ORIGINAL

IN THE SUPREME COURT OF OHIO

TAN PRO, INC.,	)	Case No. 14-0725
Appellant	)	
-vs-	)	On Appeal from the Ohio Board of Tax Appeals
RICHARD A. LEVIN [JOSEPH W. TESTA], Tax Commissioner of Ohio	)	Board of Tax Appeals Case No. 2010-A-2425
Appellee.	)	

NOTICE OF APPEAL OF APPELLANT TAN PRO, INC.

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Appellant Tan Pro, Inc. hereby gives notice of its appeal as of right, pursuant to R.C. §5714.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, journalized and entered on April 8, 2014. A copy of this Decision and Order is attached hereto and incorporated herein by reference as Exhibit A.

Tan Pro asserts the following errors:

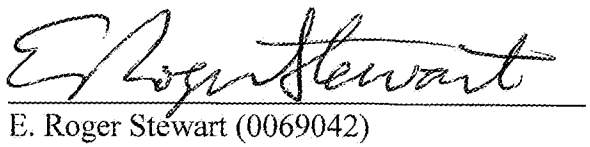
1. The Ohio Board of Tax Appeals erred in concluding that none of the items cited by Tan Pro as Tanning Equipment[1] were resold and/or permanently transferred to Tan Pro's customers in the same form in which they were purchased.
2. The Ohio Board of Tax Appeals erred in holding that the assessed purchases of Tanning Equipment were not entitled to the resale exemption provided by R.C. 5739.01(E).
3. The Ohio Board of Tax Appeals erred in holding that the assessed purchases of Tanning Equipment were not entitled to the exemption provided by R.C. 5739.02(B)(42)(m) for tangible personal property used to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service.
4. The Ohio Board of Tax Appeals erred in concluding that Tan Pro, in rendering tanning services, is the ultimate consumer of the Tanning Equipment, not Tan Pro's customers.
5. The Ohio Board of Tax Appeals erred in concluding that the *Hyatt* case, *Hyatt Corp. v. Limbach*, 69 Ohio St.3d 537, 1994-Ohio-342, 634 N.E.2d 995, was distinguishable to

[1] Defined by Tan Pro as the tanning beds, ultraviolet radiation contained within the tanning lamps, privacy partitions, sanitation chemicals, and disposable cleansing wipes. While Tan Pro contends that Tanning Equipment as a group is entitled to exemption under applicable cited statutes, it also contends in the alternative that ultraviolet radiation contained within the tanning lamps and the disposable cleansing wipes separately and independently are entitled to exemption under applicable cited statutes.

Tan Pro's situation because Tan Pro's customers did not receive the Tanning Equipment as part of the tanning services.

6. The Ohio Board of Tax Appeals erred in concluding that the Tax Commissioner did not abuse his discretion in calculating penalties and interest.
7. The Ohio Board of Tax Appeals erred in failing to rule on Tan Pro's argument that the Tax Commissioner was without constitutional authority to expand the statute of limitations beyond four years. Tan Pro respectfully requests this Court to rule on this argument.
8. The Ohio Board of Tax Appeals erred in failing to hold that the Tax Commissioner was without constitutional authority to expand the statute of limitations beyond four years.
9. The Ohio Board of Tax Appeals erred in concluding that because Tan Pro did not have a use tax account and did not file use tax returns, no statute of limitations is applicable.
10. The Ohio Board of Tax Appeals erred in affirming interest and penalties because the underlying assessment was improper.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by certified mail this 8th day of May, 2014, upon the following:

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00599659

OHIO BOARD OF TAX APPEALS

Tan Pro, Inc., Appellant, vs. Richard A. Levin, Tax Commissioner of Ohio, Appellee.	)	CASE NO. 2010-A-2425 (USE TAX) DECISION AND ORDER

APPEARANCES:

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Entered APR 08 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal filed herein by the above-named appellant, Tan Pro, Inc. ("Tan Pro") from two final determinations of the Tax Commissioner, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the record of the hearing before this board ("H.R."), and the briefs[1] of counsel.

[1] The attachments to Tan Pro's reply brief are hereby stricken, as unsworn statements that were not properly made part of the record of this case. See *ARV Assisted Living, Inc. v. Hamilton Cty. Bd. of Revision* (Interim Order, July 30, 1999), BTA No. 1998-N-168, unreported (striking from consideration information attached to a post-hearing brief which reflected a sale of the property had occurred after the BTA hearing but before the issuance of a decision); *Bd. of Edn. of the Hilliard City School Dist. v. Franklin Cty. Bd. of Revision* (July 15, 2005), BTA No. 2003-R-1430, unreported (striking from consideration certified copies of documents attached to a post-hearing brief).

In reviewing appellant's 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.

In the instant final determinations, use tax assessments against Tan Pro for the combined periods of January 1, 1998 through June 30, 2007 were affirmed. In response thereto, Tan Pro filed a notice of appeal, setting forth two general specifications of error, i.e., that the commissioner failed to recognize the documentation provided by appellant allegedly demonstrating that the transactions under consideration were exempt because tax had previously been paid and that the transactions were exempt under the law, as well as separate specifications of error for each assessment issued. Thereafter, at this board's hearing and in post-hearing briefing, Tan Pro further narrowed its claims to contend that it is "exempt from *** use tax because *** [it] resold the tanning equipment[2] to its customers" and, in the alternative, it is "distinguishable from other taxable personal care services." T.P. Brief at 5, 12.

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.

[2] According to Tan Pro, the "tanning equipment" includes the tanning beds, ultraviolet radiation (as contained within the tanning lamps), privacy partitions, sanitation chemicals, and disposable wipes. T.P. Brief at 2-3.

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* (1992), 62 Ohio St.3d 474; *Highlights for Children, Inc. v. Collins* (1977), 50 Ohio St.2d 186.

At the outset, with regard to any claim from Tan Pro that the commissioner acted outside of the applicable statute of limitations for making use tax assessments, the record establishes that Tan Pro did not have a use tax account and it did not file use tax returns; the statute requires that an assessment be issued within four years of the return in question being due and/or filed, and, when no return is filed, no statute of limitation is applicable. See R.C. 5741.16. Herein, since Tan Pro did not file the necessary returns, there was no limitation on the commissioner as to when he could issue the related assessments. Further, to the extent Tan Pro has raised and not abandoned constitutional considerations herein, we make no finding in relation thereto. Although the Ohio Supreme Court has authorized this board to accept evidence on constitutional points, it has 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.

Tan Pro initially claims that the purchases in question are exempt from use tax because its purchases were made for purposes of reselling the items in question to the consumer, i.e., "sale for resale." R.C. 5739.01(E) 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."[3] Further, on or after August 1, 2003, Tan Pro claims that pursuant to R.C. 5739.02(B)(42)(m), sales tax would not apply to the tanning equipment because it is being used in sales to customers where Tan Pro's purpose

[3] Although amended over the combined period in question, there were no material changes to this statutory provision.

was "to use tangible personal property [tanning equipment] to perform a service listed in (B)(3) of section 5739.01 *** [and] the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service." We find that none of the items cited by Tan Pro as "tanning equipment" are resold to Tan Pro's customers in the same form in which they are purchased, nor are they permanently transferred to them; specifically, the items in question, i.e., tanning beds, ultraviolet radiation and/or tanning lamps, privacy partitions, sanitation chemicals, and disposable wipes are not "sold" as items to Tan Pro's customers. Tan Pro's customers are purchasing a personal care service from Tan Pro, and, as such, Tan Pro, in rendering such personal care service, is the ultimate consumer of the tanning equipment, not its customers. See R.C. 5739.01(B)(3)(q). Accordingly, Tan Pro should have paid use tax in association with the purchase of the tanning equipment.

In the alternative, Tan Pro contends that it is exempt from consumer's use tax because tanning services are distinguishable from other taxable personal care services "because the benefit is being transferred to the ultimate customer who is paying sales tax on that transaction." T.P. Brief at 14. As support for this conclusion, Tan Pro cites *Hyatt Corporation v. Limbach* (1994), 69 Ohio St.3d 537. We find *Hyatt* distinguishable, however, since the taxpayer, Hyatt, was purchasing a service and claiming "its guests received the benefit of this service." Id. at 540. Herein, Tan Pro purchased and consumed goods, i.e., tanning equipment, in delivery of the personal care service it sells to its customers.

With regard to the penalties and interest assessed, we look to *Jennings & Churella Constr. Co. v. Lindley* (1984), 10 Ohio St.3d 67, where the court held "[r]emission of the penalty is discretionary. *** Appellate review of this discretionary power is limited to a determination of whether an abuse has occurred. ***" Id. at 70. In determining whether an abuse of discretion has occurred, we are guided by the direction provided in *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83 and *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, ¶16, and conclude, upon review of the record, there is no evidence that the commissioner abused his discretion.

Further, we find no statutory basis for the abatement of the assessed interest charges. While the Tax Commissioner is vested with discretion to remit penalties, generally, no similar provision exists relating to interest charges, since interest is assessed to place the

state in the same position that it would have been in had the taxpayer timely remitted taxes that were properly owed.

Thus, based upon the foregoing,[4] 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. Accordingly, this board finds that the Tax Commissioner's findings were reasonable. It is the decision and order of the Board of Tax Appeals that the decision of the Tax Commissioner must be and hereby is affirmed.

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.

A.J. Groeber, Board Secretary

[4] To the extent that appellant specified other errors through its notice of appeal, we find such specifications were abandoned, as not raised at hearing nor through appellant's post hearing briefs. *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, at ¶18.

PROOF OF FILING

I hereby certify that a copy of the foregoing notice of appeal was filed with the Ohio Board of Tax Appeals on this 8th day of May, 2014.

Richard C. Farrin (0022850)