

OHIO BOARD OF TAX APPEALS

SQS Food Store, Inc.,)
DBA Sami Quick Stop,)
) Case No. 98-J-952
Appellant,)
) (SALES TAX)
vs.)
) DECISION AND ORDER
Roger W. Tracy,)
Tax Commissioner of Ohio,) **Appeal Filed June 29, 2001**
) **Mahoning Cty. Court of Appeals**
Appellee.)

APPEARANCES: **Affirmed on Appeal Sept. 18, 2002** **2002-Ohio-5015**

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Entered May 26, 2000

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

The Board of Tax Appeals is considering this matter pursuant to a notice of appeal filed by SQS Food Store, Inc., DBA Sami Quick Stop. (“Appellant”) Appellant has appealed from a final determination of the Tax Commissioner that assessed sales tax against the appellant. The final determination provides in pertinent part:

“This assessment is the result of an audit of the petitioner’s sales for the period from January 1, 1993,

through December 31, 1995. The petitioner holds the vendor's licenses for a group of four convenience stores with liquor permits. The petitioner objected to the assessment and filed a petition for reassessment including a request for remission of the penalty. The objections are disposed of below.

"Tax Liability

"The petitioner contends that it had leased its convenience stores to different operators who became the legal owners of the stores and should be held responsible for the tax liability. However, the vendor's licenses and liquor permits remained in the name of SQS Food Store Inc. DBA Sami Quick Stop. The petitioner maintains that its intent was to sell the businesses and transfer the liquor permits to the various store operators but it was precluded from doing so because the corporation filed a bankruptcy petition under Chapter 11 and the liquor permits were considered assets of the bankruptcy estate. The petitioner contends that it was compelled to keep the vendor's licenses and liquor permits in its own name. However, the petitioner argues that its leases with the operators specified that the operators had the responsibility for collecting the correct amount of tax and reporting the amount of taxable sales to the petitioner so that the petitioner could prepare the sales tax returns. Therefore, the petitioner argues that it is not responsible for the tax liability; it was 'a mere conduit for getting the tax monies to the [s]tate.' The objection is not well taken.

"Every vendor making retail sales in this state is required by R.C. 5739.03 to collect sales tax from the consumer. The vendor is then required by R.C. 5739.12 to make and file a monthly return and remit the collected tax to the Tax Commissioner. Since the petitioner did not transfer or cancel the liquor permits or cancel the vendor's licenses, the statutory duty to make and file sales tax returns and to remit the proper amount of sales tax remained with the petitioner. As the continuing owner and holder of the liquor permits

and vendor's licenses, the petitioner was the 'vendor' for the purposes of the sales tax law. See, *Farhan v. Tracy* (Sep. 26, 1997), B.T.A. No. 96-R-1385, unreported; *Frugh v. Tracy* (Apr. 29, 1994) B.T.A. No. 91-Z-518, unreported. Therefore, the petitioner continued to be responsible for the timely and accurate filing of returns and the payment of sales tax as long (sic) the vendor's licenses were valid and sales were being made pursuant to the authority granted thereby. The objection is denied.

"Cigarette Mark-up

"The petitioner writes, 'Despite the agreement which was reached between the State of Ohio and the taxpayer in this case relating to the percentage of markup [sic], agreement is nonetheless not an accurate depiction of the percentage markup [sic] on certain items, especially cigarettes.' The petitioner contends that the amount of the mark-up on cigarettes is closer to between 10% and 14%, than the 18% listed in the agreement. The petitioner argues that this mark-up is dependent upon the special offers given to retailers by manufacturers. The objection is not well taken.

"Initially, the mark-up on cigarettes was calculated to be 24%, based upon a test sample with the total dollars purchased and the retail selling price agreed to by petitioner. However, the petitioner disputed this mark-up percentage because it did not allow for cigarette rebates by the manufacturers. As a result, the mark-up percentage for cigarettes was changed to 18% on the agreement signed by the petitioner.

"The petitioner now indicates that the mark-up percentage should be even lower. However, the petitioner has failed to submit evidence that would substantiate a further reduction. The petitioner supplied four letters in support of its argument. The first is a letter from Liggett indicating a '\$.30 per carton shelving allowance . . . on all cartons of Pyramid.' The next two letters, from the American

Tobacco Company and R.J. Reynolds, indicate list price reductions, but no buydowns. The last letter, from the New Achievers, indicates an opportunity to erect two displays per store, for a total payment of \$6.00 per store. This evidence does not provide the requisite quantifiable proof necessary to demonstrate that a further reduction in the mark-up percentage for cigarettes is warranted. The Ohio Supreme Court has consistently held that tax assessments are presumptively valid. *May Company v. Lindley* (1982), 1 Ohio St.3d 6; *National Tube Co. v. Glander* (1952), 157 Ohio St. 407. The burden is upon the taxpayer to demonstrate error. Absent such a showing, the assessment must be upheld. *Hatchadorian v. Lindley* (1986), 21 Ohio St.3d 66; *Ohio Fast Freight Inc. v. Porterfield* (1971), 29 Ohio St.2d 69. Since the petitioner has failed to demonstrate error, the objection is denied.”

The notice of appeal challenging the final determination provides in pertinent part:

“1. The Tax Commissioner erred when it (sic) refused to remit all of the penalty and interest since the assessed Taxpayer was not the proper Vendor. The Commissioner did not make any allowance for the fact that the assessed Taxpayer was not running the business and did not have the control usually associated with the taxpayer responsible for collecting and paying the sales tax. In addition, the assessed Taxpayer could not, due to circumstances beyond its control, remove its name from all of the business assets (especially the liquor permit and then correspondingly the Vendor’s license) during the time period covered by the audit, despite his desire to do so. However, as soon as the Assessed Taxpayer was able to remove itself from the assets, it promptly did so. Further, the Commissioner erred in not abating the penalty since the Taxpayer had no malicious motives and is not the one who benefitted in any way from the failure to pay the appropriate amount of sales tax to the State.

“2. The Commissioner’s determination was against the manifest weight of the evidence when it held that the markups utilized in the Audit were correct, when in fact the markups relied upon by the Auditor and the tax Commission were higher than the markups actually employed by the Taxpayer.

“3. The Commissioner should have found that the Taxpayer was in fact a mere conduit in sending the sales tax to the state and did not have any control over the business which were the subject of the Audit and eventual assessment.”

The parties, through counsel, appeared at the hearing herein. Neither offered evidence. The matter has been submitted to the Board of Tax Appeals upon the notice of appeal and the statutory transcript certified herein by the Tax Commissioner.

The appellant alleges that the Commissioner erred in failing to remit the penalty and interest since the appellant was not the vendor during the period in question. The appellant is an Ohio corporation formed in 1986 to operate convenience stores, four of which are the subject of the within assessment. The taxes for all the stores were reported under one vendor’s license number. In February 1990 the corporation filed a bankruptcy reorganization under Chapter 11. The Bankruptcy Court approved a reorganization plan whereby the liquor licenses were deemed primary assets of the estate, and therefore, could not be transferred. The plan called for the selling of non-productive assets such as vacant land, and for the leasing of appellant’s equipment and storeroom. The appellant was

compelled to lease the stores to third party operators. The third party operators failed to remit the proper amount of sales tax to the state. The appellant has been unsuccessful in its attempts to collect the money from the operators.

The decision whether to remit a penalty is within the discretion of the Tax Commissioner. *Jennings & Churella Construction Co. v. Lindley* (1984), 10 Ohio St.3d 67. *Servomation Corp. v. Kosydar* (1976), 46 Ohio St.2d 21; *Interstate Motor Freight System v. Bowers* (1960), 170 Ohio St. 482. In *State ex rel. Sheppard v. Koblentz* (19962), 174 Ohio St. 120, the Court defined “abuse of discretion” to be “more than an error of judgment: rather it is necessary to show an act that is fostered by perversity of will, passion or prejudice”. The appellant has not submitted any evidence showing that the Commissioner abused his discretion in failing to remit the penalties imposed herein. The Board therefore affirms the penalty assessment.

The appellant’s second assignment of error alleges that the markups relied upon the Tax Commissioner were higher than the markups actually employed by the appellant. The appellant had failed to remit the proper amount of sales tax for the period in question. R.C. 5739.13 authorizes the Commissioner to make an assessment against a vendor who fails to remit the proper amount of sales tax based upon any information in the Commissioner’s possession. *Akron Home Medical Services, Inc. Lindley* (1986), 28 Ohio St.3d 107; *McDonald’s v. Kosydar* (1975), 43 Ohio St.2d 5; *Russo v. Donahue* (1967), 10 Ohio St.2d 201;

Shadi Food Market, Inc. v. Limbach (May 10, 1991), B.T.A. No. 89-D-9, unreported. In this instance the original mark-up on cigarettes was calculated to be 24%, based upon a test sample with the total dollars purchased and the retail selling price agreed to by the appellant. After the appellant disputed this mark-up percentage, the mark-up percentage was changed to 18% in an agreement signed by the petitioner.

Although the agreement established a mark-up percentage, the appellant is not precluded from contesting the assessment. If it is claimed that the liability for taxable sales is excessive, the burden is upon appellant to establish its actual tax liability, or any other error in the Commissioner's assessment by competent and probative evidence. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d121; *Hatchadorian v. Lindley* (1986), 21 OhioSt.3d 66; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

The appellant has not submitted any evidence demonstrating its actual tax liability, nor has the appellant demonstrated that the Commissioner's determination was unreasonable. The Board therefore finds that the appellant has failed to sustain its burden of proving that the markups relied upon the Tax Commissioner were higher than the markups actually employed by the appellant.

The final assignment of error alleges that the appellant was a mere conduit in sending the sales tax to the state and did not have any control over the business that was the subject of the assessment. R.C. 5739.03 provides that each

vendor shall collect from the consumer, as trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale. R.C. 5739.01(C) defines vendor in the following manner:

“(C) ‘Vendor’ means the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given * * *.”

The appellant has alleged that its stores were being run by third party operators who failed to remit the proper amount of sales tax to the state. However, the liquor licenses were never transferred. The owner of the liquor license is the vendor responsible for the payment of sales tax pursuant to R.C. 5739.13. *Captain Frank’s Inc. v. Limbach* (Nov. 25, 1991), Franklin App. No. 59300, unreported; *Wilson v. Lindley* (Dec. 27, 1983), Franklin App. No. 83 AP-335, unreported; *Riley v. Limbach* (Aug 21, 1986), B.T.A. No. 83-G-700, unreported. Therefore, the appellant remained the vendor responsible for the payment of the tax even though the stores were being operated by third parties. This assignment of error accordingly is overruled.

The Board therefore finds based upon the record that the final determination of the Tax Commissioner is correct and is hereby affirmed.