the repair parts and tires incorporated into vehicles leased by Kincaid do not qualify for treatment as sales exempt under R.C. 5739.02(B)(32) was in error. We hereby remand the issue to the commissioner to determine which exempt purchases of repair parts and tires occurred between April 1, 1998 and the end of the audit period. Further, the commissioner’s determination that the repair parts and tires incorporated into vehicles leased by MBT do not qualify for treatment as sales exempt under R.C. 5739.02(B)(32) is affirmed.

Loans

MLC argues that it pledged vehicles and equipment as collateral for loans from various sources. The commissioner assessed a tax upon these transactions, given the documentation for the alleged loans was actually purchase installment contracts. The evidence before this board indicates that title to the various vehicles and equipment obtained by MLC and/or Mr. Miller predates the purported purchase

⁷ Said payments began in April of 1998, after the formation of Kincaid, and go through the end of the audit period, December 1998. Ex. 18.

installment contracts⁸ assessed by the commissioner. Furthermore, there is no evidence that title of said equipment ever passed from MLC and/or Mr. Miller to the lender(s). Although the transactions may facially appear to be purchases, they are actually the pledging of collateral for loans and therefore do not constitute a retail transaction under R.C. 5739.01(B)(1), as neither title nor possession of the collateral was transferred.

Therefore, we hold that those items which are evidenced by records that disclose MLC and/or Mr. Miller had acquired the equipment *before* executing the “purchase contracts” are to be removed from the assessment. Specifically the following machinery shall be removed from the assessment: (1) The 416 backhoe, serial # 05PC09981, Ex. 22; (2) The IH fork lift, serial # B202557; Ex. 23; (3) The two Kenworth tractors, serial # 1XKDDB9X7JS504119 and # 1XKDDB9X8JS504128, Exs. 26, 27, 28, 29, 30, 31, and 32; (4) Two Dorsey Trailers, VIN 1DTV75W21EA167869 and 1DTV75W24DA160252, Exs. 33,34,35,36, 37, 38, and 39, S.T. at 553-554. Further, we affirm the commissioner’s assessment against the Bobcat steer-loader, given the evidence before us fails to establish the item subject to the installment sales contract with the lender, Quality, serial # 512812315, was previously purchased.⁹

⁸ In reviewing the record it is clear that instead of utilizing loan agreements and financing statements to secure the collateral, the lender (Quality) had Mr. Miller and/or his agents execute purchase installment agreements in an effort to document what were actually loans.

⁹ Exhibit 21 contains a purchase order for a Ford truck, with a handwritten notation referencing an 853 Bobcat skid-loader; however, the order fails to identify the item’s serial number. Furthermore, the attached title pertains only to the Ford truck and there is no evidence that clearly demonstrates that the item purported to be collateral in the loan with the lender was previously obtained by Mr. Miller and/or MLC.

Resale of vehicles

MLC further characterizes the leasing of vehicles owned by MLC to MBT and Kincaid as a resale, and, therefore argues that the original purchases of vehicles by MBT during the audit period are exempt from sales tax under R.C. 5739.01(E)(1).

Not all sales are taxable. R.C. 5739.01(E)(1) through (15) provide a multitude of transactions that are not considered “retail sales.”

R.C. 5739.01(E)(1) provides:

“(E) ‘Retail sale’ and ‘sales at retail’ include all sales except those in which the purpose of the consumer is:

“(1) To resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person;”

In his final determination, the Tax Commissioner concluded that none of the purchases of vehicles were subject to a bona fide resale by lease, given there was no evidence of any payment by Kincaid. S.T. at 8.

In our discussion concerning the applicability of the transportation for hire exemption above, we concluded that Kincaid was engaged in transportation for hire, given the evidence of payments between the two entities as well as the existence of the master lease agreement. Exs. 17, 18, and 19.

The testimony of Mr. Miller and the corroborating documentary evidence that the vehicles were leased to Kincaid via the master lease agreement supports the claims of MLC. The commissioner does not otherwise discredit the existence of the lease. Therefore we find that the original purchases by MLC of

vehicles listed in the master lease agreement are entitled to the resale exemption found in R.C. 5739.01(E)(1), and that the commissioner's inclusion of said items in the assessment was in error.

Nevertheless, the lack of evidence in the record documenting the transactional activities between MBT and MLC is as problematic as it was in our discussion concerning the transportation for hire issue. With respect to any other vehicles claimed to be subject to a lease between MBT and MLC, the final determination of the commissioner is affirmed.

Last, MLC alleges that "Ford Cabs purchased by Miller and resold as dump trucks are similarly exempt from sales tax as items held for resale." Appellant's brief, at 33. Mr. Miller briefly discussed at hearing that MLC purchased Ford trucks and installed eight-foot dump beds onto the trucks for resale in its used car lot. H.R. at 276. However, there is simply no documentary evidence before us to corroborate that these trucks were in fact resold. Therefore, the commissioner's determination concerning the assessment against the Ford trucks and dump beds is affirmed.

Lease/Purchase Payments

Many of the vehicles and equipment owned by MLC were obtained through lease to purchase agreements from a variety of vendors. In exercising its option to purchase the property, MLC was credited the amount of previously made lease payments against the purchase price. MLC argues that the commissioner assessed sales tax against the lease payments and subsequently assessed tax against the gross purchase price (before credit for lease payments), and concludes that the

amounts paid in the lease transaction were taxed twice.¹⁰ It is not necessary for this board to reach this issue, given our determination that the material handling equipment is entitled to exemption under R.C. 5739.01(E)(9) and R.C. 5739.011(B)(2) and that the transportation equipment leased by Kincaid is entitled to exemption under R.C. 5739.02(B)(32) and R.C. 5739.01(E)(1).

Transactions not involving the sale of property or taxable services.

The Tax Commissioner assessed sales tax on a handful of cash payments to individuals, concluding that the payments represented taxable transactions. R.C. 5739.02 provides that “an excise tax is hereby levied on each retail sale made in this state.”

MLC objects to a variety of cash payments made to individuals, which were assessed by the commissioner. MLC argues that these miscellaneous payments were made for various personal services and labor, and one was a donation to an individual who had lost her home to fire. H.R. 210-219.

The commissioner’s statutory position that “all sales made in this state are subject to the tax until the contrary is established,” while accurate, does not necessarily apply to all of the instant miscellaneous payments of cash to individuals. Although the commissioner points to the curious nature of some of these payments, there is simply no evidence before us to establish that most of these payments were made in connection with any sale of goods.

¹⁰ Miller further argues that the D5 Dozier owned by Miller was actually taxed a third time.

Mr. Miller testified that checks issued to his brother, Doug Miller, were for contract labor. H.R. at 210, 278. Despite Mr. Miller's recollection, said checks were issued to Doug Miller with a notation that they were for "materials." Id., S.T. at 552, items 1050 and 1051; at 560, item 1361. Therefore, the commissioner's assessment on the three checks for "materials" is affirmed.

Further, we find the commissioner's determination with respect to the remainder of the cash payments to Don Wilson, Drena Maynard, Valerie Chandler, Valerie Davis, Steve Gilbert, and Mark Butler to be erroneous, and the same shall be removed from the assessment.

Accordingly, it is the decision and order of the Board of Tax Appeals that the final determination of the Tax Commissioner is affirmed in part, reversed in part, and remanded in part consistent with our opinion above.

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