

OHIO BOARD OF TAX APPEALS

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| Jerry Jennings, |) | |
| |) | CASE NO. 2004-R-32 |
| Appellant, |) | |
| |) | (USE TAX) |
| vs. |) | |
| |) | DECISION AND ORDER |
| J. Patrick McAndrew, |) | |
| Tax Commissioner of Ohio, |) | |
| |) | |
| Appellee. |) | |

APPEARANCES:

For the Appellant - Jerry Jennings, pro se
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Richmond, IN 47374

For the Appellee - Jim Petro
Attorney General of Ohio
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Entered June 17, 2005

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

This matter is before the Board of Tax Appeals upon a notice of appeal filed by Jerry Jennings.¹ Mr. Jennings appeals a final determination of the Tax Commissioner, in which the commissioner denied his petition for reassessment of a previously issued use

¹ Mr. Jennings filed a second appeal with the board involving a different audit period. This matter was docketed as BTA No. 2004-R-33 and is issued this same day.

tax assessment, number 8030400922, as adjusted, for the tax period July 1, 1996 through December 31, 1999.²

Upon review, the Tax Commissioner found that the appellant is a retailer of mobile and manufactured homes. Mr. Jennings sold both titled mobile homes and modular homes that were purchased from manufacturers and set onto buyers' lots.

Following an audit of appellant's sales, the commissioner determined that there were transfers upon which sales tax was not paid. Therefore, use tax was assessed against the appellant on those transactions.

Mr. Jennings asserted that there were numerous transactions assessed upon which the tax was paid. The Tax Commissioner allowed the appellant's objection with regard to several of these transactions. However, the commissioner found that Mr. Jennings failed to prove his contention that tax was paid on the transaction with Melvin Cook. Mr. Jennings now appeals that determination to this board.

The matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to the board by the Tax Commissioner, and the record of the evidentiary hearing ("H.R.") before this board, including exhibits. Mr. Jennings appeared at the hearing and testified on his own behalf. The Tax Commissioner was represented by counsel, but did not present any witnesses, or documentary or other evidence aside from cross-examination.

² The total assessment was originally \$70,726.90, including interest and penalty. This amount was reduced to \$22,590.32 by the commissioner.

First, the board notes that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. In addition, the taxpayer has the affirmative duty to come forward and prove the commissioner's findings are unreasonable, unlawful, or erroneous. *Manfredi Motor Transit Co. v. Limbach* (Aug. 17, 1990), BTA No. 1987-F-279, unreported. If no competent and probative evidence is presented by the appellant to show that the commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Averill v. Limbach* (Aug. 23, 1991), BTA No. 1990-C-1647, unreported.

R.C. 5741.02(A), in effect during the period of this audit, provided for an excise tax to be levied "on the storage, use, or other consumption in this state of tangible personal property ***." Further, R.C. 5741.02(B) states that "[e]ach consumer, storing, using, or otherwise consuming in this state tangible personal property ***, shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided, that the consumer shall be relieved from further liability for the tax if the tax has been paid *** by the seller in accordance with section 5741.06 of the Revised Code."

At the hearing before this board, Mr. Jennings presented testimony and several exhibits to substantiate that the sales tax on the modular home sold to Melvin Cook was paid to the manufacturer, Patriot Homes, Inc. Mr. Jennings submitted Ex. D, which was created as a result of the audit. See, also, S.T. 108. That exhibit shows that the Cook transaction was included in the audit as use tax due in the amount of \$2,936.70. Ex.

E includes the invoice from Patriot Homes, Inc. to Mr. Jennings' company, D & J Homes, showing that sales taxes in the amount of \$3,367 were in fact charged and paid.

Although the sales tax amounts differ, the board is sufficiently satisfied that there was only a single sales transaction from Mr. Jennings to Mr. Cook. In Exs. D and E, the audit sheet and the manufacturer's invoice reflect a similar time frame for the transaction (October/November 1999), the same invoice/order number (132217), and the same secondary account/customer number (99212).

Therefore, the board finds that Mr. Jennings has presented sufficient evidence to dispute the commissioner's findings with respect to the sale of the modular home by the appellant to Melvin Cook. 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, reversed with respect to that transaction.

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