

IN THE SUPREME COURT OF OHIO

THE CINCINNATI REDS, LLC)	Appeal from the Ohio Board
)	of Tax Appeals
Appellant,)	
)	Board of Tax Appeals
vs.)	Case No. 2015-1707
)	
JOSEPH W. TESTA,)	
TAX COMMISSIONER OF OHIO,)	
)	
Appellee.)	

NOTICE OF APPEAL OF APPELLANT THE CINCINNATI REDS, LLC

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Counsel for Appellee,
Joseph W. Testa, Tax Commissioner

NOTICE OF APPEAL OF APPELLANT, THE CINCINNATI REDS, LLC

Appellant, The Cincinnati Reds, LLC (the “Reds”), hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, to the Ohio Supreme Court from the Decision and Order of the Board of Tax Appeals (“Board”) journalized on May 22, 2017 in *The Cincinnati Reds, LLC v. Joseph W. Testa, Tax Commissioner of Ohio*, BTA Case No. 2015-1707. A true copy of the Decision and Order of the Board being appealed is attached as Exhibit A and incorporated herein by reference.

INTRODUCTION

The Tax Commissioner of Ohio (“Commissioner”) assessed use tax against the Reds for, among other things, promotional items (e.g., bobbleheads, player cards, and other Reds’ themed memorabilia) conveyed to attendees of certain major league baseball games in the same form as had been purchased by the Reds. However, the Reds are entitled to the resale exception/exemption under R.C. 5739.01(E) since it resold the promotional items as part of its ticket sales. The Reds provide the promotional items to induce ticket sales by supplementing the value for tickets to games which may not be as highly desired. The fans purchasing tickets to these games know they will, and expect to, receive the promotional items when the tickets are purchased. This is because the Reds advertise the promotional items to induce ticket sales to these games several months in advance. Further, the Reds are obligated to convey the promotional items to attendees consistent with its advertisements and other representations.

Therefore, the price paid for the ticket includes consideration for the promotional item. Accordingly, the Reds purchase of such items is exempt from tax since the items are resold to game attendees.

ERRORS TO BE REVIEWED

The Reds complains of the following errors in the Board's Decision and Order:

1. The Board erred in finding that promotional items (e.g., bobbleheads, player cards, and other Reds' themed memorabilia) were not resold as part of its ticket sales. The Board's finding is based upon the fact that the Reds do not separately state a charge for the promotional items. However, no separate price needs to be stated for an item to be resold. *See G&J Pepsi Bottling, Inc. v. Limbach*, 48 Ohio St.3d 31 (1990); and *Electrolert, Inc. v. Limbach*, BTA Case No. 89-J-94 (Mar. 19, 1993). The Reds resold the promotional items in this case because: (a) the promotional items induced the ticket purchases; (b) customers knew they would receive, and expected to receive, the promotional items when purchasing the tickets; and (c) the Reds were obligated to provide fans who purchased tickets and attended the game with promotional items consistent with the advertisements and other representations for these games. Thus, the Reds received consideration from those purchasing tickets for the promotional items so that a "sale" of the promotional items occurred, as defined in R.C. 5739.01(B)(1), thereby entitling the Reds to the resale exemption upon their purchase.

2. The Board erred in finding that uniform ticket prices precludes a finding that the Reds received consideration for the promotional items transferred to attendees. Ohio retailers and other businesses often offer special promotional giveaways for sales made on a particular day or at a particular time, and subject to availability. When receipt of such items by the purchaser is conditioned on making a purchase, a portion of the consideration received by the retailer is paid for the promotional items. Therefore, the Board erred by concluding that the Reds did not receive consideration for the promotional items. *Kansas City Royals Baseball Corp. v. Dir. of Rev.*, 32 S.W.3d 560 (Mo. 2000) ("Although the promotional items are ostensibly given away, the cost of

purchasing those items is factored into the price charged for each ticket of admission to a Royals game. This is sufficient consideration to find that a resale has occurred and that the corporation, therefore, owes no use tax on the promotional items.”).

3. The Board erred by finding that “the cost of the subject promotional items is not included in the ticket price.” As the Board noted, the Reds’ chief financial officer testified that the cost of the promotional items, as well as the cost of inventorying, advertising, and distributing such items, was incorporated into the Reds’ ticket prices. No evidence was introduced disputing this fact. Accordingly, the Board acted unreasonably and unlawfully in making this finding due to the absence of any probative evidence supporting this fact.

4. The Board erred by concluding that the promotional items were gifts. Rather, the promotional items were not conveyed as gifts, as attendees paid the ticket price to receive admission to the game and the promotional items, which the Reds were obligated to convey.

CONCLUSION

For the foregoing reasons, the Reds respectfully requests that the Decision of the Board be reversed. The Reds requests that final judgement be entered in its favor voiding the Board’s Decision and ordering the Commissioner to cancel the tax assessed against the Reds on the promotional items since their purchase by the Reds qualified for the resale exception/exemption of R.C. 5739.01(E).

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC

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Counsel for Appellant, The Cincinnati Reds, LLC

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by **certified** mail, postage prepaid and through the electronic filing system of the Board of Tax Appeals this 21st day of June 2017 to:

Daniel Fausey
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/s/ Steven A. Dimengo

Steven A. Dimengo #0037194

Counsel for Appellant,

The Cincinnati Reds, LLC

CERTIFICATE OF FILING

The Appellant, The Cincinnati Reds, LLC, hereby certifies to the Ohio Supreme Court that he filed this Notice of Appeal with the Board of Tax Appeals on the 21st day of June 2017. A copy of the Notice of Appeal filed with the Board of Tax Appeals is attached hereto.

/s/ Steven A. Dimengo

Steven A. Dimengo #0037194

Counsel for Appellant,

The Cincinnati Reds, LLC

STATE OF OHIO

THE CINCINNATI REDS, : Case No. _____
: :
Appellant, : Appeal from the Ohio Board of Tax Appeals
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v. : :
: :
JOSEPH W. TESTA, : :
TAX COMMISSIONER OF OHIO : :
: :
Appellee. : :

PRAECIPE

TO THE BOARD OF TAX APPEALS:

Demand is hereby made that the Ohio Board of Tax Appeals (“Board”) prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the records and proceedings of the Board pertaining its Orders in the above-styled matter; including in said certified transcript, the Board’s Orders, the original papers in the case or a transcript thereof, and all evidence with originals or copies of all exhibits as adduced in said proceeding considered by the Board in making its Orders.

Respectfully submitted,

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC

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