

OHIO BOARD OF TAX APPEALS

Larry Marshall dba Larry Marshall Janitorial,)	
)	
)	CASE NO. 98-P-923
Appellant,)	
)	
vs.)	(SALES TAX)
)	
Roger W. Tracy, Tax Commissioner of Ohio,)	
)	DECISION AND ORDER
)	
Appellee.)	

APPEARANCES:

For the Appellant -

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For the Appellee -

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ENTERED: August 10, 2001

Mr. Johnson, Ms. Jackson, and Ms. Margulies concur.

This cause and matter came on to be considered by the Board of Tax Appeals upon a notice of appeal from a final determination of the Tax Commissioner. Mr. Marshall asserts that he is not responsible for sales tax for the period of January 1, 1993 through March 22, 1993 because the applicable section of Amended Substitute House Bill 904 did not become effective until March 22, 1993. Pursuant to R.C. 5717.02, the outstanding issues were submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript certified to this Board by the Tax Commissioner, and the record of the testimony presented

at a hearing. Although duly notified, no appearance was made on behalf of Mr. Marshall at the hearing.

In reviewing the appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *See Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121, 123. 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. *See Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143; *see also Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138, 142. Moreover, the taxpayer is assigned the burden of showing in what manner and to what extent the Tax Commissioner's determination is in error. *See Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215.

Mr. Marshall is the sole proprietor of Larry Marshall Janitorial, and has janitorial service contracts in Muskingum County. Through an unrelated investigation it was discovered that Mr. Marshall was conducting janitorial sales for profit in excess of five-thousand (\$5,000.00) dollars a year, without paying sales tax. (S.T., p. 7). An audit was conducted of Mr. Marshall's business, and upon completion, the Tax Commissioner issued his final determination:

“The Tax Commissioner came to consider the above-styled matter, and being fully advised thereon finds that:

“This assessment arose from an audit of the petitioner's sales for the period January 1, 1993, through August 31, 1995. The petitioner filed a timely petition for reassessment and request for a personal appearance hearing. At the hearing on this matter, the petitioner and his representative, Robert Deitrick were present. The petitioner requested remission of the penalty, the interest, and the additional charge.

“Given the circumstances in connection with this matter, the request for remission of the penalty is allowed as noted below. The request for abatement of the additional charge is denied.

“Turning to petitioner’s additional request, the General Assembly has not given the Tax Commissioner discretion to abate preassessment interest. Hence, the Commissioner has no jurisdiction to consider the petitioner’s request for remission of preassessment interest. Accordingly, the petitioner’s claim must be denied.

“It is the order of the Tax Commissioner that if payment of

	ASSESSMENT	PENALTY	TOTAL
Sales Tax	\$4,672.90	\$0.00	\$4,672.90
Preassessment Interest	\$546.98	\$0.00	\$546.98
Additional Charge	\$467.30	\$0.00	\$467.30
		Total -----	\$5,687.18

is made within thirty (30) days after receipt by the taxpayer of this final determination, the assessment shall stand as adjusted in the above amount. If this matter is appealed to the Board of Tax Appeals, to an appropriate Court of Appeals, or to the Supreme Court, said thirty (30) day period shall begin to run from the date the entry of the Board of Tax Appeals is filed or the decision of an appropriate Appeals Court or the Supreme Court is rendered.

“If the total amount is not paid as above provided, the assessment shall stand as issued in the following amount:

	ASSESSMENT	PENALTY	TOTAL
Sales Tax	\$4,672.90	\$700.93	\$5,373.83
Preassessment Interest	\$ 546.98	\$ 0.00	\$ 546.98
Additional Charge	\$ 467.30	\$ 70.10	\$ 537.40
		Total -----	\$6,458.21

“The law provides that the unpaid amount of tax and additional charge bear interest from July 14, 1996, to the date of payment. This interest is in addition to either of the above

total amounts and is due even when payment is made within the thirty-day period described above. ***”

Mr. Marshall’s petition for reassessment, filed with the Tax Commissioner, pursuant to R.C. 5739.13 states:

“I object to the penalties, interest and additional charges. I was unaware of H.B. 904 (effective 1-1-93) which subjected my janitorial service to sales tax, and my paid tax preparer at the time did not inform me of my sales tax liability. I want to pay the sales tax due, but am requesting remission of the penalties, additional charges, and interest.”

Mr. Marshall asserted the following in his notice of appeal filed September 18, 1998:

“Now comes Larry Marshall dba Larry Marshall Janitorial, and appeals from the final determination of the Tax Commissioner as follows:

“1. The Tax Commissioner erred in failing to abate the additional charge levied on the taxpayer, where the taxpayer did not know of the change in the sales tax law resulting from Amended Substitute House Bill 904, signed into law on December 22, 1992, as passed by the 119th General Assembly, and was not informed of the effect of Amended Substitute House Bill 904 by the accountant who prepared his returns.

“2. The Tax Commissioner erred in assessing sales tax based upon R.C. § 5739.01, as set forth in Amended Substitute House Bill 904, where such change in the tax law was not pursuant to a declaration of emergency but took effect less than ninety-one (91) days subsequent to the enactment of Amended Substitute House Bill 904, 119th General Assembly.

“3. As a result of the effective date of Amended Substitute House Bill 904 not becoming effective until approximately

the second quarter of 1993, the Tax Commissioner erred in assessing sales tax liability against the taxpayer for a period in which he was not responsible for the collection and payment of sales tax.

“4. The Tax Commissioner erred in denying the taxpayer’s request for abatement of interest based upon the questionable validity of the statute which imposed the substantive tax upon the taxpayer. ***”¹

Inadequate Specificity of Error in the Petition For Reassessment

The Tax Commissioner has challenged the jurisdiction of the Board of Tax Appeals to hear this matter based upon alleged insufficiency of the petition for reassessment. It is well settled that the Board of Tax Appeals does not have jurisdiction to consider assignments of error not set forth in the petition for reassessment. *See CNG Development Co. v. Limbach* (1992), 63 Ohio St.3d 28, 32. To invoke the right to review of a particular error a taxpayer must set forth the error with specificity in the petition for reassessment. *Id.* While Paragraph 3 of the notice of appeal unequivocally raises the effective date issue, the petition for reassessment does not raise the issue. (S.T., p. 4). Instead, Mr. Marshall’s petition for reassessment sought only remission of penalties, interest and other charges. Consequently, the Board does not have jurisdiction of the effective date issue.

Any claimed abuse of discretion on the part of the Tax Commissioner must be shown to be “unreasonable, arbitrary and unconscionable.” *Southwestern Portland Cement Co. v. Limbach* (1991), 57 Ohio St.3d 22, 23; *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67, 70. Mr. Marshall has not established any abuse of the Tax Commissioner’s discretion. It is noted that the Tax Commissioner

¹ Mr. Marshall’s notice of appeal refers to the Tax Commissioner’s denial of “request for abatement of interest.” However, the Tax Commissioner only denied a request for abatement of the additional charge. The Tax Commissioner cited a lack of jurisdiction to consider the request for abatement of preassessment interest.

remitted the penalty assessed against Mr. Marshall and retained the additional charges.

Upon review of R.C. 5739.02 and R.C. 5739.01(B)(3)(j), it is apparent that one of the effects of H.B. 904 was to enact a *state sales tax levy* upon janitorial services. All state tax levies are subject to the referendum exception in Section 1d, Article II of the Ohio Constitution. Even if we had jurisdiction of the issue of the effective date, it is clear that any enactment of a tax levy, whether real estate or excise, is effective on passage. *State v. Forney* (1923), 108 Ohio St. 463, 464.

If Mr. Marshall is alternatively challenging the constitutionality of the statute, the Board notes that it does not have jurisdiction to consider such a challenge for two reasons. First, the petition for reassessment did not reference or indicate any challenge to the statute on its face. (S.T., p. 5). Second, the Board does not have jurisdiction to determine the constitutionality of a law on its face. *See Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, 231; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198.

Giving consideration to the facts, the statutes, the case law and applicable constitutional provisions, it is the Decision of the Board of Tax Appeals that the final order of the Tax Commissioner must be and hereby is affirmed.

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