

OHIO BOARD OF TAX APPEALS

Parbro Air, Inc.,)
)
 Appellant,) (USE TAX)
)
 vs.) DECISION AND ORDER
)
 J. Patrick McAndrew, Tax)
 Commissioner of Ohio,)
)
 Appellee.)

APPEARANCES:

For the Appellant - No Appearance
Parbro Air, Inc.
5400 Brillwood Lane
Cincinnati, Ohio 45243

Appeal Filed By: David T. Parlin
Parbro Air, Inc.
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Entered August 26, 2005

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

This matter is before the Board of Tax Appeals pursuant to an appeal filed on January 12, 2004. This appeal is taken from a final order of the Tax Commissioner, appellee, wherein said official affirmed a use tax assessment issued against appellant, Parbro Air, Inc. ("Parbro"). The tax was imposed upon the use of a Beechcraft airplane within the state.

The Board of Tax Appeals now considers this matter upon the notice of appeal, the statutory transcript certified to the board by the Tax Commissioner, and the record of the evidentiary hearing. At that hearing, Mr. David Parlin testified on Parbro's behalf. Mr. Parlin described Parbro as a "shell company" with one asset, the aircraft here in issue. According to Mr. Parlin, the company was formed to provide liability protection in case of some type of accident.

Mr. Parlin also described the transaction by which Parbro purchased and took title to the aircraft and presented a copy of the purchase agreement for the board's review. The agreement is also a part of the statutory transcript. According to Mr. Parlin, a Mr. Stanley Cooper previously owned the airplane. Mr. Cooper was in Florida when the transaction to sell the airplane was negotiated, but, again according to Mr. Parlin, was an Ohio resident at the time of the sale. The plane was to be sold for \$158,000, and the contract contained a number of contingencies, most relating to the airworthiness of the aircraft, but the contract was also contingent upon Mr. Cooper's successful purchase of another aircraft. The contract included an agreement that the cost of delivering the plane from Kansas City to Cincinnati would be shared evenly between the purchaser and the seller.

The record also contains bills of sale by which the aircraft transferred from Cooper Research, Inc. to Ozark Aircraft Sales, Inc. ("Ozark"), of Kansas City, Missouri and then from Ozark to Parbro. Mr. Parlin testified that the purchase price was paid by

personal check directly to Cooper Research Inc. A copy of the check also appears in the statutory transcript.

Parbro was assessed use tax, measured by the purchase price, upon the use of the aircraft within the state. Parbro challenged the assessment through the Tax Commissioner's review process, claiming that the purchase qualified for the "casual sale" exemption from taxation. The Tax Commissioner denied the claim and affirmed the assessment. An appeal to this board ensued.

We begin our consideration of this matter by acknowledging the duties imposed upon the Board of Tax Appeals when reviewing a decision of the Tax Commissioner. The Tax Commissioner's findings are entitled to a presumption of correctness and it is incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *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. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

As to the specific claims before the board, the General Assembly has imposed a tax upon the sale or use of tangible personal property within the state. R.C. 5739.02; R.C. 5741.02. The legislature has also provided numerous exemptions and exceptions to the collection of sales tax, and, through R.C. 5741.02(C)(2), has mandated

that if the acquisition of an item within the state would not be subject to tax, then the item's use within the state is correspondingly not subject to tax. Thus, when a taxpayer contends use tax has been improperly assessed, it is incumbent upon this board to review the exceptions and exemptions provided purchases under the sales tax statutes.

As a result of the basic presumption that every sale or use of tangible personal property in this state is taxable, it is well settled that the laws relating to exemption from taxation are to be strictly construed. *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Highlights for Children, Inc. v. Collins* (1977), 50 Ohio St.2d 186.

Parbro claims exemption from sales (and correspondingly, use) tax through R.C. 5739.02(B)(8), commonly known as the "casual sale" exemption. That section provides:

"For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools through the state *** an excise tax is hereby levied on each retail sale made in this state.

****.

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

****.

"(8) Casual sales by a person, ***."

"Casual sale" is defined by R.C. 5739.01(L), which provided during the relevant period:

"'Casual sale' means a sale of an item of tangible personal property which was obtained by the person making the sale through purchase or otherwise, for his own use in this state

and which was previously subject to the state's taxing jurisdiction on its sale or use ***."

Parbro contends that its purchase of the aircraft qualifies as a casual sale because it purchased the aircraft from a "person making the sale" (Mr. Stanley Cooper¹) who had used the airplane within the state of Ohio for his own use. Parbro contends that Mr. Cooper lived in Cincinnati, Ohio and the aircraft was hangered in the Cincinnati area. As further support for its claim, Mr. Parlin researched Federal Aviation Agency records. According to a "Chain of Title Search" included in the record, the aircraft in issue was titled in the name of Cooper Research Inc., Cincinnati, Ohio. Because the aircraft was titled to an Ohio company and because Parbro's owner negotiated with an Ohio resident, Parbro argues that its purchase met the qualifications of a casual sale.

Parbro recognizes that it did not obtain title from Cooper or his company. Title to Parbro was conveyed by Ozark. Parbro acknowledges that Ozark is an organization in the business of making retail sales of airplanes. In fact, Parbro acknowledges that Mr. Cooper purchased another aircraft from Ozark and, as part of that transaction, transferred title of the aircraft under contract to Mr. Parlin to Ozark. It was Mr. Parlin's testimony that the title transfer from Cooper Research, Inc. to Ozark was purposeful. Mr. Cooper wished to delay reporting capital gains (and, potentially paying income tax) his company would have earned upon the sale of the aircraft to Parbro. When the aircraft was "traded" for the newer plane, the gain was deferred until a later date. When the conditions of the agreement between Cooper and Parbro were met, Ozark

completed the transfer of aircraft to Parbro. The Tax Commissioner concludes the transaction can no longer be a casual sale because a "broker" (or, more to the point, an entity in the business of making retail sales) was involved in the transaction. Parbro argues, however, that a seller's use of an intermediary to transfer title has no effect on the "casual sale" nature of a purchase of tangible personal property. On this critical point, we must agree with the Tax Commissioner.

Under R.C. 5739.02(B)(8) and R.C. 5739.01(L), the sales tax does not apply to casual sales by a person not engaged in the business of selling tangible personal property. Conversely, if one is engaged in the business of selling tangible personal property, the sales tax is applicable. R.C. 5739.02; *Oberlander v. Porterfield* (1971), 28 Ohio St.2d 171. In *Oberlander*, the Ohio Supreme Court held:

"A 'casual sale' is defined as 'a sale of an item of tangible personal property which was obtained by the person making the sale, through purchase or otherwise, *for his own use* in this state.' (Emphasis added.) R.C. 5739.01(M).² The import of this definition is that the person selling the item did not obtain it for the purpose of resale. To qualify for the casual sale exemption the person making the sale must have acquired the tangible personal property *for his own use* in this state." (Emphasis in the original.)

It is critical to note that the casual sale exemption is dependent upon the manner in which the seller used the property prior to the sales transaction. In the present matter, however, the record contains little, if any, competent evidence regarding the use

¹ While the aircraft was titled in the name of Cooper Research, Inc., Mr. Parlin essentially spoke of Cooper Research, Inc. and Mr. Stanley Cooper interchangeably.

² The casual sale definition is now found in R.C. 5739.01(L).

of the aircraft by either Cooper Research, Inc. or Ozark.³ The statutory transcript contains a letter from a Mr. Steve Hartin on behalf of Ozark to Mr. David Parlin of Parbro. The letter states that Ozark served "as an intermediary at the request of Sanford Cooper (Cooper Research) to facilitate the exchange and sale of [the aircraft] on its behalf." S.T., at 4. This letter provides little probative value in determining the nature of the seller's use of the aircraft in the state of Ohio. More probative to the issue before this board are the bills of sale, which evidence the transfer of title from Cooper Research Inc. to Ozark and then from Ozark to Parbro. Thus, Parbro is in error when it claims that the entity from which it purchased the aircraft was Cooper Research, Inc. Instead, the record establishes the entity from which Parbro purchased the aircraft was Ozark.

The transaction by which Parbro took title does not qualify as a casual sale -- the sale of tangible personal property obtained by a person making the sale (in this case, Ozark, not Cooper) for its own use in this state and which was previously subject to the state's taxing jurisdiction on its sale. Therefore, for the foregoing reasons, it is the decision and order of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

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³ An administrative agency is not bound by strict rules of evidence in its proceedings. *Ohio Bell Tel. Co. v. Pub. Util. Comm.* (1984), 14 Ohio St. 3d 49. The hearsay rule is relaxed in administrative proceedings, but the discretion to consider hearsay evidence cannot be exercised in an arbitrary manner. *Almondree Apts. v. Bd. of Revision of Franklin Ct.* (June 28, 1988), Franklin App. No. 87AP-1216, unreported. Here, the letter from Ozark is hearsay -- an out-of-court statement offered to prove the truth of a primary issue before the board.