

Michael S. Orrin,)	
Responsible Party of FFS)	
Enterprises, Inc.,)	CASE NOS. ¹ 97-B-1029
dba Firefighters' Supply,)	97-B-1032
)	
Appellant,)	
)	
vs.)	(SALES TAX)
)	
Roger W. Tracy,)	
Tax Commissioner of Ohio,)	
)	DECISION AND ORDER
Appellee.)	

APPEARANCES:

For the Appellant - Matthew D. Harper, Esq.
 Robinson, Curphey & O'Connell
 Four Seagate, 9th Floor
 Toledo, Ohio 43604

For the Appellee - Betty D. Montgomery
 Attorney General of Ohio
 By: Phyllis J. Shambaugh
 Assistant Attorney General
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 Columbus, Ohio 43266-0410

Entered July 17, 1998

Mr. Johnson, Ms. Jackson concur; Mr. Manoranjan not participating.

This cause and matter is considered by the Board of Tax Appeals as a result of a notice of appeal filed on behalf of appellant on August 20, 1997, from a final order of the Tax Commissioner dated June 27, 1997. In this final order, the Tax

¹Both these case numbers relate to the same assessment by the Department of Taxation (#97600179.)

Commissioner dismissed appellant's petition for reassessment on the basis that he lacked jurisdiction to consider appellant's petition.

Said final order reads, as follows:

"The Tax Commissioner came this day to consider the above styled matter at Columbus, Ohio and, being fully advised thereon, finds that:

"The petition for reassessment was not filed within thirty days after the receipt of the notice of assessment, as required by section 5739.13 of the Ohio Revised Code. Therefore, the Tax Commissioner is without jurisdiction to consider the petition.

"It is therefore ordered that the petition be, and hereby is, dismissed."

Appellant's notice of appeal provides in pertinent part:

"Appellant's Petition for Reassessment should not have been denied as untimely. Appellant first received notice of the Assessment on April 8, 1997 and filed his Petition for Reassessment on April 25, 1997, only seventeen days later. The State of Ohio Department of Taxation had not effected proper service on Appellant, as required by Ohio Revised Code section 5739.13, prior to April 8, 1997. Accordingly, and pursuant to R.C. section 5739.13, the Petition for Reassessment was timely and should have been reviewed on the merits."

This matter is now considered by the Board of Tax Appeals based upon appellant's notice of appeal, the statutory transcript certified to this Board by the Tax Commissioner, and the briefs filed herein by the parties. An evidentiary hearing was waived by the parties.

As the Tax Commissioner dismissed appellant's petition for reassessment on the basis of the provisions of R.C. 5739.13, we refer to that statute which provides in pertinent part:

"Unless the vendor or consumer, to whom the notice of assessment is directed, files within thirty days after service thereof, either personally or by certified mail a petition in writing, verified under oath by the vendor, consumer, or his authorized agent, having knowledge of the facts, setting forth with particularity the items of the assessment objected to, together with the reasons for such objections, the assessment shall become conclusive and the amount of the assessment shall be due and payable, from the vendor or consumer so assessed, to the treasurer of state. *** "

In his brief, appellant contends, as follows:

"According to the transcript, the Tax Commissioner first attempted to serve Orrin with notice of the Assessment at FFS' business address in Maumee, Ohio by a letter dated September 27, 1996 (Transcript at 6). That letter was, of course, returned to the Tax Commissioner because Orrin no longer had any involvement with FFS and no longer lived in Ohio (Transcript at 6 & 49). The Tax Commissioner's Automated Collection System also indicates the Tax Commissioner then remailed the letter to Orrin's Virginia address on October 18, 1996 (transcript at 49). However, Orrin never received that notice either (Affidavit 6).

"At some point, the Tax Commissioner sent a second letter dated March 20, 1997 to Orrin's Virginia address (Affidavit section 6). Orrin received it on April 8, 1997 (Affidavit section 6). This was the first notice of the Assessment received by Orrin (Affidavit section 6). The same letter also notified Orrin that the Tax Commissioner had sent notice of the Assessment to the Ohio Secretary of State purportedly pursuant to R.C. section 5739.131.

"On April 25, 1997, only seventeen days later after receiving his first notice of the Assessment, Orrin sent his Petition for Reassessment to the Tax Commissioner by certified mail, return receipt requested (Transcript at 2-5)."

" *** **

"Appellant's Petition should not have been denied as untimely.

"R.C. section 5739.13 provides, in pertinent part, that the Tax Commissioner, 'shall give the party assessed written notice of the assessment by personal service or certified mail.' (emphasis added) The record on appeal, including the Transcript and Orrin's Affidavit, shows plainly that the only service actually received by Orrin was the certified mail letter from the Tax Commissioner which he received on April 8, 1997 (Affidavit section 6).

"R.C. section 5739.13 further provides that 'the party to whom the notice of assessment is directed' has the right to file a Petition for Reassessment 'within 30 days after service of the notice of assessment ...' (emphasis added) Again, the evidence of record on appeal, including the Transcript and Orrin's Affidavit, reveals that Orrin mailed his Petition to the Tax Commissioner on April 25, 1997, only 17 days after the Tax Commissioner served him with notice of the Assessment (Transcript at 2-5)."

The forgoing is uncontroverted by appellee's brief filed herein on May 15, 1998 and the jurisdiction of the Tax Commissioner to hear this matter is conceded by appellee's counsel.

Therefore, upon review of the record and briefs filed herein we reverse the Tax Commissioner's conclusion that he was without jurisdiction to consider the petition for reassessment and remand this matter to the Tax Commissioner for further consideration.

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