OHIO BOARD OF TAX APPEALS

THE CINCINNATI REDS, LLC, (et. al.),

Appellant(s),

vs.

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

Appellee(s).

CASE NO(S). 2015-1707

(USE TAX)

DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - THE CINCINNATI REDS, LLC
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For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
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Entered Monday, May 22, 2017

Mr. Harbarger, Ms. Clements, and Mr. Caswell 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 The Cincinnati Reds, LLC ("the Reds"). In such determination, the commissioner adjusted a use tax assessment against the Reds, relating to the period of January 1, 2008 through December 31, 2010. We consider this appeal upon the notice of appeal, the statutory transcript certified to this board by the Tax Commissioner ("S.T."), the evidence and testimony presented at a hearing before this board ("H.R."), and the written argument submitted by the parties.

The findings of the Tax Commissioner are presumed valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). 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*, 38 Ohio St.2d 135 (1974); *Midwest Transfer Co. v. Porterfield*, 13 Ohio St.2d 138 (1968). 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*, 72 Ohio St.3d 347 (1995); *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213 (1983). 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. *Kroger Co. v. Limbach*, 53 Ohio St.3d 245 (1990); *Kern*, supra; *Alcan*, supra.

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. As a result of the basic presumption that every sale or use of tangible personal property in this state is taxable, however, it is well settled that the laws relating to exemption from taxation are to be strictly construed. *Ball Corp. v. Limbach*, 62 Ohio St.3d 474 (1992); *Highlights for Children, Inc. v. Collins*, 50 Ohio St.2d 186 (1977).

The Reds are a professional baseball team operating in Cincinnati, Ohio. The Department of Taxation conducted an audit of the Reds' purchases, which ultimately resulted in an assessment. S.T. at 97-105. Although other issues were pursued through its petition for reassessment before the Tax Commissioner, and initially on appeal to this board, the Reds have narrowed their objections to the Department's assessment of use tax on its purchases of promotional items. Per the Reds, "[t]he sole issue before the Board is whether promotional items conveyed by The Cincinnati Reds LLC *** to game attendees are resold as part of the price of the admission ticket." Brief at 1. Specifically, the Reds contend that its purchases of such items are exempt from sales tax as a "sale for resale," pursuant to R.C. 5739.01(E), which provides that "'Retail sale' and 'sales at retail' include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person."

Both parties agree that the Reds' purpose in offering "promotional items, consisting of bobbleheads, player cards, and other Reds-themed memorabilia and gear," is to increase ticket sales. Brief at 2. The Reds essentially argue that the cost of all of the promotional items offered throughout a season, as well as the associated costs of "inventorying, advertising and distributing the items," are incorporated into the ticket prices, which are determined prior to the start of such season, as part of the Reds' budgetary processes. Brief at 3. To summarize, the Reds contend that they "resell the Promotional Items to the attendees along with the purchase of an admission ticket. The Reds intend to sell both the ticket and the Promotional Item to the ticket purchaser. *** Likewise, when purchasing the ticket, the fan expects to receive both admission to the game and the Promotional Item. *** And, importantly, the Promotional Items undisputedly induce the customer's purchase of the ticket." Brief at 6-7.

Upon review of the record before us, however, we conclude that the promotional items given to patrons on specific game days were not "resold" to the patrons as part of the ticket price of admission, but were given away for free, primarily to increase interest in certain targeted games or generally increase interest among a broader audience. The evidence in the record supports our conclusion that the cost of the subject promotional items is not included in the ticket price. Specifically, the ticket price for each particular seat is the same throughout an entire season, regardless of whether a promotional item is being offered. Moreover, patrons are not guaranteed that they will receive one of the promotional items, as there are limited quantities that are distributed while supplies last.

As this board has previously held, "[a] transfer of possession of property must be for a consideration in order for the transfer to constitute a 'sale' within the meaning of R.C. 5739.01(E). *Coca-Cola Bottling Corp. v. Kosydar* (1975), 43 Ohio St. 2d 186; *General Motors Corp. v. Kosydar* (1974), 37 Ohio St.2d 138." *Electrolert v. Limbach* (Mar. 19, 1993), BTA No. 1989-J-94, unreported. "[N]o sale for resale can exist where the 'resale' exacts no cost or consideration but rather involves a gift of the item." *Scovill Mfg. v. Lindley*, 1st Dist. Hamilton No. C-810616, (June 2, 1982).

In *Drackett Products v. Limbach* (June 30, 1992), BTA No. 1987-C-975, unreported, the taxpayer's customers received one "free" dustpan for each two cases of brooms purchased. We held:

> '"The dustpans are not exchanged for current value or legal detriment in the form of a promise to make future purchases or of exclusiveness of use. The customer neither pays separate consideration for nor has a contractual or legal entitlement to the dustpan. There is no "sale" of the dustpan. Cf., Coca-Cola Bottling Corp. v. Kosydar (1975), 43 Ohio St. 2d 186. Without a subsequent sale there can be no resale exemption entitlement.'" Id. at 4.

We went on to discuss the applicability of *Scovill*, supra:

> "The facts of Scovill, supra, and the case at bar are indistinguishable. Here, the appellant transferred the dustpan to its customers without any charge whatsoever. The appellant argues that the price paid for the brooms included the value of the dustpans. However, as in Scovill the appellant herein did not make a separate and distinct charge for the dustpans. In fact, the dustpans were transferred after the customer had paid for the brooms. Further, the customer paid the same amount for the brooms whether he accepted the dustpan or not. The inescapable conclusion is that appellant did not 'sell' the dustpan within the meaning of R.C. section 5739.01 (B). Just as appellant's offer provided, in clear and unambiguous language, the dustpans were given to customers 'free' of charge or any other consideration." Id. at 10.

See generally *H.J. Heinz Co. v. Bowers*, 170 Ohio St. 423 (1960).

Similarly, at the time they purchased their tickets, the Reds' patrons were not charged a separate, distinct amount for the promotional items given away. Moreover, a patron became eligible to receive a promotional item only after that game's ticket was purchased. Patrons paid the same amount for game tickets on promotional item giveaway days, even if they did not actually receive a promotional item, i.e., they chose not to take the item upon entrance to the game, or they failed to receive an item because the supply ran out. Finally, the Reds' advertising confirmed that patrons were not being charged a separate amount for the items, clearly providing that the promotional items were "free," or a "giveaway." H.R., Ex. 2.

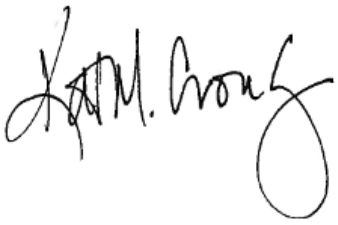
The Reds cite to *Electrolert, Inc. v. Limbach* (Mar. 19, 1993), BTA No. 1989-J-94, unreported, as supportive of their position; we, however, find such case distinguishable. In *Electrolert*, "if the customer purchased a certain quantity [of radar detectors, CBs, and weather radios], bonus items would be included. The customer purchased that quantity, knowing that it would receive the bonus items. A key element inducing the purchaser to consummate the sale in that specific quantity was the bonus items. *** The consideration paid for the entire order includes the bonus items." Thus, by looking to the "substance of the transaction to find consideration," we determined that the taxpayer's customers were actually induced to "purchase" the free bonus items, which were "additional units of that same product," along with the original quantity ordered, in order to reduce their cost per item for the entire order, i.e., regular order, plus bonus. We find no such connection between the Reds' tickets and the promotional items offered and cannot conclude that the Reds' patrons are actually "purchasing" a promotional item, especially when they are attending a game where there is no promotional giveaway.

We also acknowledge the Reds' arguments regarding other states' tax treatment of promotional item giveaways, however we find sufficient support for the commissioner's determination in Ohio's statutory provisions and case law precedent.

Accordingly, based upon the foregoing, we conclude that appellant has not provided this board with competent and probative evidence in support of the position that it does not owe the assessed tax. *Kern*, supra; *Alcan*, supra. We therefore conclude that the Tax Commissioner's findings were reasonable. It is the decision of the Board of Tax Appeals that the decision of the Tax Commissioner must be affirmed.

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

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.



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Kathleen M. Crowley, Board Secretary