ORIGINAL

In The Supreme Court of Ohio

A.M. CASTLE & COMPANY,	:	Case No. 15-0551
Appellee,	:	
v.	:	Appeal from the Ohio Board of Tax Appeals
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,	:	BTA Case No. 2013-5851
Appellant.	:	

NOTICE OF APPEAL OF JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

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BOARD OF TAX APPEALS

NOTICE OF APPEAL OF JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

Appellant, Joseph W. Testa, Tax Commissioner of Ohio ("Commissioner"), gives notice of his appeal of right to the Supreme Court of Ohio, pursuant to R.C. 5717.04, from a Decision and Order of the Ohio Board of Tax Appeals (the "BTA") journalized in Case No. 2013-5851 on March 9, 2015 (hereafter "*BTA Decision and Order*"), that reversed the Tax Commissioner's Final Determination regarding a use tax assessment for A.M. Castle & Company's use of employment services. A true copy of the *BTA Decision and Order* being appealed is attached hereto and incorporated herein by reference.

The Tax Commissioner complains of the following errors in the Decision and Order of the BTA:

> 1. The BTA erred by finding that the transactions at issue in this case were excluded from the definition of employment services under R.C. 5739.01(JJ)(3).
>
> 2. The BTA erred by finding that the appellee A.M. Castle & Company's ("AM Castle") purchases of services from D.C. Transportation, Inc. ("DC Transportation") were excluded from the definition of employment services under R.C. 5739.01(JJ)(3) and, thus, were not taxable under R.C. 5739.01(B)(3)(k).
>
> 3. The BTA erred as a matter of law by misinterpreting and misapplying *H.R.Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, when it held that A.M. Castle's purchases of services from DC Transportation were excluded from the definition of employment services under R.C. 5739.01(JJ)(3) and, thus, were not taxable under R.C. 5739.01(B)(3)(k).
>
> 4. The BTA erred as a matter of law by failing to give a strict construction to R.C. 5739.01(JJ)(3), a provision that represents an exclusion from taxation, as required by the applicable decisional law.
>
> 5. The BTA erred as a matter of law by failing to apply the plain terms of the definition of "employment services" at R.C. 5739.01(JJ). In this regard, the BTA erred as a matter of law by imposing an additional inquiry, namely that "the taxpayer claiming the exemption [ ] have the intent to maintain the employees provided to it," which is not derived from the language of the statute or the precedent interpreting the statute.

6. The BTA erred by construing R.C. 5739.01(JJ) in a manner at odds with its plain language, in a manner that creates absurd results, and in a manner that renders parts of the statute surplusage.

7. The BTA erred by failing to determine whether A.M. Castle's purchases of employment services were excluded from taxation pursuant to the analysis set forth in *H.R. Options*, which requires a review of: (1) whether the employment-services contract itself meets the requirements set forth at R.C. 5739.01(JJ), and (2) whether the actual performance of the contract shows that each employee provided under the contract was permanently assigned, i.e., assigned for an indefinite period.

8. The BTA erred by failing to engage in the objective analysis set forth in *H.R. Options* and as directed by R.C. 5739.01(JJ) when it injected the subjective consideration of the parties' "intent" to determine that A.M. Castle's purchases of employment services were exempt from taxation.

9. The BTA erred by finding that A.M. Castle had drivers assigned to it on a permanent basis, pursuant to an employment services contract within the meaning of R.C. 5739.01(JJ)(3), when the employment services contract assigned drivers to A.M. Castle on an "as required basis." "As required" is not permanent assignment because the drivers are not assigned for an indefinite period as required by *H.R. Options, supra.*

10. The BTA erred by finding that A.M. Castle had drivers assigned to it on a permanent basis, pursuant to an employment services contract within the meaning of R.C. 5739.01(JJ)(3), when the facts and circumstances surrounding the employment services contract, including the terms of the assigned-driver collective bargaining agreement, affidavit testimony, and actual driver records conflict with self-serving hearing testimony, and demonstrate that the assignments were made to A.M. Castle on an "as required basis."

11. The BTA erred by considering A.M. Castle's intent in obtaining the drivers as a factor in whether the drivers were permanently assigned under R.C. 5739.01(JJ)(3) and the precedent interpreting it.

12. The BTA erred by finding that A.M. Castle "intended" to have drivers assigned to it on a permanent basis, pursuant to an employment services contract within the meaning of R.C. 5739.01(JJ)(3), when the facts and circumstances surrounding the employment services contract demonstrate that the assignments were made to A.M. Castle on an "as required basis."

13. The BTA erred by ignoring the plain language, and by failing to apply the clear and unambiguous language, of the employment services contract which provided that driver assignments were made to A.M. Castle on an "as required basis."

14. The BTA erred by failing to consider the consider the plain and unambiguous language of the employment services contract to be the best evidence of the parties' intent that A.M. Castle's purchases of employment services were on an "as required basis."

15. The BTA erred by allowing A.M. Castle to present evidence of "intent" that was contrary to the plain and unambiguous language of the employment services contract, which provided that A.M. Castle's purchases of employment services were on an "as required basis."

16. The BTA erred by misapplying *H.R. Options* and R.C. 5739.01(JJ) when it failed to determine whether each individual assignment of an employment service purchased by A.M. Castle was exempt from taxation and it instead made a wholesale determination of A.M. Castle's aggregate purchases of employment services.

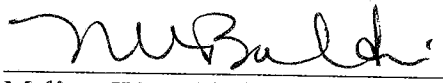
17. The BTA erred by failing to affirm the assessment entered by the Tax Commissioner in this case.

18. The BTA erred by abating the penalty imposed on A.M. Castle for the failure to maintain a consumer's use tax account and the failure to comply with use tax return requirements. The Tax Commissioner's determination to impose the penalty was within his discretionary authority and A.M. Castle failed to demonstrate that the Tax Commissioner had abused that discretion.

For all these reasons, the Tax Commissioner respectfully requests that the Decision and Order be reversed and the final determination of the Tax Commissioner be affirmed.

Respectfully submitted,

Michael DeWine (0009181)
Ohio Attorney General



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In The
Supreme Court of Ohio

A.M. CASTLE & COMPANY.,	:	
Appellee,	:	Case No.
v.	:	Appeal from the Ohio Board of Tax Appeals
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,	:	BTA Case No. 2013-5851
Appellant.	:	

PRAECIPE

TO THE SECRETARY OF THE OHIO BOARD OF TAX APPEALS:

Pursuant to R.C. 5717.04, Appellant, Joseph W. Testa, Tax Commissioner of Ohio, hereby requests that the Ohio Board of Tax Appeals (the "Board") file with the Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, a certified transcript of the record of the Board's proceedings in the above-captioned matter, including any evidence considered by the Board in rendering its decision in that matter.

Respectfully submitted,

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PROOF OF SERVCE UPON BOARD OF TAX APPEALS

This is to certify that the Notice of Appeal of Appellant, Joseph W. Testa, Tax Commissioner of Ohio, was filed by hand delivery with the Ohio Board of Tax Appeals, State Office Tower, 30 East Broad Street, 24th Floor, Columbus, Ohio 43215, as evidenced by its date stamp as set forth hereon on this 7th day of April, 2015.

Melissa Baldwin

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal and Praecipe was filed by hand-delivery with the Ohio Supreme Court, 65 South Front St., Columbus, Ohio 43215, and the Ohio Board of Tax Appeals, 30 E. Broad St., 24th Floor, Columbus, Ohio 43215; and served by certified mail return receipt requested this 7th day of April, 2015, upon:

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OHIO BOARD OF TAX APPEALS

A.M. CASTLE & COMPANY, (et. al.),

Appellant(s),

vs.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

CASE NO(S). 2013-5851

(USE TAX)

DECISION AND ORDER

APPEARANCES:

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Entered Monday, March 9, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal from a final determination of the Tax Commissioner, filed herein by A.M. Castle & Company ("Castle"). In such determination, the commissioner denied Castle's objections to a use tax assessment that resulted from an audit of Castle's purchases for the period from January 1, 2008 through December 31, 2009. This matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the evidence and testimony presented at a hearing before the board ("H.R."), and the written argument from the parties. We acknowledge Castle's motion to strike the commissioner's post hearing reply brief; however, as briefs are provided for the assistance of this board in rendering its determination, and are not required to be filed by the parties, nor required to be considered by the board, Castle's motion is hereby overruled.

In reviewing the instant appeal, we recognize the 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.

Castle "is a provider of specialty metal products in bar, tube, plate and sheet to metal users," with headquarters in Illinois and offices in various locations, including Ohio. S.T. at 1. It contests the portion of the use tax assessment relating "to services that were provided by a third-party, DC Transportation, Incorporated, under a contract pursuant to which DC Transportation employees operate vehicles owned or leased by A.M. Castle," and specifically claims the charges for such services are excludable from taxable employment services, pursuant to R.C. 5739.01(JJ)(3). H.R. at 7-8.

Pursuant to R.C. 5739.02, "an excise tax is *** levied on each retail sale made in this state," with R.C. 5739.01(B)(3)(k) defining the term "sale" to include "[a]ll transactions by which *** [an e]mployment service is or is to be provided." R.C. 5741.02(A)(1) levies a complementary "excise tax *** on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided." R.C. 5739.01(JJ) defines "employment service" as "providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service." Pertinent to the arguments advanced by appellant, R.C. 5739.01(JJ)(3) also states that "'[e]mployment service does not include *** [s]upplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis."

In *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, the Supreme Court discussed the statutory provisions relating to employment services:

> "In *H.R. Options*, [*Inc. v. Zaino* (2004)], 100 Ohio St.3d 373, 2004 Ohio 1, ***, ¶ 21, we explained that 'permanent' in the context of (JJ)(3) means that an employee is 'assign[ed] to a position for an indefinite period,' which in turn means that (1) the assignment has no specified ending date and (2) the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions. Id. ¶ 21. We also held that R.C. 5739.01(JJ)(3) was to be treated as an exception or exemption from taxation, with the result that it must be strictly construed against the taxpayer's claim for tax relief. H.R. Options, ¶ 17, clarified by *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004 Ohio 2085, ***, ¶ 2.
>
> "*H.R. Options* is additionally significant because we construed the exemption as turning on the facts of each employee's assignment rather than on the presence of 'magic words' in the employment-service agreements themselves. *H.R. Options*, 100 Ohio St.3d 373, 2004 Ohio 1, ***, ¶ 21. Instead of requiring that the contracts recite 'permanent' (or 'indefinite') assignment, we viewed the language of the contracts as one element that, along with the facts and circumstances of the individual assignments, established whether the provider was truly 'supplying personnel' in an exempt manner. Indeed, instead of requiring the commissioner to focus on contract language in *H.R. Options*, we directed that official to look at two types of evidence when auditing a claim of exemption: (1) the employment-services contract itself, to see whether it is consistent with the requirements set forth at (JJ)(3), and (2) the facts and circumstances of the assignment, in order to ascertain whether in actual practice the assignment of the particular employees was 'indefinite'

> in character, or whether the assignments were seasonal, substitutional, or designed to meet short-term workload conditions. Id., ¶ 22." Id. at ¶18-19.

Thus, in order for the services provided by DC Transportation to qualify for the exemption/exception set forth in R.C. 5739.01(JJ)(3), they must meet two criteria: they must be provided subject to a contract of at least one year in duration and DC's employees must be assigned to Castle on a permanent basis. The commissioner, in the final determination, acknowledges that the contract between DC Transportation and Castle meets the durational requirement of at least one year, S.T. at 2; H.R. at 12; accordingly, we need not further address such aspect of its qualification for exemption.

With regard to the second criteria, the commissioner concluded that "[t]he contract does not specify that the employees are assigned on a permanent basis. The contract provides that 'Lessor shall provide Lessee with a sufficient number of drivers to operate the motor vehicles owned or leased by Lessee, as required by Lessee.' This language leaves open the drivers that may be provided indicating that they will be provided on an 'as required' basis." Further, the commissioner determined that contrary to Castle's contentions that the contract in question "assigns employees to AM Castle on a permanent basis," the contract contains no such provision. S.T. at 2.

In support of its argument that, in fact, DC's employees are provided to Castle on a "permanent" basis, Castle offered the testimony of two witnesses before this board. First, Ronald Knopp, the vice president of operations for Castle, testified that in the course of its business, Castle does not employ any truck drivers; it prefers to "use representatives like DC Transportation who have the expertise in the market to secure knowledgeable drivers [to] get us equipment and trucking and trailers to get our material from our facilities to our customers." H.R. at 20. He went on to indicate that the DC drivers are Castle's "connection to our customer. They wear our colors; they drive logo trucks. They are the connection and the representation of Castle to our accounts. They're the ones that knock on the doors, deliver the product, and have the relationship with our customers." H.R. at 21. He elaborated that on average, DC supplies around eleven or twelve drivers, who, under the contract, which is subject to Teamster regulatory requirements, are guaranteed eight hours of work per day, which can include driving and loading/unloading trucks and maintenance of trucks. H.R. at 23-24, 30-31, 40; Ex. 2. The drivers that Castle uses are full-time employees, who work only for Castle; they are neither seasonal, temporary, short-term, nor substitute in nature. H.R. at 25-26.

Next, Castle called Thomas Fink, the president of DC, to testify. He indicated that DC is a "full-time lease provider for transportation personnel," with many clients, including Castle. H.R. at 60. He described the drivers DC provides to Castle as "long-term, full-time employees subject to the collective bargaining agreement with the union." H.R. at 62. He confirmed that the drivers are full-time and permanently assigned to Castle, until Castle no longer needs them, and do not work in a seasonal, substitute, or casual employee capacity. H.R. at 63-64, 66, 80-81. He related that on rare occasions, if a driver was unavailable for work at Castle "at the last moment," e.g., was sick, a "substitute" DC employee would be sent in that driver's stead. H.R. at 64, 69-70.

Castle concedes that in the contract between DC and Castle, the word "permanent," referencing the DC drivers' assignment to Castle, does not appear. H.R. at 36. Further, Castle explained that "casual driver," as referenced in the contract, is a "term *** carried over from the Teamsters as to reflect the junior employee of the full-time employees. *** A casual driver is the one who comes in and does the odd jobs at the low seniority position *** but his benefits, his pay is exactly the same as the remainder of the senior drivers. He's still guaranteed the eight hours, he's full time, he's 40 hours of work." H.R. at 42-43. Mr. Knopp testified that contrary to the reference in the contract for casual/temporary drivers, Castle never had a temporary driver. H.R. at 43. Further, Mr. Knopp indicated that although the contract indicates that when called to work, drivers may not be "put to work," drivers have never not been put to work. H.R. at 47-48.

As we review the foregoing, we are mindful that in *Bay Mechanical*, supra, the court reiterated "*H.R.*

Options adopts a consistent theme sounded by the BTA itself when reviewing exemption claims: when "determining whether an exception or exemption to taxation applies, it is not just the form of a contract that is important," but instead, the "crucial inquiry becomes a determination of what the seller is providing and of what the purchaser is paying for in their agreement." *Excel Temporaries, Inc. v. Tracy*, BTA No. 97-T-257, *** (Oct. 30, 1998) (applying the permanent-assignment exception before *H.R. Options*)." Id. at ¶23. The court went on to conclude that "*H.R. Options* teaches that supplying personnel on an exempt basis under R.C. 5739.01(JJ)(3) means that the employees are actually provided to work for an indefinite period—i.e., that they are not serving as seasonal workers, as substitutes for regular employees on leave, or as labor needed to meet a short-term workload. It follows that a contract can contain all the right language, but if a particular employee is seasonal, substitutional, or on a short-term-workload assignment, the provider is not "supplying" that employee "pursuant to" the agreement for purposes of qualifying for exemption under R.C. 5739.01(JJ)(3)." Id. at ¶24.

The commissioner argues that "the drivers assigned to AM Castle by DC Transportation were not permanent. AM Castle always retained the ability, and acted on that ability, to adjust to a 'sufficient number of drivers' it had assigned to its fleet, 'as required' at any given time." Commissioner Brief at 8. He goes on to argue that "the Contract provides that drivers will be assigned to AM Castle 'as required,' which indicates that AM Castle requests drivers from DC Transportation only as necessary, and according to AM Castle's business demands. *** The Contract also allows AM Castle to request that DC Transportation 'remove [a] driver from service' upon AM Castle's written request. *** But no reason for the removal request is required. *** Again, this indicates that AM Castle has retained the ability to adjust its fleet of drivers according to business need." Commissioner Brief at 9. Apparently, because the contract does not state, with specificity, how many drivers will ultimately be assigned to Castle, the commissioner concludes that the drivers are not, therefore, assigned "permanently." As further support for that conclusion, the commissioner cites the collective bargaining agreement as giving Castle the right to "refuse to accept, displace, or discharge drivers provided by DC Transportation for 'valid business or economic reasons,' or authorizing the use of 'casual' drivers.

We find no requirement in R.C. 5739.01(JJ)(3), or caselaw interpreting it, that the number of employees, as set out in the contract authorizing employment services, must be a static, specific number, which cannot be varied or adjusted based upon extrinsic factors, such as changes in business/operating conditions or employee performance; such specificity would require a level of certainty, as to the provider's and recipient's future business requirements, that clearly would be difficult, if not impossible, to predict. Instead, we find such provision requires the taxpayer claiming the exemption to have the intent to maintain the employees provided to it, on an ongoing basis, for at least a year, with no particular end in sight to the assignment, beyond the year, as opposed to on a temporary or seasonal basis. Based upon Castle's witnesses' testimony about Castle's and DC's course of action under the contract, as well as the terms of the contract, we conclude that it was both Castle's and DC's intent for DC to provide permanent drivers to Castle, as demonstrated through Castle's ongoing, long-term relationships with many of the same drivers over many years. Ex. 1; H.R. at 26-27, 80-81.

Thus, based upon the foregoing, this board concludes that Castle has met its burden of proof herein, and, as such, we find that the Tax Commissioner's findings were unreasonable and unlawful as they related to the employment services transactions. It is the decision and order of the Board of Tax Appeals that this matter be remanded to the Tax Commissioner to remove from the subject assessment all tax associated with services provided by DC to Castle, as we find they are excluded, pursuant to R.C. 5739.01(JJ)(3), i.e., $192,909.94, Castle Brief at 9; Commissioner Brief at 4; further, all interest and penalties associated with such tax must also be removed from the assessment.

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

Kathleen M. Crowley, Board Secretary