

ORIGINAL

FILED/RECEIVED
BOARD OF TAX APPEALS

AUG 13 PM 3:35

In the
Supreme Court of Ohio

Accel, Inc.,

Appellee,

v.

Joseph W. Testa,
Tax Commissioner of Ohio,

Appellant.

FILED :
AUG 13 2015 :
CLERK OF COURT :
SUPREME COURT OF OHIO :

15-1332

Case No. _____

On Appeal from the
Ohio Board of Tax Appeals

BTA Case No. 2012-2840

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

Christian M. Bates, Esq.
Joseph G. Corsaro, Esq.
Scott R. Poe, Esq.
Corsaro and Associates Co., LPA
28039 Clemens Road
Westlake, OH 44145
CBates@Corsarolaw.com

*Counsel for Appellee
Accel, Inc.*

MICHAEL DEWINE (0009181)
Ohio Attorney General

DANIEL W. FAUSEY* (0079928)
** Counsel of Record*
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
614-995-9032
866-513-0356 fax
Daniel.fausey@ohioattorneygeneral.gov

*Counsel for Appellant
Joseph W. Testa, Tax Commissioner of Ohio*

Appellant, Joseph W. Testa, Tax Commissioner of Ohio, gives his notice of his appeal as of right, under R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, journalized and entered on July 15, 2015, that reversed in part and affirmed in part the Tax Commissioner's Final Determination regarding Appellee Accel's claim for exemption from Ohio sales and use tax. That Decision and Order is attached as Exhibit A.

The Tax Commissioner sets forth the following errors in the Board's decision:

1. The Decision and Order of the Board of Tax Appeals is unreasonable and unlawful.

2. The BTA failed to apply the appropriate standard of review, that “[a]bsent a demonstration that the commissioner’s findings are clearly unreasonable or unlawful, they are presumptively valid.” *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 123, 537 N.E.2d 1302 (1989); *Am. Fiber Sys. v. Levin*, 125 Ohio St.3d 374, ¶ 42, quoting *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 215 (1983). Instead, the BTA reviewed the findings of the Tax Commissioner *de novo* and, without holding that the Tax Commissioner’s findings were “unreasonable or unlawful,” merely substituted its own judgment for that of the Commissioner. The BTA’s decision rested on factual determinations, and did not take issue with the Tax Commissioner’s understanding of the law. Therefore, it was error for the BTA to substitute its own view of the facts for the Tax Commissioner’s. Instead, the BTA should have limited its review to whether the Commissioner’s factual findings were “reasonable” and, if so, affirmed.

3. The BTA failed to apply the correct standard of statutory construction when a person seeks exemption from taxation. This Court has repeatedly explained “tax exemptions ‘must be construed *strictly against* the taxpayer.’” *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004-Ohio-2085, 807 N.E.2d 363, ¶ 2 (emphasis sic). “In all doubtful cases exemption is denied.” *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, 876 N.E.2d 928, ¶ 7, quoting *Youngstown Metro. Hous. Auth. v. Evatt*, 143 Ohio St. 268, 273, 55 N.E.2d 122 (1944). In this case, the BTA did not strictly construe the statutes (R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ)(3)) against exemption, but instead construed them liberally in favor of exemption.

4. The BTA erred as a matter of fact and law in finding that the sales to Accel were

not used and consumed for purposes of “packaging” as that term is used in Ohio sales and use tax law. Instead, the BTA should have affirmed the Tax Commissioner’s final determination which found that the sales to Accel were used and consumed in “packaging” for Ohio sales and use tax purposes.

5. The BTA erred as a matter of fact and law in ignoring, misinterpreting, and misapplying the plain language of R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ).

6. The BTA erred as a matter of fact and law in ignoring, misinterpreting, and misapplying the precedent that interprets and applies R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ).

7. The BTA erred in misapplying the facts to the law under R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ) and the cases interpreting those provisions.

8. The BTA erred as a matter of fact and law in ignoring reliable and probative evidence that Accel was engaged in a packaging operation, including, but not limited to:

- a. Dozens of admissions by the company’s founders and its own marketing materials, that Accel is a packaging company. For instance, Accel labeled itself a contract packager on its own website, has been called a contract packaging company by its founder and co-CEO, tells clients and the media that it offers “an end-to-end innovating packaging solution” and uses the term packaging in *its own mission and vision statements*, and to describe *the purpose for its very existence*. See, TC Ex. C-K.
- b. Accel’s own tax returns and internal financial statements, wherein it self-identified its business activity as “packaging.” HT 291-98, Joint Stips.¶ 4-5;

Apt. Ex. K-O.

- c. Expert testimony by a Professor with a Phd. in Package Engineering, who teaches at Michigan State's School of Packaging, that under the commonly-accepted academic and industry standards, Accel is in the business of "contract packaging." Ex. B, Expert Report of Robert Clarke, P.5; HT 485-86, 465-66.
- d. Fact testimony and evidence that the operations at Accel meet the definition of packaging. This include placing items in a package ("Accel is enclosing products primary packages, unto a secondary unit") and that Accel's packaging materials included "wrapping" and "containers" such as shrink wrap, bubble wrap, baskets, and shipping cases. HT at 545-548. The gift baskets arrive at Accel whole, albeit in various shipping containers, and Accel merely wraps them for shipping and shelf display – all packaging functions. HT at 452, 475-77, 491-92, 545-48; see TC'x Ex. B at 13-15.

9. The BTA's erred by ignoring or misconstruing reliable and probative evidence that Accel was *not* engaged in manufacturing, including, but not limited to:

- a. Accel's majority-owner and co-CEO Tara Abraham, stated in an interview that "We [Accel] believe that manufacturing really implies primary components of the product . . . while packaging is a secondary process that comes after manufacturing. . . . Contract manufacturers manufacture the bottles and the various lotions and also fill the bottles with the lotion. Accel Inc. takes the filled bottles and puts together the gift sets." TC Ex. G.
- b. Fact testimony and evidence from Accel's own witnesses that the products

received by Accel are finished products that do not change in state or form during Accel's packaging. Instead, Accel receives the gift baskets whole, and merely wraps them for shipping and shelf display – all packaging functions. HT at 452, 475-77, 491-92, 545-48; see TC'x Ex. B at 13-15.

- c. Expert testimony by the Tax Commissioner's expert witness, Dr. Robert Clarke, testified that no change in state or form of the finished goods occurs as a result of Accel's packaging operations. HT 495, 465-66; Ex. B Expert Report of Robert Clarke at 5.

10. The BTA's erred by relying on de minimus evidence that was not reliable or probative to determine that Accel was "assembling" a "finished product," including *only*:

- a. "that Accel goes through a three-stage process to complete a gift set, including a design phase where Accel works with its client to "brainstorm ideas on how to build that gift set, how that gift set is going to be presented in an aesthetic form so that it is sellable in a retail environment." BTA Decision at 3, citing H.R. at 57.
- b. "Accel then implements the design through a fill and assembly specification to assemble the individual products into the gift set designed collaboratively by Accel and its customer." BTA Decision at 3, citing H.R. at 63-75.

These facts, even if taken as true do not amount to a "change in state or form" to constitute manufacturing and, as the testimony and exhibits established, are typical of packaging operations.

11. The BTA erred as a matter of fact and law by finding that Accel's "processes transform individual products, i.e., shampoos, lotions, shower gels, etc., into a distinct new

product – a gift set consisting of such products specifically assembled in a re-usable container, e.g., a basket.” BTA Decision at 3. Instead, the “gift set” arrives as a finished product, containing finished products (including the re-usable container) that are merely packaged for shipping, shelf life, and display. No transformation of raw materials into finished goods occurs during Accel’s process. Instead, the finished good arrives to Accel already in its final state and is merely packaged by Accel.

12. The BTA erred as a matter of law by improperly distinguishing and failing to follow this Court’s precedent, including the holding of *Fichtel and Sachs*, that “there must be some change in the state or form of a product” before it can be considered manufacturing and “[p]utting several parts in a single box does not in any way change the state or form of any of the parts.” *Fichtel & Sachs Indus., Inc. v. Wilkins*, 2006-Ohio-246, 108 Ohio St.3d 106, ¶¶ 37-38. See, also, *Sauder Wooderworking Co. v. Limbach*, 38 Ohio St.3d 175, 177, 527 N.E.2d 296, citing *Custom Beverage Packers v. Kosydar*, 33 Ohio St.2d 68, 294 N.E.2d 672 (1973) (“ the ‘transformation’ or ‘conversion’ process inherent in the ‘manufacturing’ or ‘processing’ * * * was complete prior to the furniture pieces and hardware being placed in the cartons on the packaging line.”) *Sauder Woodworking Co. v. Limbach*, 38 Ohio St.3d 175, 177 (1988).

13. The BTA erred by relying on outdated, non-controlling, and inapposite cases such as: (1) *Pretty Products, Inc. v. Limbach*, 5th Dist. Coshocton No. 85-CA-10, 1985 Ohio App. LEXIS 9344 (Nov. 15, 1985) a decision with no analysis that **predates** this Court’s controlling decision in *Fichtel* by 11 years; (2) and *United States v. Dean*, 945 F.Supp.2d 1110 (C.D. Cal. 2013) a **federal** decision from California, regarding IRS and Treasury regulations, with a lower standard for what qualifies as “manufacturing” than Ohio tax law, and having no bearing whatsoever on the applicable Ohio standard.

14. The BTA erred as a matter of fact and law by failing to apply, misapplying, misinterpreting, or ignoring the plain language of several statutes, including:

- a. R.C. 5739.01(R), which provides that “‘Assembly’ and ‘assembling’ mean attaching or fitting together parts to form a *product, but do not include packaging a product.*” (Emphasis added). The BTA held that Accel was “assembling” under this definition, which is incorrect as a matter of fact and law. As a matter of law, the process of packaging is expressly excluded from the definition of “assembling,” and therefore can never be included. As a matter of fact, Accel is engaged in packaging as explained above. Also, as a matter of fact and law, Accel is not engaged in the process of “attaching or fitting together parts to form a product.” Instead, Accel receives a finished product and merely places it in packaging materials to make it shelf-ready.
- b. R.C. 5739.01(S), which provides that “‘Manufacturing operation’ means a process in which materials are *changed, converted, or transformed into a different state or form from which they previously existed* and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. ‘Manufacturing operation’ *does not include packaging.*” (Emphasis added). As a matter of law, the process of packaging is expressly excluded from the definition of “manufacturing operation,” and therefore can never be included. As a matter of fact and law, Accel does not change the “state or form” of any items. Instead, Accel receives a finished product and merely places it in packaging materials to make it shelf-ready.

- c. R.C. 5739.012(A)(1), which provides that “(a) ‘Distinct and identifiable products’ does not include any of the following: (i) Packaging, including containers, boxes, sacks, bags, and bottles, and packaging materials, including wrapping, labels, tags, and instruction guides that accompany the retail sale of the products and are incidental or immaterial to the retail sale thereof.” All of the transactions for which Accel was assessed (other than the leased labor) meet this definition of “packaging.” Therefore, the BTA erred as a matter of fact and law by finding that Accel was not engaged in packaging.
- d. 5739.02(B)(15) which:
- i. expressly exempts sales of packaging to the *retailer, reseller* or *manufacturer* of the product “including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail.” As a matter of law, the General Assembly has already provided that sales of packaging to *retailer, reseller, and manufacturers* are exempt sales, but have not so provided for the packager. Because, as a matter of fact and law, Accel is a packager and not a reseller, retailer, or manufacturer, the BTA erred by not applying the General Assembly’s intent to tax its purchases and sales.

ii. The statute further defines “packages” thusly: “‘Packages’ includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers ‘Packaging’ means placing in a package.” All of the transactions for which Accel was assessed (other than the leased labor) meet this definition of “packaging,” as a matter of fact and law. Moreover, Accel’s business is “placing [finished goods] in a package,” as a matter of fact and law. Therefore, the BTA erred as a matter of fact and law by finding that Accel was not engaged in packaging.

15. The Board of Tax Appeals erred as a matter of law by permitting Accel to offer the testimony and report of an expert witness, Carol Ptak, on the subject of manufacturing. Accordingly, it was error for the BTA to admit her testimony or report. In this regard:

a. Ptak should not have been allowed to testify, as she lacked credibility. Ptak misstated her own credentials in her own expert report, as demonstrated during the hearing in this matter. This alone should have been the basis for excluding her testimony. Ptak’s misstatements included:

i. Ptak gave herself a degree that she doesn’t have. In her report, Mrs. Ptak lists herself as holding a Master’s Degree in Manufacturing and Materials Management from Rochester Institute of Technology (“RIT”). Appellant’s Exhibit G, App. A. But, in reality, Mrs. Ptak holds a Masters in Business Administration. HT 142. Nor does RIT offer a degree or certificate program in “Manufacturing and Materials Management.” HT 142-43; TC Ex. B at 997.

- ii. Ptak bestowed a Professorship on herself that she does not have. Mrs. Ptak lists herself as a “Professor in Operations Management” at the undergraduate and graduate level at Pacific Lutheran University.” Appellant’s Exhibit G, App. A. But she was not a “Professor.” In reality, as Mrs. Ptak herself said on the stand, she “was not hired as professor. [She] was hired as an invited distinguished executive in residence.” H.T. 139-40.
 - iii. Ptak represented that she is the “author” of books for which she was a “co-author” or merely wrote the foreword.
- b. Ptak was not qualified to testify because she lacked the requisite specialized knowledge, skill, experience, training, or education regarding both packaging and manufacturing (the physical transformation in state or form of raw materials). By her own admission, Ptak had no experience or education whatsoever with packaging processes—the exact processes at issue in this case. Moreover, Ptak’s work history and experience are all on the business side and the “supply side” of manufacturing, involving purchasing and processes that occur prior to manufacturing. She had no experience or education in processes that transform the state or form of raw materials into finished goods through design, testing, prototyping, and production.

16. Any reliance by the BTA on any testimony or report from Ptak is in error, because, for the reasons explained above, the testimony and report of Ptak are neither reliable nor probative, under this Court’s precedent. See, *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992) (“‘Reliable’ evidence is dependable; that is, it can be confidently

trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.* *
* ‘Probative’ evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.”)

17. The Board of Tax Appeals erred as a matter of fact and law by determining that Accel purchased nontaxable employment services from Resource Staffing pursuant to R.C. 5739.01(JJ)(3).

18. The BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were “permanent” within the meaning of R.C. 5739.01(JJ)(3). In so finding, the BTA ignored reliable and probative evidence that the employees were only temporary or seasonal, including:

- a. The contract between Accel and Resource Staffing expressly provided that the only positions would be “General Laborers.” ST at 192.
- b. No term of employment was provided in the contract for any employees.
- c. The Auditor explained that the labor force fluctuates with the seasons in his report.
- d. Accel’s own labor records established that the names of employees listed on the invoices changed quite often and in a temporary manner. ST at 251.
- e. Accel’s own invoices for temporary labor reflecting that the amount spent on labor fluctuates with the seasons. ST at 251. Roughly 72% of the money spent on labor by Accel was during the five months from July to November. Id. Accel spent up to seven times more on leased labor during the busy retail holiday season than it did during other times of the year. ST at 256.
- f. Accel’s own witness testified that its use of temporary labor is seasonal, rather

than permanent, and therefore does not comport with the exclusion. HT 76, 94-46. Accel's own Cost Accounting Manager Joe Scott explained that temporary labor physically produces the gift sets. HT at 76. The labor need varies from project to project, and from month to month. Id. at 94-95. Because of that seasonal fluctuation, each project requires Mr. Scott to calculate how many temporary employees are required to meet the workload needs of that specific project. Id. at 94-95. After Mr. Scott determines the number of short-term employees necessary to complete the project, he obtains the requisite temporary labor to supplement Accel's core group of employees. Id. at 95-96. According to Mr. Scott, Accel's business—being closely tied to the retail industry—increases between August and November and drops off the rest of the year. Id. at 94-95. Through the course of the audit, the State determined that in the months mentioned by Mr. Scott, Accel spends approximately twice as much as it spends the other seven months combined. See TC Ex. A at 259.

- g. The Auditing Agent testified that Accel increased its workload depending on the demands of the contract packaging job at hand and on the season. HT 253-57. And the Tax Commissioner's expert witness confirmed that meeting seasonal demand is a typical function of contract packagers who serve the retail industry. HT 472-73.
- h. Expert witness testimony established that Accel's busy season would be the retail Christmas season, which is an inherently seasonal business, wherein it would require the most temporary labor.

19. The BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were “permanent” within the meaning of R.C. 5739.01(JJ)(3). In so finding, the BTA relied on evidence that was not reliable or probative, relying *solely* on the testimony of biased, self-interested, and non-credible witnesses, that contradicted documents in the record and was not supported by any documents, including:

- a. Testimony from the owner of Resource staffing, Mr. Lluevers. Mr. Lluevers’ testimony was biased, not credible, and should have been completely disregarded by the BTA. Any reliance on his testimony is reversible error. Mr. Lluevers admitted at hearing that he has “skin in the game,” because his company had agreed to indemnify Accel if the employees were found to be taxable. HT at 333. And, Mr. Lluevers admitted that his company had its own assessments pending with the Tax Commissioner against it for exactly the same arrangements as it had with Accel for different employers. Thus, it was directly in his own self-interest to preclude his company from liability on this and other assessments and his testimony should have been afforded no weight.
- b. Self-serving testimony from Accel’s CFO that it was “in their interest” to have permanent employees, and to rehire those who had been laid off seasonally.
- c. Even accepting the testimony of Lluevers and Harms as competent and credible, such testimony did not establish that Accel had permanent leased laborers. Instead, it established at best, that it was in the company’s interest to have the same seasonal, temporary laborers return as needed by the company to meet short-term, seasonal, and fluctuating needs. The testimony failed to

establish that Accel contracted for “permanent” leased labor from Resource Staffing.

- d. Reliance solely on witness testimony in the face of contradictory testimony, documentation, and findings of the Tax Commissioner is in error as expressly in contradiction with the holding of *Bay Mech. & Elec. Corp., v. Levin*, BTA No. 2008-K-1687, 2011 WL 2446198 at *3 (June 14, 2011), affirmed by *Bay Mech. & Elec. Corp. v. Testa*, 2012-Ohio-4312, 133 Ohio St.3d 423, ¶ 14 (“The BTA found that the controller's testimony and exhibits, presenting as they did information ‘gleaned from records not before us,’ did not rise to the level of proof required by H.R. Options.”)

20. The BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were “under the supervision or control of another” within the meaning of R.C. 5739.01(JJ)(3). In so finding, the BTA ignored reliable, probative information, including:

- a. the contract between Accel and Resource Staffing expressly provided that “employees will be under Client Company’s [Accel’s] direction and control during their assignment to Client Company, and that Client Company can direct and control the employees to fulfill its business needs and to comply with any legal requirements.” ST at 185.
- b. Voluminous testimony and documentation that Accel has various lines running at all times, where packaging is performed according to varying job requests and instructions. This is Accel’s business and there was no testimony establishing that any so-called “supervisors” from Resource Staffing had any

hand in the training, placement, responsibilities, or any other day-to-day control or supervision of the employees on the various lines.

21. The BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were “under the supervision or control of another” within the meaning of R.C. 5739.01(JJ)(3). In so finding, the BTA relied on evidence that was not reliable or probative, relying *solely* on the testimony of one biased, self-interested, and non-credible witnesses, that contradicted documents in the record and was not supported by any documents, including:

- a. It was error to rely on any Testimony from Mr. Lluevers, for the reasons explained above.
- b. The BTA’s finding in this regard was based solely on a few lines of testimony from Mr. Lluevers that did not explain how Resource Staffing “supervised” the employees at all. Moreover, his testimony was only that Resource Staffing wished to have supervisor on hand to “control of the *quality* of the employees’ work.” HT at 288 (emphasis added). Such testimony fails to establish that the employees were not also, and more directly, under the supervision and control of Accel.

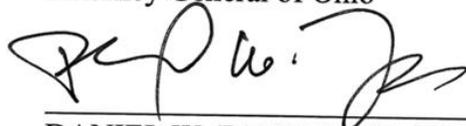
22. The Board of Tax Appeals erred by ignoring, misinterpreting, or failing to apply the express language of R.C. 5739.01(JJ), which requires that the contract between Accel and Resource Staffing provide personnel “pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” The contract between Accel and Resource Staffing did not specify that each employee assigned under the contract was to be assigned on a

permanent basis and therefore, the contract fails to meet the express statutory requirements for exclusion from sales tax for this transaction.

23. The Board of Tax Appeals erred as a matter of law by construing R.C. 5739.01(JJ)(3) to require inquiry into the particular facts and circumstances of the employment arrangement, when the express language of the statute does not so provide.

Respectfully submitted,

Michael DeWine
Attorney General of Ohio



DANIEL W. FAUSEY (0079928)
Assistant Attorney General
30 East Broad Street, 25th Floor
Columbus, Ohio 43215
Telephone: (614) 995-9032
Facsimile: (866) 513-0356
daniel.fausey@ohioattorneygeneral.gov

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

CERTIFICATE OF SERVICE

I certify that, on this 13 day of August, 2015, a true copy of the foregoing "Notice of Appeal" and "Praecipe" was served: (1) by hand delivery upon the Ohio Supreme Court, 65 S. Front Street, Columbus, Ohio 43215, and the Ohio Board of Tax Appeals, 30 E. Broad Street, 24th Floor, Columbus, Ohio 43215; and (2) by certified mail upon the following:

Christian M. Bates, Esq.
Joseph G. Corsaro, Esq.
Scott R. Poe, Esq.
Corsaro and Associates Co., LPA
28039 Clemens Road
Westlake, OH 44145
CBates@Corsarolaw.com

*Counsel for Appellee
Accel, Inc.*



Daniel W. Fausey

OHIO BOARD OF TAX APPEALS

ACCEL, INC., (et. al.),

CASE NO(S). 2012-2840

Appellant(s),

(USE TAX)

vs.

DECISION AND ORDER

JOSEPH TESTA, (et. al.),

Appellee(s).

APPEARANCES:

For the Appellant(s)

- ACCEL, INC.
Represented by:
CHRISTIAN BATES
CORSAO & ASSOCIATES CO., LPA
28039 CLEMENS ROAD
WESTLAKE, OH 44145

For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
DANIEL W. FAUSEY
ASSISTANT ATTORNEY GENERAL
OFFICE OF OHIO ATTORNEY GENERAL
30 EAST BROAD STREET, 25TH FLOOR
COLUMBUS, OH 43215-3428

Entered Wednesday, July 15, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

Appellant appeals a final determination of the Tax Commissioner wherein he largely affirmed a use tax assessment issued as a result of an audit of appellant's purchases from January 1, 2003 through December 31, 2009. This matter is considered upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, the record of this board's hearing ("H.R."), and the parties' briefs. Upon consideration of the commissioner's motion to strike a portion of appellant's post-hearing brief, i.e., footnote 6, said motion is hereby denied.

Appellant ("Accel") described itself in its post-hearing brief as "a unique company that assembles gift sets, consisting primarily of health and beauty products (i.e., shampoos, lotions, shower gels, etc.), for major retailers such as Bath and Body Works and Victoria's Secret." Appellant's Post-Hearing Brief at 1. Following an audit of Accel's purchases, the Tax Commissioner assessed Accel use tax for "packaging materials" used in its operations and its purchased labor. Accel filed a petition for reassessment, which raised numerous objections, including, relevant to this matter: exemption as a manufacturer under R.C. 5739.02(B)(42)(a), double taxation, exemption as a packager under R.C. 5739.02(B)(15), exception for resale transactions under R.C. 57309.01(E), exemption of delivery charges under R.C. 5739.02(B)(11), exception for leased long-term labor under R.C. 5739.01(JJ)(3), statute of limitations, and constitutional objections. Accel also asked that the penalty and interest be abated. The commissioner, for the most part, rejected Accel's objections, and the present appeal ensued.

At this board's hearing, Accel's president and co-CEO, David Abraham, testified about Accel's operations. Although Mr. Abraham acknowledged that Accel markets itself as a "packager," he explained that it does so to distinguish itself from "pick and pack" companies who simply put finished products in shipping boxes. He explained that Accel, in contrast, designs gift sets, in consultation with its clients, and attaches end-user items into a non-disposable "package." H.R. at 28. Accel also presented the testimony of Joe Scott, its cost accounting manager, who explained the steps taken by Accel to create its gift sets, and Dan Harms, CFO, who testified about Accel's labor arrangements with Resource Staffing. Further, Accel called Moises Lluervers, CFO of Resource Staffing to testify regarding Accel's arrangements to purchase labor from Resource Staffing during the period in question.

Both Accel and the commissioner presented expert testimony in support of their respective positions. Accel presented Carol Ptak, its offered expert witness in manufacturing, who testified about the definition of manufacturing used by the American Production and Inventory Control Society ("APICS"), and opined that Accel's operations would meet such definition as a manufacturer. The Tax Commissioner presented Dr. Robert Clarke, professor at the School of Packaging at Michigan State University, who opined that Accel merely packaged products, rather than transformed them into another product. After the hearing, the commissioner moved this board to reconsider the attorney examiner's ruling qualifying Ms. Ptak as an expert witness on the manufacturing process. The motion is hereby overruled; however, the objections are considered in our determination of the weight to be given Ms. Ptak's opinion in our ultimate determination.

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.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided, with it being the obligation of the user to file a return and remit tax on the purchase of such items when tax was not paid to a seller. R.C. 5741.12. The legislature has also provided numerous exemptions and exceptions to the collection of sales tax, and, through R.C. 5741.02(C)(2), has mandated that if the acquisition of an item within the state would not be subject to tax, then the item's use within the state is correspondingly not subject to tax. However, "[s]tatutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto." *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus. See, also, *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Highlights for Children, Inc. v. Collins* (1977), 50 Ohio St.2d 186.

At the outset, we acknowledge Accel's claims that the assessment is unconstitutional under the Supremacy Clause of the U.S. Constitution and the Equal Protection Clauses of the U.S. and Ohio constitutions. The Ohio Supreme Court has authorized this board to accept evidence on constitutional points; however, it has also clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Therefore, we acknowledge Accel's constitutional claims, but make no findings in relation thereto.

We further note that Accel failed to make any further argument regarding its stated error regarding the taxation of delivery charges pursuant to R.C. 5739.02(B)(11). Accordingly, we find that Accel has failed to show the error in the commissioner's determination, and hereby affirm the commissioner's final determination as to this issue.

Turning to Accel's main argument, as a threshold matter, this board must determine whether Accel's activities constitute "manufacturing," "assembly," or "packaging." If Accel's operations qualify as manufacturing or assembly, it argues, the purchases at issue in the assessment qualify for exemption under R.C. 5739.02(B)(42)(a) and (g), which exempt from the sales tax, and corresponding use tax, "[s]ales where the purpose of the purchaser is to *** incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining" or "use the thing transferred *** primarily in a manufacturing operation to produce tangible personal property for sale." If not exempt under R.C. 5739.02(B)(42), Accel argues that it alternatively qualifies for exemption under R.C. 5739.02(B)(15) which exempts sales to those engaged in retail sales. The commissioner, on the other hand, argues that Accel's operations are merely "packaging," for which exemption is only permitted for those engaged in manufacturing and/or retail sales. Accordingly, we must initially determine whether Accel's operations constitute "packaging."

Packaging is defined in R.C. 5739.02(B)(15) as "placing in a package;" that section also defines "packages" to include "bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers." In *Custom Beverage Packers, Inc. v. Kosydar* (1973), 33 Ohio St.2d 68, 73, the Supreme Court added to these definitions by stating that packages "restrain movement of the packaged object in more than one plane of direction." Thereafter, in *Cole Natl. Corp. v. Collins* (1976), 46 Ohio St.2d 336, the court further found that "an item that prevented movement in more than one plane of direction, ***, was not a package if its predominant economic purpose was to facilitate the marketing of the taxpayer's products rather than to package the products." *Newfield Publications, Inc. v. Tracy* (1999), 87 Ohio St.3d 150. The *Newfield* court added that "the function of a package is to contain a product for shipping or handling." *Id.* at 153.

The evidence presented by Accel indicates that it does more than merely package products. Accel argues that its processes transform individual products, i.e., shampoos, lotions, shower gels, etc., into a distinct new product – a gift set consisting of such products specifically assembled in a re-usable container, e.g., a basket. Mr. Scott testified at this board's hearing that Accel goes through a three-stage process to complete a gift set, including a design phase where Accel works with its client to "brainstorm ideas on how to build that gift set, how that gift set is going to be presented in an aesthetic form so that it is sellable in a retail environment." H.R. at 57. Accel then implements the design through a fill and assembly specification to assemble the individual products into the gift set designed collaboratively by Accel and its customer. H.R. at 63-75. This process is similar to that discussed in *Pretty Products, Inc. v. Limbach*, 5th Dist. Coshocton No. 85-CA-10, 1985 Ohio App. LEXIS 9344 (Nov. 15, 1985), where the court found that the attachment of a cardboard header to car mats created a new, distinct product that constituted manufacturing. Such processes are in stark contrast to, for example, the mere "packaging" performed by the taxpayer in *Fichtel & Sachs Industries, Inc. v. Wilkins*, 108 Ohio St.3d 106, 2006-Ohio-246, where clutch kits were simply taken from inventory bins and put in a single box to fill a customer's order. See, also, *B.J. Alan Co. v. Zaino* (Jan. 26, 2001), BTA No. 1999-J-448, unreported. Compare, *Natl. PharmPak Services, Inc. v. Lawrence* (July 27, 2001), BTA No. 1999-M-1014, 1015, 1016, unreported. While we agree with the commissioner that the federal district court's decision in *United States v. Dean* (C.D. Cal. 2013), 945 F.Supp.2d 1110, is not persuasive on an issue of Ohio tax law, the court's decision and description of a similar gift set operation in the context of federal tax law highlights the unique nature of a gift set as a discrete consumer good. See, also, H.R., Ex. G at 1-2. We therefore find that Accel's activities do not constitute packaging.

Having found that Accel's operations do not meet the definition of "packaging," we turn to whether its operations are "manufacturing" or "assembly." We agree with the commissioner's contention that Accel does not engage in manufacturing as that term is traditionally understood in the sales and use tax context. See *Sauder Woodworking Co. v. Limbach* (1988), 38 Ohio St.3d 175, 176 ("An operation which merely enhances the value of the product without producing a change in state or form does not constitute processing."). However, we do find that Accel engages in assembly for purposes of R.C. 5739.02(B)(42)(a). "Assembly" is defined in R.C. 5739.01(R) as "attaching or fitting together parts to

form a product, but do[es] not include packaging.” In *Scholz Homes, Inc. v. Porterfield* (1971), 25 Ohio St.2d 67, 72, the Supreme Court explained that assembly “means more than the mere gathering together of fabricated materials;” rather, assembly is putting together various parts to make an operative whole.

In *Express Packaging, Inc. v. Limbach* (Sept. 18, 1992), BTA No. 1989-K-22, unreported, this board addressed the packaging exemption allowed to manufacturers in the context of a taxpayer that “custom packag[ed] goods which [were] previously manufactured by appellant’s customers into ‘units’” and which were received by the appellant “in large quantities or bulk form and *** subsequently combined by appellant in different quantities and assortments.” In that case, we found that simply placing prepared spices into bottles, and capping and labelling those bottles, did not constitute manufacturing. The Supreme Court similarly found that a “pick and pack” operation did not constitute manufacturing. *Fichtel & Sachs*, supra. Here, the record clearly demonstrates that Accel does more than simply put consumer goods into a carton, as was the case in *Express Packaging*. See, H.R. at 57-75. Indeed, Accel refers to its day-to-day operations as assembly, based on the Fill and Assembly specifications written during its collaborative design process with its customers. See H.R., Ex. S. Based upon the foregoing, we find that Accel engages in assembly for purposes of R.C. 5739.02(B)(42)(a), and, therefore, its purchases of “packaging material” are exempt from use tax.

Having so found, we will not further address Accel’s argument regarding the resale exception in R.C. 5739.01(E).

Accel also appealed the commissioner’s determination regarding its purchases of leased labor from Resource Staffing and Manpower. Initially, we note the commissioner’s objection to exhibits X and Y, an October 6, 2006 amendment to Resource Staffing’s contract with Accel and a summary of employees provided by Resource Staffing to Accel and their respective tenures, respectively. The commissioner represents that the documents were subpoenaed by him prior the hearing, but that such documents were not produced until the eve of hearing, and, despite being introduced by Accel at hearing, were not disclosed in accordance with this board’s rules. See Ohio Adm. Code 5717-1-15(I). The commissioner further argues that the documents are inadmissible hearsay. Upon review of the arguments and Accel’s responses thereto, the objections are well taken and exhibits X and Y are stricken from the record.

Purchases of “employment services,” are taxable under R.C. 5739.01(JJ); however, “[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 by the contract is assigned to the purchaser on a permanent basis” is exempt. R.C. 5739.01(JJ)(3). The parties do not dispute that the contract with Resource Staffing was for a period of at least one year. The Supreme Court explained in *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, ¶21, that assigning an employee on a permanent basis means assigning the employee with an indefinite end date, not as a substitute for a current employee who is on leave, and not to meet seasonal or short-term workload conditions. In his final determination, the commissioner found that the number of employees assigned to Accel under its contracts with Resource Staffing and Manpower, which was verbal only, fluctuated with the seasons, based on the dollar amount spent on such labor by Accel. S.T. at 9. The commissioner also noted that the names of specific employees assigned to Accel “changed quite often in a temporary manner.” S.T. at 10, quoting Auditor’s Remarks, pg. 13. The commissioner further rejected Accel’s arguments that its labor purchases were exempt under the resale and manufacturing exemptions.

Accel argues that employees were assigned on a permanent basis. It cites the testimony of Mr. Harms and Mr. Luevers, who indicated that the intent was to have permanent employees to avoid the need for constant training of new employees and to provide needed continuity. While Accel acknowledged that it occasionally became behind on its bills, resulting in less than its full staffing needs being met, Mr. Luevers testified that, in such instances, the hours of each employee were proportionately cut back, rather than entire employees being withheld. H.R. at 341-342. Moreover, Accel cites this board’s decision in *Excel Temporaries, Inc. v. Tracy* (Oct. 30, 1998), BTA No. 1997-T-257, unreported, where we found that even a

high degree of turnover of individual employees supplied under such a contract does not defeat a claim of exception under R.C. 5739.01(JJ)(3). *Id.* at 13. In response, the commissioner noted Mr. Scott's testimony that employee needs were determined on a project-by-project basis.

The testimony of Mr. Harms and Mr. Lluevers indicates that Resource Staffing assigned employees permanently to Accel; indeed, doing so was part of Resource Staffing's unique business model. H.R. at 288-290, 307-309. While we acknowledge the existence of some turnover of employees, we agree with Accel that such turnover does not obviate exception under R.C. 5739.01(JJ)(3). *Excel Temporaries*, *supra*. Further, we find the commissioner's arguments regarding the fluctuating hours required by Accel in conjunction with Accel's production levels to be unavailing. The concept of temporary or seasonal labor implies that employees are assigned for a short time period; the testimony presented at this board's hearing indicates that Accel adjusted its labor needs for each project by decreasing each employees' hours, rather than by accepting a smaller number of employees during less busy time periods. H.R. at 341-342. However, employees were not reassigned elsewhere and remained assigned to Accel for an indefinite period. H.R. at 330. We find nothing in the statute or related case law that requires that employees work a consistent number of hours. Rather, it is only required that the employees be assigned on a permanent basis. Based on the record before us, we find that Resource Staffing supplied personnel to Accel on such a basis during the time period in question.

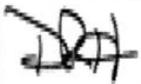
Moreover, Accel argues that the employees provided by Resource Staffing were not "under the supervision or control of another," as is required to meet the definition of "employment service" in R.C. 5739.01(JJ). The testimony of Mr. Lluevers indicated that Resource Staffing supplied supervisors, on its own payroll, not Accel's, to supervise and direct the employees provided for Accel's production activities. H.R. at 327-238.

While Accel argues that its relationship with Manpower was similar to its relationship with Resource Staffing, we find the only evidence of Manpower's provision of employment services was the affidavit of David Abraham, previously provided to the commissioner. Given the lack of specific evidence, as was presented with regard to Resource Staffing, we are unable to conclude that the commissioner erred in his determination regarding the employment services provided by Manpower.

Finally, Accel argues that the commissioner erred in failing to abate penalties and pre-assessment interest. It cites to R.C. 5703.58(B), which states that "the commissioner shall not make or issue an assessment against a consumer for any tax due under Chapter 5741 of the Revised Code, or for any penalty, interest, or additional charge on such tax, if the tax was due before January 1, 2008." That section, however, was not enacted and effective until September 29, 2011. As the commissioner correctly notes, the underlying assessment in this matter was made/issued on January 18, 2011. We therefore find that the prohibition in R.C. 5703.58(B) has no bearing in this matter. Although Accel made no further argument beyond its original notice of appeal relating to penalties and interest, specifically under R.C. 5741.99(C), R.C. 5739.133(A)(3), and R.C. 5741.14, we find that the commissioner made no error in his assessment of penalties and interest.

Based upon the foregoing, the final determination of the Tax Commissioner is hereby affirmed in part and reversed in part.

BOARD OF TAX APPEALS

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