

Ticketmaster - Indiana,)	
)	CASE NO. 94-A-1324
Appellant,)	
)	(USE TAX)
vs.)	
)	
)	
Roger W. Tracy, Tax Commissioner)	DECISION AND ORDER
of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant	-	George M. Hoffman Neal, Gerber & Eisenberg Two North LaSalle Street Chicago, Illinois 60602
For the Appellee	-	Betty D. Montgomery Attorney General of Ohio By: Robert C. Maier Assistant Attorney General State Office Tower 30 East Broad Street 16th Floor Columbus, Ohio 43215

Entered March 14, 1997

Mr. Johnson, Ms. Jackson, and Mr. Manoranjan concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal filed herein on November 23, 1994, by the above-named appellant from a final determination of the Tax Commissioner. Therein, the Tax Commissioner denied appellant's objections to a use tax assessment which resulted from an audit of appellant's sales made during the period from January 1, 1988 through December 31, 1990. Appellant's request for remission of penalty was conditionally allowed.

The matter was submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to

the Board by the Tax Commissioner, the hearing before this Board, and the briefs submitted by both parties.

Appellant Ticketmaster-Indiana (hereinafter "Ticketmaster") is in the business of providing ticketing services for entertainment events, sporting events, concerts, plays, etc. via contracts it enters into with various venues, sports teams, and promoters of shows and entertainment events. Said contracts provide clients access to the Ticketmaster "system", which appellant argues includes various services provided to the client in exchange for payment of an "inside charge" to Ticketmaster. (R., p. 8) Ticketmaster provides services which include, but are not necessarily limited to, the following:

- access to Ticketmaster's ticket distribution system
- marketing and promotional activities
- advertising
- market research
- box office personnel training
- 24 hour service on the Ticketmaster system
- centralized cash control

(R., p. 10-12)

It is appellant's contention that the aforementioned "inside charges" were improperly taxed as part of an automatic data processing transaction, when, in fact, it claims said charges are assessed for personal services rendered. These contentions are set forth in its notice of appeal, where it states that:

"* * *

"6. The Final Determination erroneously concluded that certain charges which Ticketmaster received during the Audit Period are subject to Ohio use tax as 'data processing' services. That ruling is

incorrect. Pursuant to Section 5739.01 (B)(3)(e) of the Ohio Revised Code ('the Code'), a service is taxable as data processing only if the 'true object' of the transaction was to obtain data processing or related computer services. The true object of Ticketmaster's services to its client is the sale of tickets and related services. Ticketmaster provides nontaxable 'personal or professional services' in which data processing is 'incidental or supplemental' within the meaning of Code Section 5739.01 (B)(3)(e).

"7. The Final Determination contains the following additional errors:

"(a) The statement that 'the function of the taxpayer [Ticketmaster] is to process data so as to issue tickets to buyers.' See Final Determination at p. 1.

"(b) The holding that the Inside Charges may be taxed prior to June 29, 1990, the date that Richfield Properties v. Lindley, 1985 Ohio Tax Lexis (Ohio B.T.A. 2/22/85) ('Richfield I'), was overruled by Richfield Properties v. Limbach, Ohio State Tax Rep. Sec. 400-660 (Ohio B.T.A. 1990) ('Richfield II'). Richfield I had held that similar ticket selling services were exempt from Ohio sales/use tax. That case was the law until Richfield II was decided. See Final Determination at p. 1-2.

"(c) The holding that the Commerce Clause of the U.S. Constitution allows Ohio to tax the data processing aspect of Ticketmaster's services, if any, even though Ticketmaster's mainframe computer is located outside Ohio. See Final Determination at p. 2.

"* * *

"9. In the event that Ticketmaster's services constitute taxable data processing, the tax should be computed on only the portion of the Inside Charges which represents data processing services. See the alternative argument raised at p. 7 of Ticketmaster's Petition of Reassessment, attached hereto as Exhibit B ('the Petition'). The Final Determination did not address this issue.

"10. Even if the use tax is upheld on some or all of the Inside Charges, is determined to be taxable [sic], all penalties should be abated due to reasonable cause. See p. 8 of the Petition. The Final Determination did not address this issue."

Appellant made no argument in its post-hearing brief with regard to Errors 7b, 7c, 9, and 10. Accordingly, we must assume that those arguments have been abandoned and we will not address them further.

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 that 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. Federated Dept. Stores, Inc. v. Lindley (1983), 5 Ohio St. 3d 213.

According to the information contained in the statutory transcript, Ticketmaster was assessed pursuant to the provisions of R.C. 5739.01. During the audit period, R.C. 5739.01 (B)(3)(e) provided in pertinent part that:

"(B) 'Sale' and 'selling' include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

" * * *

"(3) All transactions by which:

" * * *

"(e) Automatic data processing and computer services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing or computer services rather than the receipt of personal or professional services to which automatic data processing or computer services are incidental or supplemental. * * * "

R.C. 5739.01 (Y)(1) provided the following:

"(Y)(1) 'Automatic data processing and computer services' means: processing of others' data, including keypunching or similar data entry services together with verification thereof; providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment; and services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems. 'Automatic data processing and computer services' shall not include personal or professional services.

We have previously considered the aforementioned statutory provisions in several contexts. In NIN Communications, Inc. v. Roger W. Tracy, Tax Commissioner of Ohio (May 12, 1995), B.T.A. Case No. 93-X-353, unreported, we addressed the same issue: whether Ticketmaster clients' "true object is to receive an adp or computer service, or whether it is to receive a personal or

professional service (to which adp or computer services are merely an adjunct)." In NTN, we went on to state that:

"The Supreme Court has stated that the test for this analysis is found in the statute set out above (R.C. 5739.01(Y)), rather than the 'true object' test of Emery Industries, Inc. v. Limbach (1989), 59 Ohio St. 3d 96; ComTech v. Limbach (1991), 59 Ohio St. 3d 96; CCH Computax v. Tracy (1993), 68 Ohio St. 3d 86."

Since we have a mixed transaction herein, i.e., part computer/adp service, part professional service, we must apply the test as set forth in R.C. 5739.01(Y), as distinguishable from the true object test in Emery, supra, which applies in a situation involving a different sort of mixed transaction, i.e., part service, part transfer of personal property. See WBNS TV, Inc. v. Tracy (June 3, 1994), B.T.A. Case No. 92-P-584, unreported, aff'd 75 Ohio St. 3d 572.

As we stated in NTN, supra, "(T)he statutory scheme of R.C. 5739.01 (Y) requires us to determine whether the use of computers in this case constitutes the purchase of an adp service, or whether it is the purchase of another service, in which computers figure incidentally." This Board and the Supreme Court have previously made this type of determination in several cases, including Reuters America, Inc. v. Tracy (Nov. 28, 1994), B.T.A. Case No. 92-H-1414, unreported, where we found that the true object of the subscribers to Reuters, the global organization that provided news and information to its subscribers, was "personal and professional services." In Community Mutual Insurance Company

v. Tracy (March 4, 1994), B.T.A. Case No. 91-J-418, unreported, we also found that the litigation support service purchased from Data Automation Corporation by Community Mutual Insurance Company constituted professional/personal services and consequently, was not subject to sales and use tax. Similarly, in Genuine Parts Co. v. Limbach (1991), 62 Ohio St. 3d 93, the Court held that the purchase of an adp/computer service was not taxable, as the purchaser's true object was to obtain professional accounting services.

In contrast, in Amerestate, Inc. v. Tracy (June 3, 1994), B.T.A. Case No. 92-D-499, unreported, we found Amerestate's sale of aggregated real property data, either in periodic publication form or via access to Amerestate's computer to be taxable as an adp service since Amerestate simply compiled the information for resale, with no associated interpretation or analysis of that information. In CCH Computax v. Tracy (1993), 68 Ohio St. 3d 86, the Court upheld our finding that Computax provided an adp service due to the fact "Computax sorts, classifies and rearranges information and then mechanically prints tax returns and appropriate schedules which are sold to its customers." In Quotron Systems, Inc. v. Limbach (1992), 62 Ohio St. 3d 447, the Court found that the adp or computer service which provided "access to Quotron's computer equipment to examine or acquire stock price data stored in or accessible to that computer equipment" was taxable.

Finally, in Richfield Properties v. Limbach (June 29, 1990), B.T.A. Case No. 87-A-271, unreported, this Board found the

use of a computerized service connected with the sale and issuance of tickets to sporting and other entertainment events to be taxable. While the Tax Commissioner argues that Richfield is applicable herein, we can only determine that said case certainly has similar facts to those in the instant matter. Richfield owned and operated a 20,000 seat sports and entertainment facility and acted as both landlord and promoter of the events held at the facility. "To facilitate the sale of tickets", Richfield contracted with Ticketron, "a computerized ticketing distribution service," to sell tickets for the attractions at the facility. Based upon such description of Ticketron's activities, we have no indication that Ticketron did anything more than sell tickets for Richfield. Richfield, p. 375. Without more to indicate that other services were also contracted for between Ticketron and Richfield, we cannot draw any conclusive parallels to the issue considered herein.

As we stated in NTN, supra, "R.C. 5739.01 (Y)(2), Reuters America, Inc., supra, Community Mutual, supra, and Genuine Parts, supra, dictate that in considering an alleged mixed transaction (part adp, part professional service), this Board must determine whether the service provider engaged in some cognitive act or analytical thought for the benefit of the purchaser." Based upon the evidence and testimony presented, we find that Ticketmaster first and foremost provides a computer service used for purposes of selling tickets.

In its contracts, Ticketmaster clearly indicates that it will charge its clients an "inside charge" on all tickets sold

through its system, either at a retail outlet or by telephone. Said charge is defined in some of the contracts as "(T)he amount charged to Principal by Ticketmaster for services rendered by Ticketmaster under this Agreement" and equates to a percentage of or flat amount for each of the tickets sold. (Comm. Ex., p. T000127)

Further, some of Ticketmaster's contracts also include various clauses which amount to the provision of various services to its clients to maximize the sale of tickets. (R., p. 10; Comm. Ex., p. T000132, 133) These services, which Ticketmaster claims are provided in exchange for payment of the inside charge by its clients, may include: distribution service via the retail outlet network; telephone access via telephone centers; marketing for clients' events; box office services and consulting services; training services; cash management functions. (R., p. 24, 25) An illustrative summary of these services is found in correspondence between Ticketmaster and a prospective client, wherein it delineates its unique offerings to its clients:

"1. Ticketmaster offers the state-of-the-art computer technology to meet the needs of all box offices, whether they are 30-seat workshop theaters or 70,000-seat domed stadiums.

"2. Complete box office control. Once your events are programmed into the Ticketmaster system, your box office takes control. Through simple commands, you control every seat for each event.

"3. Ticketmaster commits a marketing approach to assist in selling your tickets. From selling individual gift certificates to your own venue to creating a professional radio

promotion, we are dedicated to finding new ways to sell your tickets.

"4. System security is guaranteed. Private operator codes and passwords limit the accessibility of the system, based on your needs and concerns. Extensive reporting capabilities that track every transaction insure the safety of your information.

"5. Ticketmaster produces monthly calendar of events guides, to keep the public aware of your events coming to town. The event guides are complimentary and are distributed by the thousands through our extensive remote ticket centers and by mail.

"6. Ticketmaster is innovative. Ticketmaster sells horse-and-carriage rides, takes dinner reservations, sells T-shirts, sponsors bus transportation to events, and sells first-run motion picture tickets, bicentennial bricks, and the Countdown buttons.

"7. Ticketmaster is involved. In Cincinnati, Ticketmaster was the exclusive computerized ticketing source for the Greater Cincinnati Bicentennial in 1988. In addition, Ticketmaster is a member of the Greater Cincinnati Chamber of Commerce and is the exclusive source for the Thriftway/ATP Tennis Tournament benefiting Children's Hospital Medical Center. Nationwide, Ticketmaster was selected as the exclusive source for China's Son of Heaven exhibits.

"8. Ticketmaster provides you not only the finest distribution network but also over 350 ticket centers throughout the Midwest to service your patrons. We have local charge-by-phone service as well as nationwide toll-free access to our phone center." (Emphasis in original)
(Comm. Ex., p. T001141, 001142)

Based upon the foregoing, we find that while, in many instances, Ticketmaster's clients are sold a ticket-selling package, with services tailored to each client's specific needs and designed to maximize such client's ticket sales, they are

contracting, primarily, for a computer or adp function from Ticketmaster. Many of Ticketmaster's "services" that it can offer its clients are driven by or supported by its computer system; in fact, many of the "services" Ticketmaster provides could not be offered without the use of its computer or adp functions. Clearly, the computer/adp functions form the basic service that Ticketmaster sells, to which other "extras" are added, based upon the client's needs. These computer functions are an integral and indispensable part of the overall services offered by Ticketmaster and they serve as the catalyst for the remaining services Ticketmaster offers. For example, a review of the foregoing correspondence indicates that items 1, 2, 4, 7, and 8 are directly related to the computer or adp function that Ticketmaster could provide a potential customer. While it has been demonstrated, through testimony and evidence provided by appellant, that Ticketmaster provides marketing and other related functions to its clients (some of which, not incidentally, utilize the computer/adp function, e.g., market surveys), we find that the primary reason for which any client would contract with Ticketmaster is to receive a state-of-the-art computerized ticket-selling service.

Accordingly, based upon the foregoing, this Board finds that appellant has not overcome the presumption of validity of the Tax Commissioner's determination. See Hatchadorian v. Lindley (1986), 21 Ohio St. 3d 66. Thus, this Board finds that the Tax Commissioner's findings were reasonable and lawful.

It is the Decision and Order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is affirmed. ohiosearchkeybta