ORIGINAL

In the
Supreme Court of Ohio

SUSAN C. CRUZ,	:	Case No. 2014-0513
Appellant,	:	
v.	:	
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO	:	Appeal from Ohio Board of Tax Appeals Case No. 2013-1010
Appellee.	:	

APPELLEE TAX COMMISSIONER'S MOTION TO DISMISS

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FILED
SEP 26 2014
CLERK OF COURT
SUPREME COURT OF OHIO

MOTION

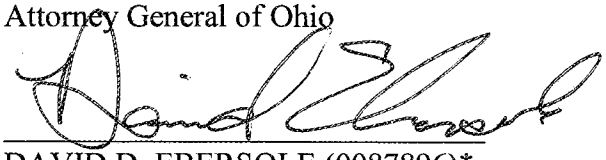
This appeal was taken as of right pursuant to R.C. 5717.04 from a Decision and Order of the Ohio Board of Tax Appeals ("BTA"). The appellee Tax Commissioner moves for the Court to dismiss the appeal because the appellant's notice of appeal fails to confer subject matter jurisdiction on the Court by failing to specify any error that would properly warrant a reversal or modification of the BTA's Decision and Order.

Even if the Notice of Appeal's sole "issue on appeal" were to be decided in favor of the appellant, Susan Cruz, it would not provide any valid basis to overturn the BTA's decision affirming the Commissioner's affirmance of his issuance of the personal responsibility assessments against Ms. Cruz.

For these reasons, as more fully amplified in the attached Memorandum in Support, this Court should grant the motion to dismiss.

Respectfully submitted,

Michael DeWine
Attorney General of Ohio



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Counsel for Appellee
Joseph W. Testa, Tax Commissioner of Ohio

MEMORANDUM IN SUPPORT

This appeal is taken as of right pursuant to R.C. 5717.04. The appellant, Susan Cruz appeals from a decision and order of the Board of Tax Appeals ("BTA"), which affirmed the appellee Tax Commissioner's final determination upholding personal liability assessments (also referred to as "corporate officer assessments") issued pursuant to R.C. 5739.33 arising from Ms. Cruz's corporation's misappropriation of Ohio sales tax funds.

Under Ohio sales tax law, retail vendors (including pet store retailers) are required to collect and remit sales tax on taxable retail sales, as trustees for the State. See R.C. 5739.03. If a retail vendor conducts its business as a corporation and fails to timely collect and remit to Ohio the sales tax on its retail sales, the Commissioner may issue assessment liability both against the corporation itself (pursuant to R.C. 5739.13), and against a class of persons having fiscal responsibilities as officers or employees of the corporation (pursuant to R.C. 5739.33, which provides that the personal liability imposed thereunder "may be collected by assessment in the manner provided in section R.C. 5739.13 of the Revised Code.").

In this case, the BTA held that, as the President and majority shareholder of Cruz-Samsa Corp., *dba* Petland of the Heights (hereafter "Petland"), Ms. Cruz was a member of the class of officers and employees of Petland personally liable under R.C. 5739.33 for Petland's failure to have timely collected and remitted Ohio sales tax on its retail sales. See *Susan C. Cruz v. Testa*, BTA Case No. 2013-1010 (Mar. 7, 2014) (hereinafter "BTA *Decision and Order*") at 2-4, as attached hereto. The BTA thus affirmed the Commissioner's final determination upholding the personal liability assessments issued to Ms. Cruz.

In her appeal to this Court, Ms. Cruz failed to specify error with the BTA's decision. Under R.C. 5717.04, a notice of appeal taken from an order of the Board of Tax Appeals "shall set forth the decision of the board appealed from and the errors therein complained of." *Global*

Knowledge Training, L.L.C. v. Levin, 127 Ohio St.3d 34, 2010-Ohio-4411, ¶ 22 (citing *Newman v. Levin*, 120 Ohio St.3d 127, 2008-Ohio-5205, ¶ 28 (quoting *Norandex, Inc. v. Limbach*, 69 Ohio St.3d 26, 31 (1994))).

The requirement to set forth the errors "complained of" is "jurisdictional." Id. (citing *Lawson Milk Co. v. Bowers*, 171 Ohio St. 418, 420 (1961)). And, this requirement has been given a stringent interpretation, one that requires "strict compliance." *Lawson Milk*, at 419 ("This court has consistently held that strict compliance with the statutory requirements with respect to appeals provided for in Chapter 5717, Revised Code, is required."); *Brown v. Levin*, 119 Ohio St.3d 335, 2008-Ohio-4081, 894 N.E.2d 35, ¶ 18.

Here, Ms. Cruz filed a one-paragraph notice of appeal to this Court as of right pursuant to R.C. 5717.04, setting forth a sole "issue on appeal," as follows:

> 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.

(Emphasis added), Notice of Appeal, as attached hereto.

The Notice of Appeal to this Court fails to assert any error regarding the actual controversy that was at issue at the Board of Tax Appeals, i.e., the 27 *personal responsibility* assessments that the Commissioner issued to Ms. Cruz. Her Notice of Appeal to this Court made no allegation, and sought no relief, concerning the validity of the actual assessments issued to Ms. Cruz as a responsible person under R.C. 5739.33.

Indeed, even if the Notice of Appeal's sole "issue on appeal" were to be decided in favor of Ms. Cruz, it would not provide any valid basis to overturn the BTA's decision affirming the

Commissioner's affirmance of his issuance of the personal responsibility assessments against Ms. Cruz.

This is so because, the BTA expressly determined that the Commissioner, in fact, had effectuated valid service of the corporate assessments issued to Petland, a determination that the Notice of Appeal does not contest and regarding which this Court has not been conferred with jurisdiction to consider. See the BTA's *Decision and Order* at 2, fn. 1, holding that the Commissioner "sufficiently served" the corporate assessments.

Given the failure of Ms. Cruz's Notice of Appeal to this Court to have set forth any grounds on which the BTA's decision affirming the Commissioner's final determination upholding Ms. Cruz's personal responsibility assessments could be reversed, this Court should grant the Motion to Dismiss.

Respectfully submitted,

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Attorney General of Ohio

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Counsel for Appellee
Joseph W. Testa, Tax Commissioner of Ohio

SUPREME COURT OF OHIO

SUSAN C. CRUZ	:	
	:	
Appellant	:	
	:	APPEAL FROM TAX COMMISSIONER
JOSEPH W. TESTA	:	DECISION AND ORDER
Tax Commissioner of Ohio	:	Case No. 2013-1010
	:	
Appellee	:	

NOTICE OF APPEAL

Filed on Behalf of Susan C. Cruz, Appellant

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SUPREME COURT OF OHIO

SUSAN C. CRUZ	:	
	:	
Appellant	:	
	:	APPEAL FROM TAX COMMISSIONER
JOSEPH W. TESTA	:	DECISION AND ORDER
Tax Commissioner of Ohio	:	Case No. 2013-1010
	:	
Appellee	:	

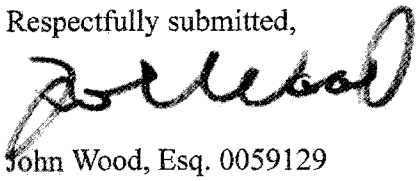
NOTICE OF APPEAL

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

yyOHIO BOARD OF TAX APPEALS

Susan C. Cruz,	)	CASE NO. 2013-1010
	)	
Appellant,	)	(SALES TAX
	)	PERSONAL LIABILITY)
vs.	)	
	)	DECISION AND ORDER
Joseph W. Testa, Tax Commissioner of Ohio,	)	
	)	
	)	
Appellee.	)	

APPEARANCES:

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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 extend 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

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Appellee Tax Commissioner's Motion to Dismiss was served upon the following by U.S. regular mail on this 26th day of September, 2014:

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Counsel for Appellant
Susan Cruz

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