

OHIO BOARD OF TAX APPEALS

Jerry Jennings,)	
)	CASE NO. 2004-R-33
Appellant,)	
)	(USE TAX)
vs.)	
)	DECISION AND ORDER
J. Patrick McAndrew,)	
Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	- Jerry Jennings, pro se 4645 King Road Richmond, IN 47374
For the Appellee	- Jim Petro Attorney General of Ohio Duane M. White Assistant Attorney General, Taxation Section State Office Tower, 16th Floor 30 East Broad Street Columbus, OH 43215

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 tax

¹ Mr. Jennings filed a second appeal with the board involving a different audit period. This matter was docketed as BTA No. 2004-R-32 and is issued this same day.

assessment, number 8030400795, as adjusted, for the tax period January 1, 2000 through June 30, 2001.²

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 duplicate transactions assessed. The Tax Commissioner allowed the appellant's objection with regard to several of these transactions. Mr. Jennings also claimed that tax was paid to the clerk of courts on the sales of some of these mobile homes. However, the Tax Commissioner found that under the statutory scheme effective January 1, 2000, Mr. Jennings, as the dealer, was not permitted to charge tax to the buyer, but was, in fact, deemed to be the consumer who was required to remit the tax. Any pass through to the purchaser had to be included as part of the purchase price. Finally, Mr. Jennings maintained that the mobile home sold to Rick A. McConnell was delivered outside the state of Ohio. The Tax Commissioner denied Mr. Jennings' objection because of a lack of support for this contention. Mr. Jennings now appeals the commissioner's final determination to this board.

² The total assessment was originally \$170,655.76, including interest and penalty. This amount was reduced to \$160,586.12 by the commissioner.

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.

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.

Mr. Jennings listed his objections to the Tax Commissioner’s final determination in Appellant’s Ex. A. In his first objection, Mr. Jennings claims that there are duplications in the assessment for forty-three customers. To support this contention, Mr. Jennings uses the audit sheets that show purchases on which tax should have been paid. See Appellant’s Ex. B. By agreement of the parties, subsequent to the hearing Mr. Jennings provided the board with a listing of these customers showing the page and system record code where those items could be located. The board also performed its own analysis of this

information Mr. Jennings provided to the board at hearing (Appellant's Ex. B), and indeed found forty-three duplicate items for a total of \$77,854.64. See Addendum attached hereto. This data was uncontested by the Tax Commissioner. Therefore, this board finds that there were numerous duplications of transactions in Mr. Jennings' audit that were erroneously included.

In his final determination, the Tax Commissioner reduced Mr. Jennings' assessment by \$8,621.88 for duplications. However, the commissioner did not specifically identify which transactions were removed from the assessment. In addition, Mr. Jennings testified that he did not know which transactions had been removed from the assessment by the commissioner, but he assumed that those transactions were included in his total of \$77,854.64. Therefore, this board finds that the \$77,854.64 in total duplications must be reduced by the amount the commissioner had already deducted.

Mr. Jennings' second, fourth, and fifth objections claim that sales tax had already been paid to the manufacturer, Benchmark Homes, which submitted the tax to the state. In his second objection, Mr. Jennings refers to a sale to a customer named Kollin. Appellant's Ex. C. Objection four refers to a unit sold to Garry Graham. Appellant's Ex. D. Objection five involves tax on a unit sold to Carol Puckett. Appellant's Ex. E.

However, R.C. 5739.0210(E), which became effective on January 1, 2000, designated that the dealer in mobile and manufactured homes is considered the consumer for sales and use tax purposes on its sales.

Specifically, R.C. 5739.0210(E) provides:

“(E) When a new motor vehicle dealer sells a new manufactured home or new mobile home to a purchaser, other than another new motor vehicle dealer purchasing such home for subsequent sale by the dealer, the new motor vehicle dealer shall be the consumer of such sale and shall remit the tax required by this chapter and Chapter 5741. of the Revised Code. The price on which the tax shall be paid is the aggregate value in money of anything previously paid or delivered, or promised to be paid or delivered, by the new motor vehicle dealer for that dealer's previous purchase of the new manufactured or mobile home from a manufacturer, remanufacturer, distributor, or other new motor vehicle dealer. The price on which the tax shall be paid does not include any amount paid by a new motor vehicle dealer as a refundable deposit for wheels and axles that are used to transfer a new manufactured home or new mobile home to the dealer and to the person who purchases the home from the new motor vehicle dealer to the extent the deposit actually is refunded to the dealer, provided that the amount of the deposit is stated separately from the consideration paid or delivered, or promised to be paid or delivered, for the purchase of the home by the dealer. The separate statement shall appear on the sales agreement or the initial invoice or billing rendered by the manufacturer, remanufacturer, distributor, or other new motor vehicle dealer to the new motor vehicle dealer that is the consumer of the home for the purposes of this division. The tax applies and shall be due from the dealer on the date the new manufactured home or new mobile home is delivered to the purchaser, the date the purchaser remits the full price for the manufactured home or new mobile home to the dealer, or, in the case of a dealer-financed transaction, the date the purchaser completely executes the financing for the new manufactured home or new mobile home, whichever date occurs first. The tax shall be paid at the rate in effect in the county where the new manufactured home or new mobile home is to be titled to the purchaser.”

The statute requires the dealer to report and pay sales or use tax either at the time it purchased the unit or at the time the unit is sold to a purchaser. R.C. 5739.0210 also prohibits the dealer from charging the tax to the purchaser of the new home. Instead, the statute requires that the dealer pass the tax through to the purchaser as part of the dealer's

cost of the mobile home. See *Sisson v. Lawrence* (Nov. 30, 2001), BTA No. 99-L-1352, unreported (for a discussion of the prospective nature of R.C. 5739.0210).

Although tax appears to have been paid and submitted to the state on these three transactions, Mr. Jennings did not follow the statutory requirements. Therefore, the board finds that the Kollin, Graham, and Puckett transactions should be included in Mr. Jennings' sales that were required to have tax paid.

Objection three asserts that the Kollin transactions were included in the audit's taxable sales three times.³ The Kollin transaction was already found by this board to be a duplicate in considering Mr. Jennings' first objection. The third listing on Appellant's Ex. B, page 7, record 116 is different from the other two in several ways. First, the full name is used, and the record includes a P.O. (purchase order) number. Second, the dates and the amounts of the sale are different, as are the taxes. Although Mr. Jennings testified that he had only one customer by the name of Kollin, there is insufficient documentation to support this contention. Therefore, the board finds that the Kollin and the Debrah A. Kollin transactions must both be included in purchases on which tax should have been paid.

In his sixth objection, Mr. Jennings claims that a unit sold to Rick A. McConnell should not have been included in purchases on which tax should have been paid because it was delivered to the customer in West Harrison, Indiana. The Tax Commissioner had denied this objection on the basis that Mr. Jennings had not produced any evidence to support this contention. At the hearing before this board, Mr. Jennings submitted

³ See Appellant's Ex. B, page 6, record 44; Appellant's Ex. B, page 7, record 116; and Appellant's Ex. B, page 7, record 127.

Appellant's Ex. F, which included a copy of the title, the mobile home moving permit, and the purchase order showing that Mr. McConnell's address was in Indiana. Based on these documents, the board finds that Mr. Jennings has provided sufficient competent and probative evidence that the unit sold to Mr. McConnell was delivered outside the state of Ohio.

Mr. Jennings' seventh objection to the commissioner's final determination is that tax had been paid twice on the unit sold to Carol Puckett. Mr. Jennings paid use tax on the unit, and the manufacturer had also charged sales tax and submitted it to the state, which Mr. Jennings paid when he purchased the unit. Again, R.C. 5739.0210 makes the dealer, Mr. Jennings, the consumer and thus liable for the reporting and payment of the tax. In this instance, that is exactly what Mr. Jennings did. Thus, the board finds that Mr. Jennings is not entitled to a refund of the tax paid by the manufacturer on this transaction.

Mr. Jennings' objections eight, nine, ten, and eleven all involve the same issue, that the Tax Commissioner did not give Mr. Jennings credit for the amount of tax he submitted with his April, September, October, and November returns. Obviously, Mr. Jennings is entitled to have his payments credited to his obligation. Therefore, the Tax Commissioner should ensure that all payments made have been properly credited to Mr. Jennings.

Accordingly, consistent with our discussion above, 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 in part and affirmed in part, in accordance with the foregoing.

ADDENDUM

<u>Amount</u>	<u>First Reference</u>		<u>Second Reference</u>		<u>Customer Name</u>	<u>P.O. Number</u>	<u>Date of Sale</u>
	<u>Page</u>	<u>Line</u>	<u>Page</u>	<u>Line</u>			
\$1,075.80	6	52	7	85	Neal & Michelle Foreman	100-173	1/8/01
\$2,049.45	6	66	7	128	Sharon Hofacker & Gay Hale	098-259	1/9/00
\$2,598.18	6	63	7	124	Robert Rader	100-144	2/28/00
\$2,039.05	6	32	7	112	Hensel Broughton	100-046	3/18/00
\$1,120.02	6	57	7	111	Rebecca Stephens	100-042	3/16/00
\$1,458.47	6	21	7	118	Elaine King	100-51	4/26/00
\$1,064.95	6	31	7	108	Harold & Penny Metcalf	00-011	4/8/00
\$1,236.00	6	55	7	117	Phyllis Bruner	100-52	4/26/00
\$3,167.10	6	44	7	127	Kollin		5/19/00
\$1,998.60	6	49	7	114	Michael Martings	100-066	5/29/00
\$2,397.78	6	65	7	123	Scott & Lisa Warner	100-127	5/13/00
\$1,256.94	6	67	7	117	Sherri Satler	100-075	5/20/00
\$1,164.48	6	2	7	120	Barbara Weinstiger	100-111	6/28/00

\$2,176.20	6	10	8	115	Cartwright	100-073	6/23/00
\$2,338.51	6	46	8	126	Mark & Sherry Deshun	100-134	6/16/00
\$1,046.34	6	79	7	113	William & Joann Allen	100-047	6/5/00
\$1,889.10	6	54	8	88	Philip & Evelyn Dafforn	100-184	7/28/00
\$1,654.20	6	74	8	83	Vickie Wicke	100-165	7/18/00
\$1,459.80	6	42	8	122	Kenneth G. Miller	100-125	8/3/00
\$1,455.90	6	47	7	121	Mark Cost	100-101	8/25/00
\$2,117.71	6	60	8	125	Rick A McConnell	100-152	8/25/00
\$2,630.10	6	8	8	87	Brad & Rebcca Stein	100-181	10/7/00
\$1,846.98	6	68	7	97	Shirley Purvis	101-050	10/25/00
\$3,097.90	6	11	7	92	Charles & Judy Biggs	101-016	11/16/00
\$1,226.70	6	62	8	84	Robert Donley & Eriker North	100-172	11/3/00
\$1,298.10	6	70	7	89	Ted Clark	100-190	12/9/00
\$1,802.70	6	38	8	90	June Shellabarger	101-006	1/26/01
\$2,307.11	6	22	7	101	Eric Combs & Clyde Eldridge	101-066	2/18/01
\$1,751.40	6	41	8	91	Kenneth & Joycelyn	101-013	2/10/01

\$1,099.67	6	53	7	93	Patrick White Penny Hagen	101-018	2/15/01
\$1,509.60	6	12	8	105	Charles E. Thomas	101-080	3/17/01
\$1,028.40	6	13	7	102	Chris & Lisa Hedenreich	101-074	3/2/01
\$1,751.10	6	45	8	94	Maidiria Roehieffer	101-024	3/2/01
\$1,515.48	6	29	7	98	Gerald & Rebecca Holbrook	101-053	4/8/01
\$2,681.51	6	59	7	99	Richard Carter	101-059	4/16/01
\$1,388.22	6	76	7	96	Virgil Fritz	101-044	4/2/01
\$3,649.51	6	64	7	100	Sandra M. Huber	101-065	5/2/01
\$1,883.70	7	129	8	81	Mark Hamilton	00-012	5/12/01
\$1,534.50	7	4	8	95	Beety Berike	01-025	6/11/01
\$2,561.65	7	3	8	103	Beerey & Bev Grimes	101-077	6/18/01
\$2,032.51	7	50	8	104	Michelle & Faff	101-079	6/16/01
\$1,442.68	7	35	8	106	James & Dorothy Gabbard	101-081	6/25/01
<u>\$1,050.54</u>	7	72	7	107	Tonya Tem & Lois Diamond	101-081	6/22/01

\$77,854.64 TOTAL

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