

ORIGINAL

NOTICE OF APPEAL FROM THE OHIO BOARD OF TAX APPEALS

IN THE SUPREME COURT OF OHIO

FILED
SEP 05 2014
BOARD OF TAX APPEALS
COLUMBUS, OHIO

Teddy L. Wheeler
In his Capacity as Pike County Auditor,

Case No.

Appellant,

Appeal from the Ohio Board of Tax Appeals

v.

14-1362

Joseph W. Testa,
Tax Commissioner of Ohio,

BTA Case No. 2012-2043

Appellee,

and

Martin Marietta Energy Systems, Inc.
a/k/a Lockheed Martin
Energy Systems, Inc.

Appellee.

FILED
SEP 05 2014
CLERK OF COURT
SUPREME COURT OF OHIO

**NOTICE OF APPEAL OF APPELLANT TEDDY L. WHEELER PIKE COUNTY
AUDITOR**

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NOTICE OF APPEAL OF TEDDY L. WHEELER, PIKE COUNTY AUDITOR

Appellant, Teddy L. Wheeler, in his capacity as Pike County Auditor ("Auditor") hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio, from the Decision and Order ("Decision") of the Board of Tax Appeals ("BTA") journalized on August 7, 2014 in *Teddy L. Wheeler, in his Official Capacity as Auditor of Pike County Ohio v. Joseph W. Testa, Tax Commissioner of Ohio, et al.*, Case No. 2012-2043, (the "Decision"). A true copy of the Decision that is being appealed is attached hereto as Exhibit A.

The Decision was issued on August 7, 2014, affirming the Tax Commissioner's Final Determination, canceling the preliminary assessment issued by the Auditor (the "Assessment"), and making other findings. The next day, on August 8, 2014, Lockheed Martin Energy Systems, Inc. ("LMES"), filed a Notice of Appeal of the Decision in the Ohio Supreme Court, case number 14-1362 ("LMES Appeal"), asserting that LMES did not disagree with the Decision it obtained before the BTA. A Motion to Dismiss has been filed in the this Court asserting that the LMES Appeal did not properly invoke the jurisdiction of the Ohio Supreme Court in this matter, because LMES has no standing to file an appeal. A court cannot obtain jurisdiction over a matter when the party seeking to invoke its jurisdiction has no standing to bring the appeal. *Newman v. Levin*, 2007 Ohio 5507, 116 Ohio St.3d 1205. Because LMES cannot create jurisdiction in the Ohio Supreme Court relating to an appeal of the Decision, the Auditor has chosen to file an appeal in this Court in the Fourth District Court of Appeals.

However, in an abundance of caution in this unique situation for which the Appellant has not been able to find any prior decision giving guidance, this Notice of Appeal is being filed after the

Notice of Appeal has been filed in the Fourth District Court of Appeals to preserve the appeal if it is determined that there is no jurisdiction in the Fourth District Court of Appeals.

ERRORS TO BE REVIEWED

The Auditor submits the BTA acted unlawfully and unreasonably, based upon the following errors in the Decision:

1. The BTA erred in construing the clear and unambiguous language of R.C. 5703.58 in determining that the Assessment was precluded by the limitation period in the statute.
2. The BTA erred in its construction and interpretation of R.C. 5703.58 relative to determining that the Assessment was precluded by the limitation period in the statute.
3. The BTA erred in determining that the Pike County Commissioners have authority to waive, compromise, or settle a claim by Pike County for personal property taxes, arising pursuant to R.C. Chapter 5711, and specifically R.C. 5711.16, against LMES regarding taxable tangible personal property used by LMES.
4. The BTA erred in determining that the Pike County Commissioners have authority to waive, compromise, or settle a claim by other taxing authorities in Pike County, other than the County itself, for personal property taxes, arising pursuant to R.C. Chapter 5711, and specifically R.C. 5711.16, against LMES regarding taxable tangible personal property used by LMES when the other taxing authorities were not delineated as entities that were bound by the terms of an agreement for payment in lieu of taxes ("PILT Agreement") and were not parties to the PILT Agreement.
5. The BTA erred when it interpreted the PILT Agreement, finding that it resolved the taxes at issue. The BTA has no statutory or other legal authority to interpret contractual agreements.
6. The BTA erred in finding that the PILT Agreement preempted and foreclosed the

Auditor's ability to issue any preliminary assessment certificate of valuation or accompanying assessment.

7. The BTA erred in determining that a claim for personal property taxes, arising pursuant to R.C. Chapter 5711, and specifically R.C. 5711.16, against LMES regarding taxable tangible personal property used by LMES could be waived, settled, or compromised pursuant to the PILT Agreement to which the Tax Commissioner was not a party pursuant to R.C. 5703.05(C).

8. The BTA erred in construing the clear and unambiguous language of R.C. 5711.16 relative to whether LMES was a manufacturer.

9. The BTA erred in its construction and interpretation of R.C. 5711.16 as to whether LMES was a manufacturer.

10. The BTA erred in concluding that the Tax Commissioner had authority to cancel a preliminary assessment for personal property taxes issued by a county auditor.

11. The BTA erred by holding that the Tax Commissioner did not have to follow the mandate of R.C. 5711.31, when the Tax Commissioner purportedly cancelled the Assessment, rather than making corrections relating to value on the Assessment.

12. The BTA erred by failing to hold that the Tax Commissioner was required to properly determine the true value of taxable tangible personal property.

13. The BTA erred by not applying O.A.C. 5703-3-10, O.A.C. 5703-3-11, or the 302 computation to taxable personal property used for the manufacture of uranium when the BTA and the Tax Commissioner were aware of the unchallenged acquisition cost, but made no determination of the age or class of the personal property.

14. The BTA erred by failing to apply O.A.C. 5703-3-10 and 5703-3-11. The Tax Commissioner was aware of the original cost of taxable tangible personal property used by LMES, but failed to determine the Composite Group Life Class of the property, and failed to determine the minimum true value for the property which, pursuant to O.A.C. 5703-3-10 and 5703-3-11, could not be zero if the property was being used by LMES.

15. The BTA erred by failing to determine the true value of taxable tangible personal property used by LMES.

Respectfully submitted,

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Auditor

Proof of Service upon Ohio Board of Tax Appeals

This is to certify that the Notice of Appeal of Teddy L. Wheeler, in his Official Capacity as the Pike County Auditor, was filed with the Ohio Board of Tax Appeals, State Office Tower, 30 East Broad Street, 24th Floor, Columbus, Ohio, as evidenced by the Board of Tax Appeals date stamp set forth on the first page of the Notice of Appeal.


Kevin L. Shoemaker (0017094)
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Certificate of Service

A copy of the foregoing was served by certified U.S. Mail upon the persons listed below on this 5th day of September, 2014.

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EXHIBIT A

OHIO BOARD OF TAX APPEALS

TEDDY L. WHEELER, IN HIS OFFICIAL
CAPACITY AS AUDITOR OF PIKE COUNTY,)
OHIO, (et. al.),)
Appellant(s),)
vs.)
JOSEPH W. TESTA, TAX COMMISSIONER OF)
OHIO, (et. al.),)
Appellee(s).

CASE NO(S). 2012-2043

(PERSONAL PROPERTY TAX)

DECISION AND ORDER

APPEARANCES:

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Entered Thursday, August 7, 2014

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

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant ("Auditor") from a final determination of the Tax Commissioner wherein the commissioner cancelled the personal property tax assessment issued by appellant to appellee Martin Marietta Energy Systems, n/k/a Lockheed Martin Energy Systems, Inc. ("MM"), relating to tax year

1993. We make our determination based upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of this board's hearing ("H.R."), the parties' joint stipulations of fact ("Stip"), the depositions submitted in lieu of live testimony ("Dep."), and the written arguments of counsel.

There is a 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 the 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. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern*, supra; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan*, supra.

Through the notice of appeal, the Pike County Auditor contests the Tax Commissioner's cancellation of a personal property tax assessment issued by the auditor to MM based upon the value of tangible personal property located at the Portsmouth Gaseous Diffusion Plant ("PORTS"), a uranium enrichment plant. For the tax year in question, i.e., 1993, PORTS, and the equipment that is the subject of the instant assessment, were owned by the United States Department of Energy ("DOE"), "because of the extra hazardous nature of it that no contractor would build the facilities or have the capital investment for it." Nesteruk Dep. at 8-9; MM acted as the contract operator of PORTS that managed, operated and maintained the buildings and facilities at PORTS. Stip 1; Ex. 39.

Specifically, for tax year 1993, the Pike County Commissioners entered into an agreement with the DOE for payments in lieu of taxes ("PILOT agreement"). Such agreement, authorized under the Atomic Energy Act of 1946, i.e., 42 U.S.C. 2208, provided that "the County has requested financial assistance from DOE, and has stated that it will waive and release any claims for tax years 1992 through 1997 for taxes against DOE and its contractors on, with respect to, or measured by the value or use of Government-owned real and personal property." Auditor Ex. 20 at 1; MM Ex. 4 at 1. The agreement indicated that DOE's payment of \$175,546.83 would "constitute full satisfaction of any and all claims the County may have for taxes for tax years 1992 through 1997 against DOE and DOE's contractors, of any nature whatsoever, on, with respect to, or measured by the value or use of Government-owned real or personal property which is utilized in carrying on activities of DOE." Auditor Ex. 20 at 2; MM Ex. 4 at 2. Similar agreements were in effect for tax years 1952 through 1997. Stip 6. Thereafter, in December 2010, the auditor, although aware of the PILOT agreement in place for tax year 1993, issued a preliminary assessment certificate of valuation to MM for tax year 1993, resulting in a personal property delinquent tax liability of \$23,244,789. S.T. at 443-449. Upon MM's petition for reassessment, the commissioner took action, pursuant to R.C. 5711.31, to cancel such assessment issued by the auditor. For the reasons stated herein, we find that the subject assessment was properly cancelled.

At the outset, the auditor contends that the commissioner did not have the statutory authority to cancel the assessment in question. We disagree. Pursuant to R.C. 5703.05, generally, and R.C. 5711.31, more specifically, the commissioner could take whatever action was necessary to "correct" the assessment. Clearly, if the commissioner determines that an assessment has been issued by an auditor in error, the commissioner has the authority to cancel such assessment, i.e., to review the acts of his deputies, including county auditors as designated in R.C. 5711.11 and 5715.40, and take whatever action is necessary to correct any errors made, including cancellation.

Every taxpayer engaged in business in Ohio was required to annually file a personal property tax return with the county auditor of each county in which property used in the taxpayer's business was located. R.C. 5711.02. On that return, the taxpayer listed "all taxable property *** as to ownership or control, valuation, and taxing districts." R.C. 5711.03. A "taxpayer," was defined in R.C. 5711.01(B) as "any owner of taxable property *** and includes every person *** doing business in this state, or owning or having a beneficial interest in taxable personal property in this state ***."

Clearly, MM did not own the subject personal property, as title to it was retained by the DOE. MM also does not stand in the stead of an owner, by virtue of having a "beneficial interest" in the subject property, pursuant to R.C. 5711.01(B). In *Refreshment Service Co. v. Lindley* (1981), 67 Ohio St.2d 400, 403, the court "construe[d] the term 'beneficial interest' to include the interest of one who is in possession of all characteristics of ownership other than legal title of the taxable property. Such a definition prevents one from escaping the incidence of the personal property tax by transferring legal title to the taxable property while keeping the benefits of its ownership. The determination of whether a person has a 'beneficial interest' in an article of personal property requires an examination of the rights and privileges that person has in the property in question. If in fact this person is found to possess all the characteristics of ownership without having legal title to the property, then the person must be found to have a beneficial interest in the property and liable for any personal property tax assessed." Herein, all personal property at PORTS, including the uranium at the plant, was owned by the federal government and MM was not permitted to utilize any of it for its own purposes. The "DOE didn't want a comingling of contractor property, so it was excluded and none was provided." Nesteruk Dep. at 43. The property was physically "tagged" indicating it was owned by the federal government and records were maintained tracking its status. Unauthorized use of such equipment could have resulted in criminal penalties. Nesteruk Dep. at 18-21, 24; Donnelly Dep. at 11, 16, 18-19; Dayton Dep. at 11-12. The maintenance/repair/purchase of equipment was subject to DOE's approval, unless of such an insignificant, day-to-day nature that it was deemed unnecessary to obtain such consent. Dayton Dep. at 16; Donnelly Dep. at 30-32, 43.

Further, the DOE supervised, oversaw and controlled all operations of PORTS. Dayton Dep. at 17. Special clearances were required to be employed by PORTS. Donnelly Dep. at 11. "[H]ardly a week went by without DOE looking over our shoulders." Donnelly Dep. at 15. Language from the contract between MM and the DOE indicates that the DOE "directed" certain MM activities, while others were "subject to the control of DOE," and "[p]erformance of the work under *** [the] contract" was "subject to the technical direction of DOE *** Representatives." Donnelly Dep., Ex. A, at 11-12, 18. The DOE determined the specifications of production at PORTS. Donnelly Dep. at 17-18. MM primarily provided the skilled staff to work at PORTS. Nesteruk Dep. at 39. The DOE determined all of the sales/production necessary to meet customer needs, as MM did not participate in the marketing and sales efforts. Dayton Dep. at 13-14; Donnelly Dep. at 74. Accordingly, we conclude that MM did not have a "beneficial interest" in the subject personal property. While MM, of course, had its own business interests under the contract, those interests were limited by the terms of such contract which may have ceded the management of the day-to-day operations to MM, but retained the long term control over and authority for all decisions of any consequence in the DOE.

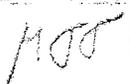
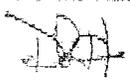
The auditor also contends that MM is subject to the personal property tax assessed by virtue of the provisions of R.C. 5711.16, as a manufacturer. That section specifically provides that "[a] person who purchases, receives, or holds personal property for the purpose of adding to its value by manufacturing, refining, rectifying, or combining different materials with a view of making a gain or profit by so doing is a manufacturer. *** A manufacturer shall also list all engines and machinery, and tools and implements, of every kind used, or designed to be used, in refining and manufacturing, and

owned or used by such manufacturer." The auditor cites *ATS Ohio, Inc. v. Tracy* (1996), 76 Ohio St.3d 297, in support of such proposition. In *ATS*, the court addressed ownership of "inventory in the process of manufacture." Id. at syllabus. In analyzing the provisions of R.C. 5711.16, the court held that "[t]he final sentence of the second paragraph states the rule for treatment of property other than inventory, including engines, machinery, tools, and implements on the tax return. Instead of taxing only the items of property from this category that are owned by the taxpayer, R.C. 5711.16 provides that tax must be paid on items from the category that are "owned or used by such manufacturer." Id. at 299-300. By virtue of MM's restricted relationship with the DOE and its personal property at PORTS, we conclude that MM is not a manufacturer, as contemplated by R.C. 5711.16, but that the DOE, who rendered ultimate control and supervision over PORTS, was the manufacturer. Therefore, MM was not properly assessed as a manufacturer.

In addition, beyond the foregoing, we find that the PILOT agreement, in effect for the tax year in question and actively negotiated by the auditor, himself, by its very terms, "preempted and foreclosed the Auditor's ability to issue any preliminary assessment certificate of valuation or accompanying assessment." Comm. Reply Brief at 1. Neither the commissioner nor this board has the statutory authority to void the PILOT agreement or alter or interpret its terms, and therefore, we conclude that the parties' have executed their obligations under the agreement, as written.

Finally, we question the propriety of the auditor's actions in assessing MM for tax year 1993, some seventeen years after the tax year in question. R.C. 5703.58 provides that no assessment shall be issued "after the expiration of ten years *** from the date the tax return or report was due when such amount was not reported and paid." The auditor, as the commissioner's designated deputy, pursuant to R.C. 5711.11 and 5715.40, issued the assessment in question, clearly outside of the ten year limitation.

Thus, based upon the foregoing, we have determined that the appellant auditor improperly assessed personal property tax against MM; MM did not own the personal property in question, nor was MM a manufacturer. Further, pursuant to the terms of a PILOT agreement, the county was precluded from assessing personal property tax against MM for the year in question. As such, we have determined that the commissioner appropriately cancelled the assessment in question. Accordingly, based upon our conclusions, we need not address any other contentions raised by the parties hereto. The final determination of the commissioner is hereby affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

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