

SUPREME COURT OF OHIO

ORIGINAL

SUSAN C. CRUZ

Appellant

JOSEPH W. TESTA
Tax Commissioner of Ohio

Appellee

CASE NO. 2014-0513

APPEAL FROM BOARD OF TAX APPEALS
DECISION AND ORDER
Case No. 2013-1010

APPELLANT'S MERIT BRIEF

Filed on Behalf of Susan C. Cruz, Appellant

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STATEMENT OF FACT

This is an appeal from the Decision and Order of March 7, 2014 by the Board of Tax Appeals assessing responsible party tax liability against Susan Cruz for unpaid sales taxes of Cruz-Samsa Corporation because she was the president and majority shareholder. The Department of Taxation had made a number of assessments against Cruz-Samsa Corporation for unpaid sales taxes. The Department sought responsible party liability against Susan Cruz. Susan contested that she was not a statutory responsible party, and alleged the Corporation had never received notice of the Department's assessments to be able to contest them, or to allow the Department to enforce them against her. In her Memorandum Susan Cruz speculated that service might have been to the same Eastlake, Ohio address where the Department sent process in aid of execution. Susan Cruz attached to her memorandum a number of exhibits. There was an affidavit from her that there had been no service upon the Corporation, for whom she was the statutory agent for service, and that a non-employee minority shareholder previously responsible for the sales tax returns had resigned prior to any assessment. Among the exhibits were the incorporation papers, the resignation letter, and the court dockets showing the address used in aid of execution.

The Commissioner held that Susan Cruz was a responsible party, and held “The petitioner also argues that assessment against the company is invalid due to lack of service against the company. This is an attacked [sic] on the validity of the underlying corporate assessments. Under *Rowland v. Collins* (1976), 48 Ohio St.2nd 311, the objection cannot be considered. The present petitioner may not challenge the merits of the assessment against the corporation in a proceeding under 5739.33.” On appeal to the Board of Tax Appeal, Susan Cruz

again raised the issue that the failure of the Department to serve the Corporation was a defense to her paying an invalid assessment as a responsible party. The Board responded “the Commissioner rejected the argument as not being properly raised; instead, he asserted that such argument should've been made in a proceeding challenging the underlying assessments themselves. We agree. *Rowland v. Collins* (1976), 48 Ohio St.2d 311. Moreover, we find that service on Mr. Sampson was sufficient, as it was 'reasonably calculated to give notice of the assessment and allow the taxpayer to present his objections.' *Castallano v. Kosydar* (1975), 42 Ohio St.2d 107, 110.” Susan Cruz now brings appeal solely on the issue of her right to raise the issue of service of process upon a corporation in a responsible party suit.

ARGUMENT

ISSUE. WHERE THE PRESIDENT OF A CORPORATION IS FOUND TO HAVE CONTROL OVER ALL ASPECTS OF A CORPORATION, INCLUDING BEING STATUTORY AGENT FOR SERVICE OF PROCESS AGAINST THE CORPORATION, THAT PRESIDENT HAS STANDING IN CONTESTING PAYMENT AS A RESPONSIBLE PARTY TO RAISE THE ISSUE THAT THE CORPORATION WAS NEVER PROPERLY ASSESSED BY FAILURE OF SERVICE OF PROCESS, AND ANY LIABILITY ALLEGED AGAINST THE CORPORATION AND NOW SOUGHT FROM HER WAS NULL AND VOID.

Susan Cruz raised the issue on appeal to the Board that she could not be held derivatively liable for a corporate tax obligation assessed without service or other notice to the corporation. The Board responded “Appellant also asserted in her petitions that the underlying sales tax assessments against Cruz-Samsa Corporation were invalid due to lack of proper service on the Corporation. In her memorandum in support of her petitions she argued that service on the minority shareholder of the Corporation, (Mark Samsa) was improper, because she was the statutory agent for the Corporation. The Commissioner rejected the argument as not being properly raised; instead, he asserted that such argument should've been made in a proceeding

challenging the underlying assessments themselves. We agree. *Rowland v. Collins* (1976), 48 Ohio St.2d 311. Moreover, we find that service on Mr. Sampson was sufficient, as it was 'reasonably calculated to give notice of the assessment and allow the taxpayer to present his objections.' *Castallano v. Kosydar* (1975), 42 Ohio St.2d 107, 110." Decision and Order, footnote 1, p.2.

The Commissioner and the Board both held *Rowland v. Collins* (1976), 48 Ohio St.2d 311 determinative that there is no right in a responsible party to challenge the underlying judgment the party is expected to pay. The Commissioner and Board misstates *Rowland*.

Rowland was not a case wherein a responsible party contested whether the corporation had notice. *Rowland* stands for the proposition that a responsible party's liability in a responsible party proceeding is "derivative in nature" and "[t]he separate identities of corporation and officer are thus irrelevant in this context. Once the assessment against the corporation becomes conclusive by the failure to present objections thereto the officer is bound by the oscitancy of his corporation." *Rowland*, p. 313. Oscitancy implies more than merely sitting upon one's rights when called to respond, it implies yawning upon one's rights.

Failure to perfect service is not an objection implicating oscitancy. Failure to perfect service alleges one was never called upon to act. It is black letter law that notice and an opportunity to be heard is a basic constitutional right; lack of notice and an opportunity to be heard is an objection to the jurisdiction of a tribunal; as a jurisdictional objection, it may be raised at any time.

While the proper standing to raise the objection may be a matter for dispute in some cases, in the present case Susan Cruz's standing is admitted by the Board. "[A]s president and

majority shareholder appellant was clearly in *a position of control over all the Corporation's activities*, including its fiscal responsibility.” [emphasis added], Decision and Order, pp. 3-4.

Cruz was uncontestedly the agent for service of process, and also had the authority to respond on behalf of the corporation. Therefore, as having a derivative liability based on her control over *all* the corporation's activities, Cruz has standing to challenge the corporate liability based on lack of notice and opportunity to be heard.

The Commissioner had refused to address whether there was service or not, but the Board did. In arguing failure of service Susan Cruz is helped significantly by the finding of the Board that service had not been upon the Corporation per se, but upon a minority shareholder. The Board stated “In [Susan Cruz's] memorandum in support of her petitions, she argued that service on the minority shareholder of the Corporation (Mark Samsa) was improper because she was a statutory agent for the Corporation *** [W]e find that service on Mr. Sampsa was sufficient, as it was 'reasonably calculated to give notice of the assessment and allow the taxpayer to present his objections' *Castallano v. Kosydar* (1975), 42 Ohio St.2d 107, 110.” Decision, fn. 1, p. 2 .

The case law cited by the Board was off-point. *Castellano v. Kosydar* never stated that service other than by the statutes was proper, nor did it hold or even support the proposition that service upon a minority shareholder was sufficient. The argument by the responsible party in *Castellano v. Kosydar* was that the statute was wrong to allow service by certified mail at a correct home address where service was received by others on behalf of the addressed responsible parties. In one case the wife received on behalf of the husband, in the other the father received on behalf of the son. *Castellano v. Kosydar*, p. 687. The Court held such

certified mail service at a responsible party's home, even though signed for by others "is reasonably calculated to give notice of the assessment and allow the taxpayer to present his objections." Page 689. But what "is reasonably calculated to to give notice" of a tax proceeding in Ohio is defined by statute. The Castellanos were objecting to the certified mail notice allowed under the statute. Susan Cruz does not, like the Castellanos, dispute that the statute as written denied her an opportunity to respond. Susan Cruz alleges it was the Department's failure to follow the statute as written that denied any opportunity to respond.

Ohio's R.C. 5703.37(B)(1) requires service upon the Corporation by personal service or certified mail; only if the certified mail is returned for an undeliverable address, and after reasonable inquiry, may the Commissioner consider service complete. Where certified service is returned for another reason service is completed by resending by ordinary mail. R.C. 5703.37(B)(2). There is a presumption that, where certified service fails other than for an undeliverable address, subsequent ordinary service which was mailed was received. R.C. 5703.37(B)(1)(b). Where the presumption of service is disputed, the Corporation bears the burden of proving by a preponderance of the evidence that the address to which notice was sent was not an address which the corporation was "associated with" at the time of service. R.C. 5703.37(C)(1). An address "associated with" the Corporation is statutorily defined as one where the Corporation was residing, receiving legal documents, or conducting business or had conducted business. For such service to suffice, the Corporation's agent or the Corporation's "affiliate" had to be conducting business at the address when the notice was mailed. A person is an "affiliate" if he owned or controlled at least 20 percent of the stock. R.C. 5703.37(C)(1)

Since it is admitted that the mailing was not made to the Corporation at its address, or to

the Corporation's statutory agent, then it could be served at any address where the business of the Corporation was formerly *and* is presently being conducted if received by one owning 20 percent or more of the voting rights of the Corporation.

It was not until the Decision of the Board that the fact was established service was made on a minority shareholder, Mark Samsa. Simultaneously, the Board recognized Mark Samsa no longer had a role or control of operations of the Corporation. As noted at footnote 2, page 3 of the Board's Decision and Order, "The statutory transcript contains a notarized statement by appellant stating that: 'I am the majority shareholder of Cruz-Samsa Corp., an Ohio for-profit corporation; the corporation has a minority shareholder, Mark Samps; on or about the end of the year 2007, Mr. Samsa resigned from his position in the Corporation as an individual who assisted the Corporation in the preparation of it's [sic] Ohio sales tax return pursuant to his resignation letter, a copy of which is attached hereto. Thereafter Mr. Samsa had no further role or control in the operation of the corporation.'" This was never contested, and was accepted by the Board. Service on Mark Samsa was insufficient under the statute to effect service on the Corporation.

CONCLUSION

The Commissioner improperly refused to consider whether the Department's judgment was null and void for failure to give notice and an opportunity to be heard to the Corporation. The sole case upon which he depended was not authoritative on the matter. The Board was likewise in error for depending on *Rowland*, but did address sufficiency of process nevertheless. The Board erred in depending upon *Castellano* rather than addressing the statutory necessities. Susan Cruz must be allowed to contest service against the Corporation as a defense to

responsible person liability. This would probably result in the Corporation actually being able to contest the amount, and the matter proceeding from there.

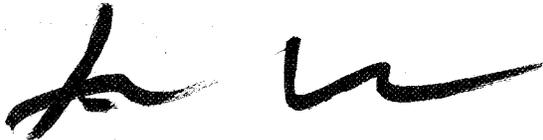
Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of this Merit Brief has been served upon counsel for Joseph Testa by first class United States mail this 6th day of August, 2014 at Barton A. Hubbard, Assistant Attorney General, 30 East Broad Street, 25th Floor, Columbus, Ohio, 43215.



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4-3-14

SUPREME COURT OF OHIO

SUSAN C. CRUZ

Appellant

JOSEPH W. TESTA
Tax Commissioner of Ohio

Appellee

14-0513

: APPEAL FROM TAX COMMISSIONER
: DECISION AND ORDER
: Case No. 2013-1010

NOTICE OF APPEAL

Filed on Behalf of Susan C. Cruz, Appellant

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SUSAN C. CRUZ

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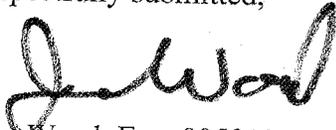
NOTICE OF APPEAL

Now comes Susan Cruz and notices that she is appealing the Decision and Order of the Tax Commissioner in Ohio Board of Tax Appeals Case No. 2013-1010, a copy of which is attached.

The issue on appeal is whether Appellant, charged with responsible party liability on a sales tax determination against a corporation of which she was president and principal shareholder, can challenge the assessment against the corporation on the sole ground of failure of the Tax Commissioner to notice the corporation at any point.

A request is being made to the Board of Tax Appeals that a transcript of the hearing be provided.


Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of this Notice of Appeal was served upon Appellee through his attorneys of record, Michael DeWine and Barton A. Hubbard at 30 East Broad Street, 25th Floor, Columbus Ohio, 43215, by United States certified mail this 2nd day of April, 2014, as evidenced by the attached postal receipt.



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3-7-14

OHIO BOARD OF TAX APPEALS

Susan C. Cruz,

Appellant,

vs.

Joseph W. Testa, Tax Commissioner
of Ohio,

Appellee.

CASE NO. 2013-1010

(SALES TAX
PERSONAL LIABILITY)

DECISION AND ORDER

APPEARANCES

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For the Appellee - Michael DeWine
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30 East Broad Street-25th Floor
Columbus, Ohio 43215

Entered MAR 07 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals from a final determination of the Tax Commissioner wherein he found that appellant was a responsible party for sales tax assessments issued against Cruz-Samsa Corp. for the periods October 2007, and December 2007 through June 2010. We proceed to consider the matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, and the record of the hearing before this board.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d.135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the

taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

When a corporation fails to make payment of sales tax due to the state of Ohio, R.C. 5739.33 imposes personal liability on certain corporate officers and employees deemed "responsible." This liability is derivative in nature and arises from the corporation's primarily liability previously found to exist. R.C. 5739.33 states as follows:

"If any corporation, limited liability company, or business trust required to file returns and to remit tax due to the state under this chapter *** fails for any reason to make the filing or payment, any of its employees having control or supervision of or charged with the responsibility of filing returns and making payments, or any of its officers, members, managers, or trustees who are responsible for the execution of the corporation's, limited liability company's, or business trust's financial responsibilities, shall be personally liable for the failure. The dissolution, termination, or bankruptcy of a corporation, limited liability company, or business trust shall not discharge a responsible officer's, member's, employee's, or trustee's liability for a failure of the corporation, limited liability company, or business trust to file returns or remit tax due."

In her petitions for reassessment, and again on appeal, appellant argues that she was neither responsible for filing tax returns or for paying sales taxes.¹

Although appellant concedes that she was president and majority shareholder of Cruz-Samsa Corporation, she argues that she was never an employee, and that another

¹ Appellant also asserted in her petitions that the underlying sales tax assessments against Cruz-Samsa Corp. were invalid due to lack of proper service on the corporation. In her memorandum in support of her petitions, she argued that service on the minority shareholder of the corporation (Mark Samsa) was improper, because she was the statutory agent for the corporation. The commissioner rejected the argument as not being properly raised; instead, he asserted that such argument should have been made in a proceeding challenging the underlying assessments themselves. We agree. *Rowland v. Collins* (1976), 48 Ohio St.2d 311. Moreover, we find that service on Mr. Samsa was sufficient, as it was "reasonably calculated to give notice of the assessment and allow the taxpayer to present his objections." *Castellano v. Kosydar* (1975), 42 Ohio St.2d 107, 110.

person (Mark Samsa) was responsible for filing sales tax returns.² The commissioner affirmed the assessments, stating:

“During the periods assessed, the petitioner was the 66% owner of the company. The petitioner was the sole incorporator of the corporation and admitted of holding the position of President for the company. The vendor’s License listed the petitioner as the President of the company. Furthermore, the petitioner signed the Franchise Agreement individually dated June 29, 2005 for the operation of a Franchise known as ‘Petland.’ Although the petitioner contends that she was not a paid employee, this alleged fact is not the sole determining factor as to whether a person is a responsible party under R.C. 5739.33. As stated above, the petitioner was the majority owner, President and the operator of a franchise business operation. The evidence shows that she also had authority to hire and discharge employees in the company. Therefore, the petitioner had the authority to control the fiscal responsibilities. R.C. 5739.33 does not permit officers, otherwise responsible for the fiscal responsibilities, to escape liability by delegating those duties to others. See, *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55, 559 N.E.2d 449. An officer with the authority to control the fiscal responsibilities does not need to exercise that control to be held liable. Thus, the petitioner is a responsible party as contemplated under R.C. 5739.33.” S.T. at 2.

At this board’s hearing, appellant’s counsel essentially reiterated the ~~arguments made in the petition and in the notice of appeal — that, because appellant~~ was not personally involved with filing tax returns or paying bills, she is not a responsible party under R.C. 5739.33. We disagree. Although there is little in the record regarding the day-to-day operations of Cruz-Samsa Corp., as president and majority shareholder, appellant was clearly in a position of control over all the

² The statutory transcript contains a notarized statement by appellant stating that: “I am the majority shareholder of Cruz-Samsa Corp., an Ohio for profit corporation; The corporation has a minority shareholder, Mark Samsa; On or about the end of the year 2007, Mr. Samsa resigned from his position in the corporation as an individual who assisted the corporation in the preparation of it’s[sic] Ohio sales tax returns pursuant to his resignation letter, a copy of which is attached hereto. Thereafter, Mr. Samsa had no further role or control in the operation of the corporation.” S.T. at 141.

corporation's activities, including its fiscal responsibilities. As we stated in *Borger v. Levin* (Jan. 10, 2012), BTA No. 2008-A-1905, unreported: "Even in a person does not actually participate in or supervise the corporation's fiscal duties, if his position is one that would ordinarily be responsible for such duties, then the officer may be found to be responsible to the state." Id. at 4 (citing *Spithogianis v. Limbach* (1990), 53 Ohio St.3d 55; *McGlothin v. Limbach* (1991), 57 Ohio St.3d 72; *Granger v. Tracy* (June 11, 1999), BTA Nos. 1998-M-242, unreported). We therefore find no error in the commissioner's determination that appellant is a responsible party for Cruz-Samsa Corp.

Accordingly, the commissioner's final determination is hereby affirmed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary

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3-7-14

OHIO BOARD OF TAX APPEALS

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Bratenahl, Ohio 44108

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At this board’s hearing, appellant’s counsel essentially reiterated the arguments made in the petition and in the notice of appeal — that, because appellant was not personally involved with filing tax returns or paying bills, she is not a responsible party under R.C. 5739.33. We disagree. Although there is little in the record regarding the day-to-day operations of Cruz-Samsa Corp., as president and majority shareholder, appellant was clearly in a position of control over all the

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Accordingly, the commissioner's final determination is hereby affirmed.

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



A.J. Groeber, Board Secretary

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Ohio Department of
TAXATION

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Dear Taxpayer:

Enclosed is the Tax Commissioner's final determination regarding your case. The title is captioned either "Journal Entry" or "Final Determination."

You have the right to appeal this decision to the Board of Tax Appeals. Unlike appeals to the Tax Commissioner, proceedings before the Board of Tax Appeals are very formal, and the Board's procedures must be carefully followed. An appeal to the Board may be done in the following way:

- You have only **60 days** from the date you received this final determination to appeal.
- If you choose to appeal, you must send the Board of Tax Appeals your original notice of appeal and two copies. A copy of the enclosed final determination should also be attached to each notice of appeal. Your notice of appeal must **clearly** state why you are appealing. The law requires you to describe carefully each error which you believe the Tax Commissioner made.
- You must also send the Tax Commissioner a copy of your notice of appeal and a copy of the enclosed final determination.
- The Board of Tax Appeals and the Tax Commissioner **must each receive** ¹the notice of appeal and the copy of the final determination within 60 days of your receipt of this final determination. In order to file your appeal on time, you must mail the notices by certified mail, express mail or authorized delivery service and make sure that the recorded date is within 60 days of your receipt of the enclosed final determination. Ordinary mail delivery is not considered received until each agency actually receives your notice of appeal. Alternatively, you may personally deliver the notices before the 60 days are up to be sure both agencies receive it within the 60-day time limit. Appeals which are received late do not meet the requirements of the law and cannot be considered.

For your information, Ohio Revised Code Section 5717.02 appears on the back of this letter. This is the section of the Code stating the requirements for a proper appeal to the Board of Tax Appeals. You **must** follow all of these **mandatory** requirements in order to appeal. If you don't, you may lose your right to appeal.

The mailing address of the Board of Tax Appeals is:

Rhodes State Office Tower
30 East Broad Street, 24th Floor
Columbus, OH 43215-3414

The Tax Commissioner's mailing address is:

Rhodes State Office Tower
30 East Broad Street, 22nd Floor
Columbus, OH 43215

5717.02 Appeals from final determination of the tax commissioner; notice; procedure; hearing.

Except as otherwise provided by law, appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be taken to the board of tax appeals by the taxpayer, by the person to whom notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner is required by law to be given, by the director of budget and management if the revenues affected by such decision would accrue primarily to the state treasury, or by the county auditors of the counties to the undivided general tax funds of which the revenues affected by such decision would primarily accrue. Appeals from the redetermination by the director of development under division (B) of section 5709.64 or division (A) of section 5709.66 of the Revised Code may be taken to the board of tax appeals by the enterprise to which notice of the redetermination is required by law to be given. Appeals from a decision of the tax commissioner concerning an application for a property tax exemption may be taken to the board of tax appeals by a school district that filed a statement concerning such application under division (C) of section 5715.27 of the Revised Code.

Such appeals shall be taken by the filing of a notice of appeal with the board, and with the tax commissioner if the tax commissioner's action is the subject of the appeal or with the director of development if the director's action is the subject of the appeal, within sixty days after service of the notice of the tax assessment, reassessment, valuation, determination, finding, computation, or order by the commissioner or redetermination by the director has been given as provided in section 5703.37 of the Revised Code. The notice of such appeal may be filed in person or by certified mail, express mail, or authorized delivery service. If the notice of such appeal is filed by certified mail, express mail, or authorized delivery service as provided in section 5703.056 of the Revised Code, the date of the United States postmark placed on the sender's receipt by the postal service or the date of receipt recorded by the authorized delivery service shall be treated as the date of filing. The notice of appeal shall have attached thereto and incorporated therein by reference a true copy of the notice sent by the commissioner or director to the taxpayer or enterprise of the final determination or redetermination complained of, and shall also specify the errors therein complained of, but failure to attach a copy of such notice and incorporate it by reference in the notice of appeal does not invalidate the appeal.

Upon the filing of a notice of appeal, the tax commissioner or the director, as appropriate, shall certify to the board a transcript of the record of the proceedings before the commissioner or director, together with all evidence considered by the commissioner or director in connection therewith. Such appeals or applications may be heard by the board at its office in Columbus or in the county where the appellant resides, or it may cause its examiners to conduct such hearings and to report to it their findings for affirmation or rejection. The board may order the appeal to be heard upon the record and the evidence certified to it by the commissioner or director, but upon the application of any interested party the board shall order the hearing of additional evidence, and it may make such investigation concerning the appeal as it considers proper.

As amended by H.B. 612, 123rd G.A.

The petitioner appeared at a hearing held in these matters on October 10, 2012 in Columbus, Ohio.

These are responsible party assessments. Cruz-Samsa Corp. incurred sales tax liability resulting in a number of assessments. These assessments have not been satisfied and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Cruz-Samsa Corp. has been derivatively assessed against Susan C. Cruz. The only issue is whether the petitioner is a responsible party of Cruz-Samsa Corp. under R.C. 5739.33 for the periods listed above.

The petitioner objects to the assessment and contends that she is not a responsible party of Cruz-Samsa Corp. under R.C. 5739.33 for the periods at issue. This contention is not well taken.

During the periods assessed, the petitioner was the 66% owner of the company. The petitioner was the sole incorporator of the corporation and admitted of holding the position of President for the company. The vendor's License listed the petitioner as the President of the company. Furthermore, the petitioner signed the Franchise Agreement individually dated June 29, 2005 for the operation of a Franchise known as "Petland". Although the petitioner contends that she was not a paid employee, this alleged fact is not the sole determining factor as to whether a person is a responsible party under R.C. 5739.33. As stated above, the petitioner was the majority owner, President and the operator of a franchise business operation. The evidence shows that she also had the authority to hire and discharge employees in the company. Therefore, the petitioner had the authority to control the fiscal responsibilities. R.C. 5739.33 does not permit officers, otherwise responsible for the fiscal responsibilities, to escape liability by delegating those duties to others. See, *Spithogianis v. Limbach* (1990), 53 Ohio St. 3d 55, 559 N.E.2d 449. An officer with the authority to control the fiscal responsibilities does not need to exercise that control to be held liable. Thus, the petitioner is a responsible party as contemplated under R.C. 5739.33.

The petitioner also argues that assessment against the company is invalid due to lack of service against the company. This is an attack on the validity of the underlying corporate assessments. Under *Rowland v. Collins* (1976), 48 Ohio St. 2d 311, the objection cannot be considered. The petitioner may not challenge the merits of the assessment against the corporation in a proceeding under R.C. 5739.33. The objection is denied.

Therefore, it is the order of Tax Commissioner that the assessment is affirmed as issued.

Current records indicate that no payment has made on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Proper credit for any payments will be given at the

collection state. Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above referenced total. Payment shall be made payable to Ohio Treasurer Josh Mandel. Any payment made within sixty days of the date of this final determination should be forwarded to: Ohio Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-1090.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

Joseph W. Testa
Tax Commissioner

§ 5703.37. Service of notice or order.

Ohio Statutes

Title 57. TAXATION

Chapter 5703. DEPARTMENT OF TAXATION

Current through June 20, 2014

§ 5703.37. Service of notice or order

- (A) (1) Except as provided in division (B) of this section, whenever service of a notice or order is required in the manner provided in this section, a copy of the notice or order shall be served upon the person affected thereby either by personal service, by certified mail, or by a delivery service authorized under section 5703.056 of the Revised Code that notifies the tax commissioner of the date of delivery.
- (2) In lieu of serving a copy of a notice or order through one of the means provided in division (A)(1) of this section, the commissioner may serve a notice or order upon the person affected thereby through alternative means as provided in this section, including, but not limited to, delivery by secure electronic mail as provided in division (F) of this section. Delivery by such means satisfies the requirements for delivery under this section.
- (B) (1) (a) If certified mail is returned because of an undeliverable address, the commissioner shall first utilize reasonable means to ascertain a new last known address, including the use of a change of address service offered by the United States postal service or an authorized delivery service under section 5703.056 of the Revised Code. If, after using reasonable means, the commissioner is unable to ascertain a new last known address, the assessment is final for purposes of section 131.02 of the Revised Code sixty days after the notice or order sent by certified mail is first returned to the commissioner, and the commissioner shall certify the notice or order, if applicable, to the attorney general for collection under section 131.02 of the Revised Code.
- (b) Notwithstanding certification to the attorney general under division (B)(1)(a) of this section, once the commissioner or attorney general, or the designee of either, makes an initial contact with the person to whom the notice or order is directed, the person may protest an assessment by filing a petition for reassessment within sixty days after the initial contact. The certification

of an assessment under division (B)(1)(a) of this section is prima-facie evidence that delivery is complete and that the notice or order is served.

- (2) If mailing of a notice or order by certified mail is returned for some cause other than an undeliverable address or if a person does not access an electronic notice or order within the time provided in division (F) of this section, the commissioner shall resend the notice or order by ordinary mail. The notice or order shall show the date the commissioner sends the notice or order and include the following statement:

"This notice or order is deemed to be served on the addressee under applicable law ten days from the date this notice or order was mailed by the commissioner as shown on the notice or order, and all periods within which an appeal may be filed apply from and after that date."

Unless the mailing is returned because of an undeliverable address, the mailing of that information is prima-facie evidence that delivery of the notice or order was completed ten days after the commissioner sent the notice or order by ordinary mail and that the notice or order was served.

If the ordinary mail is subsequently returned because of an undeliverable address, the commissioner shall proceed under division (B)(1)(a) of this section. A person may challenge the presumption of delivery and service under this division in accordance with division (C) of this section.

- (C) (1) A person disputing the presumption of delivery and service under division (B) of this section bears the burden of proving by a preponderance of the evidence that the address to which the notice or order was sent was not an address with which the person was associated at the time the commissioner originally mailed the notice or order by certified mail. For the purposes of this section, a person is associated with an address at the time the commissioner originally mailed the notice or order if, at that time, the person was residing, receiving legal documents, or conducting business at the address; or if, before that time, the person had conducted business at the address and, when the notice or order was mailed, the person's agent or the person's affiliate was conducting business at the address. For the purposes of this section, a person's affiliate is any other person that, at the time the notice or order was mailed, owned or controlled at least twenty per cent, as determined by voting rights, of the addressee's business.
- (2) If the person elects to protest an assessment certified to the attorney general for collection, the person must do so within sixty days after the attorney general's initial contact with the person. The attorney general may enter into a compromise with the person under sections 131.02 and 5703.06 of the Revised Code if the

person does not file a petition for reassessment with the commissioner.

- (D) Nothing in this section prohibits the commissioner or the commissioner's designee from delivering a notice or order by personal service.
- (E) Collection actions taken pursuant to section 131.02 of the Revised Code upon any assessment being challenged under division (B)(1)(b) of this section shall be stayed upon the pendency of an appeal under this section. If a petition for reassessment is filed pursuant to this section on a claim that has been certified to the attorney general for collection, the claim shall be uncertified.
- (F) The commissioner may serve a notice or order upon the person affected by the notice or order through secure electronic means only with the person's consent. The commissioner must inform the recipient, electronically or by mail, that a notice or order is available for electronic review and provide instructions to access and print the notice or order. The recipient's electronic access of the notice or order satisfies the requirements for delivery under this section. If the recipient fails to access the notice or order electronically within ten business days, then the commissioner shall inform the recipient a second time, electronically or by mail, that a notice or order is available for electronic review and provide instructions to access and print the notice or order. If the recipient fails to access the notice or order electronically within ten business days of the second notification, the notice or order shall be served upon the person through the means provided in division (B)(2) of this section.
- (G) As used in this section:
 - (1) "Last known address" means the address the department has at the time the document is originally sent by certified mail, or any address the department can ascertain using reasonable means such as the use of a change of address service offered by the United States postal service or an authorized delivery service under section 5703.056 of the Revised Code.
 - (2) "Undeliverable address" means an address to which the United States postal service or an authorized delivery service under section 5703.056 of the Revised Code is not able to deliver a notice or order, except when the reason for nondelivery is because the addressee fails to acknowledge or accept the notice or order.

Cite as R.C. § 5703.37

History. Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 129th General Assembly File No. 117, HB 508, §1, eff. 9/6/2012.

§ 5703.60. Petition for reassessment.

Ohio Statutes

Title 57. TAXATION

Chapter 5703. DEPARTMENT OF TAXATION

Current through June 20, 2014

§ 5703.60. Petition for reassessment

- (A) If a petition for reassessment has been properly filed under a law that specifies that this section applies, the tax commissioner shall proceed as follows:
- (1) Except as provided in division (D) of this section, the commissioner may correct the assessment by issuing a corrected assessment. The corrected assessment may reduce or increase the previous assessment, as the commissioner finds proper. The commissioner shall send the corrected assessment by ordinary mail to the address to which the original assessment was sent, unless the petitioner notifies the commissioner of a different address. The commissioner's mailing of the corrected assessment is an assessment timely made and issued to the extent that the original assessment was timely made and issued, notwithstanding any time limitation otherwise imposed by law.

Within sixty days after the mailing of the corrected assessment, the petitioner may file a new petition for reassessment. The petition shall be filed in the same manner as provided by law for filing the original petition. If a new petition is properly filed within the sixty-day period, the commissioner shall proceed under division (A)(2) or (3) of this section. If a new petition is not properly filed within the sixty-day period, the corrected assessment becomes final, and the amount of the corrected assessment is due and payable from the person assessed.

The issuance of a corrected assessment under this division nullifies the petition for reassessment filed before such issuance, and that petition shall not be subject to further administrative review or appeal. The commissioner may issue to the person assessed only one corrected assessment under this division.
 - (2) The commissioner may cancel the assessment by issuing either a corrected assessment or a final determination. The commissioner may mail the cancellation in the same manner as a corrected assessment under division (A)(1) of this section. Cancellation of an assessment pursuant to this division is not subject to further administrative review or appeal.
 - (3) If no corrected assessment or final determination is issued under division (A)(1) or

(2) of this section, or if a new petition for reassessment is properly filed under division (A)(1) of this section, the commissioner shall review the assessment or corrected assessment petition that is still pending. If the petitioner requests a hearing, the commissioner shall assign a time and place for the hearing and notify the petitioner of such time and place, but the commissioner may continue the hearing from time to time as necessary. Upon completion of the review and hearing, if requested by the person assessed, the commissioner shall either cancel the assessment or corrected assessment by issuing a corrected assessment or final determination under division (A)(2) of this section, or issue a final determination that reduces, affirms, or increases the assessment or corrected assessment, as the commissioner finds proper. If a final determination is issued under this division, a copy of it shall be served on the petitioner in the manner provided by section 5703.37 of the Revised Code, and it is subject to appeal under section 5717.02 of the Revised Code. Only objections decided on the merits by the board of tax appeals or a court shall be given the effect of collateral estoppel or res judicata in considering an application for refund of amounts paid pursuant to the assessment or corrected assessment.

- (B) Except as provided in division (D) of this section, in addition to the authority provided in division (A) of this section and division (H) of section 5703.05 of the Revised Code, the tax commissioner, on the commissioner's own motion, may issue a corrected assessment with regard to the assessment of any tax for which a properly filed petition for reassessment would be subject to division (A) of this section. A corrected assessment may be issued under this division only if the original assessment has not been certified to the attorney general for collection under section 131.02 of the Revised Code, or is not an appeal pursuant to section 5717.02 of the Revised Code. The corrected assessment shall not increase the amount of tax, penalty, or additional charge if the statute of limitations to issue a new assessment for such increase has expired. The corrected assessment shall be issued and reviewed in the same manner as a corrected assessment under division (A)(1) of this section.
- (C) If the tax commissioner issues a corrected assessment or final determination under this section that reduces an assessment below the amount paid thereon, and the reduction is made at the written request of the party assessed, either through the filing of a proper petition for reassessment or otherwise, the commissioner shall certify any overpayment as a refund due only to the extent a refund could have been timely claimed when the request was made. If the reduction is made on the commissioner's own motion, the commissioner shall certify any overpayment as a refund due only to the extent a refund could have been timely claimed at the time the reduction was made.
- (D) The tax commissioner shall not issue a corrected assessment under division (A)(1) or (B) of this section after the party assessed has requested in writing that the commissioner not use that procedure.