SUPREME COURT OF OHIO

Accel, Inc. v. Testa

2017 Ohio 8798 (Ohio 2017) · No. 2015-1332 · Decided December 6, 2017

SUMMARY

The Supreme Court of Ohio affirmed the Board of Tax Appeals' decision concerning a consumer-use-tax assessment against Accel, Inc. The court held that Accel's preparation of gift sets could qualify as assembling, despite also involving packaging, and that certain employment-services transactions qualified for the permanent-assignment exemption. The court also rejected the tax commissioner's argument that the Board of Tax Appeals owed deference to the commissioner's factual findings.

CASE DETAILS

COURT	Supreme Court of Ohio
WRITING FOR THE COURT	Per curiam; Maureen O'Connor, Chief Justice; Terrence O'Donnell, Justice; Judith L. French, Justice; William M. O'Neill, Justice; Pat DeWine, Justice; Mary DeGenaro Kennedy, Justice; Patrick F. Fischer, Justice
JURISDICTION	Ohio
DECIDED	December 6, 2017
DOCKET	2015-1332
DISPOSITION	affirmed
PROCEDURAL POSTURE	The Tax Commissioner appealed, and Accel cross-appealed, from a decision of the Ohio Board of Tax Appeals concerning a consumer-use-tax assessment.
STANDARD OF REVIEW	The Supreme Court reviews a Board of Tax Appeals decision to determine whether it is reasonable and lawful. The BTA's factual findings must be supported by reliable and probative evidence, and its credibility determinations and weighing of evidence receive deference subject to abuse-of-discretion review. The BTA reviews the Tax Commissioner's determinations de novo as to both facts and law, although the taxpayer bears the burden of proving the Commissioner's findings incorrect.
PRECEDENTIAL VALUE	published precedential opinion
PARTIES	Testa, Tax Commissioner v. Accel, Inc.

TOPICS

sales and use tax · statutory interpretation · judicial review of agency action · appellate procedure

PRACTICE AREAS

taxation · administrative law · appellate procedure

QUESTIONS PRESENTED

1. Whether the BTA owed deference to the Tax Commissioner's factual findings or instead reviewed those findings de novo.
2. Whether Accel's preparation of gift sets constituted assembling or assembly qualifying for the sales-and-use-tax exemption under R.C. 5739.02(B)(42)(a) and R.C. 5739.01(R), despite also involving packaging.
3. Whether the materials used in Accel's gift sets qualified for exemption under the manufacturing-operation provisions of R.C. 5739.01(S).
4. Whether employment-services transactions involving Resource Staffing employees qualified for the permanent-assignment exemption under R.C. 5739.01(JJ)(3).
5. Whether transactions involving Manpower employees qualified for that exemption.
6. Whether R.C. 5703.58(B) barred the assessment because some tax was due before January 1, 2008.
7. Whether the BTA abused its discretion in admitting or considering the parties' expert testimony and reports.

HOLDINGS

1. The BTA reviews the Tax Commissioner's determinations de novo as to both facts and law and owes no deference to the Commissioner's factual findings beyond requiring the taxpayer to prove by a preponderance of the evidence that those findings are incorrect.
2. Accel's preparation of gift sets could reasonably be found to involve assembling or assembly under R.C. 5739.02(B)(42)(a) and R.C. 5739.01(R), even though the operations also involved packaging.
3. The BTA reasonably and lawfully found that employees supplied by Resource Staffing were assigned to Accel on a permanent basis under R.C. 5739.01(JJ)(3), notwithstanding the absence of express permanent-assignment language in the overarching employment-services contract.
4. Accel failed to establish that the personnel supplied by Manpower were assigned on a permanent basis, and the BTA did not abuse its discretion in denying the exemption for those transactions.
5. R.C. 5703.58(B) did not bar the assessment because the statute became effective after the Tax Commissioner issued the assessment.
6. Any error in admitting the parties' expert reports or testimony was harmless because the BTA's decision did not rely on that evidence.

KEY QUOTATIONS

> *"De novo review is, of course, the opposite of deferential review."* (¶ 13)

> *"We hold that the BTA owed no deference to the tax commissioner's findings beyond placing the evidentiary burden on the taxpayer, Accel, to show them to be, by a preponderance of the evidence, incorrect."* (¶ 16)

> *"Under this reading, "assembling" extends the exemption to situations in which there is no transformation of substances but there is a putting together of components into a new functional (or in this case aesthetic) whole."* (¶ 22)

> *"Under H.R. Options, bringing back the same workers each time with differing hours is consistent with permanent assignment; using new workers just for a brief workload spike is not."* (¶ 48)

FACTUAL BACKGROUND

Accel produced gift sets by designing, planning, and assembling multiple items into new, marketable gift-set products. It purchased materials incorporated into those sets and obtained workers through Resource Staffing and Manpower. The BTA found the gift-set materials exempt because the activity involved assembling, found Resource Staffing employees assigned on a permanent basis, and found insufficient evidence that Manpower employees were permanently assigned. The Commissioner also assessed use tax for the audit period and argued that the assessment was not subject to the later-enacted statutory time bar.

PROCEDURAL HISTORY

The Tax Commissioner issued a consumer-use-tax assessment against Accel for purchases made from January 1, 2003, through December 31, 2009. After Accel petitioned for reassessment, the Commissioner issued a final determination assessing tax, interest, and penalties totaling $3,221,380.74. The Board of Tax Appeals affirmed the assessment in part and reversed it in part, including allowing exemptions for materials used in gift sets and certain employment-services transactions. The Supreme Court of Ohio affirmed the BTA's decision.

DISPOSITION

affirmed

CASES CITED

- Satullo v. Wilkins, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14
- Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino, 93 Ohio St.3d 231, 232, 754 N.E.2d 789 (2001)
- Key Servs. Corp. v. Zaino, 95 Ohio St.3d 11, 16, 764 N.E.2d 1015 (2002)
- Higbee Co. v. Evatt, 140 Ohio St. 325, 332, 43 N.E.2d 273 (1942)
- MacDonald v. Shaker Hts. Bd. of Income Tax Rev., 144 Ohio St.3d 105, 2015-Ohio-3290, 41 N.E.3d 376, ¶ 21
- Hatchadorian v. Lindley, 21 Ohio St.3d 66, 488 N.E.2d 145 (1986)
- Am. Fiber Sys., Inc. v. Levin, 125 Ohio St.3d 374, 2010-Ohio-1468, 928 N.E.2d 695, ¶ 42
- Newman v. Levin, 120 Ohio St.3d 127, 2008-Ohio-5202, 896 N.E.2d 995, ¶ 31
- Nusseibeh v. Zaino, 98 Ohio St.3d 292, 2003-Ohio-855, 784 N.E.2d 93, ¶ 10

- Krehnbrink v. Testa, 148 Ohio St.3d 129, 2016-Ohio-3391, 69 N.E.3d 656, ¶ 30
- Maxxim Med., Inc. v. Tracy, 87 Ohio St.3d 337, 339, 720 N.E.2d 911 (1999)
- T. Ryan Legg Irrevocable Trust v. Testa, 149 Ohio St.3d 376, 2016-Ohio-8418, 75 N.E.3d 184, ¶¶ 58, 62-63
- HealthSouth Corp. v. Testa, 132 Ohio St.3d 55, 2012-Ohio-1871, 969 N.E.2d 232, ¶ 10
- Sauder Woodworking Co. v. Limbach, 38 Ohio St.3d 175, 177, 527 N.E.2d 296 (1988)
- Custom Beverage Packers, Inc. v. Kosydar, 33 Ohio St.2d 68, 73, 294 N.E.2d 672 (1973)
- Cole Natl. Corp. v. Collins, 46 Ohio St.2d 336, 339, 348 N.E.2d 708 (1976)
- Fichtel & Sachs Industries, Inc. v. Wilkins, 108 Ohio St.3d 106, 2006-Ohio-246, 841 N.E.2d 294, ¶ 40
- Scholz Homes, Inc. v. Porterfield, 25 Ohio St.2d 67, 72, 266 N.E.2d 834 (1971)
- Navistar, Inc. v. Testa, 143 Ohio St.3d 460, 2015-Ohio-3283, 39 N.E.3d 509, ¶ 39
- E. Liverpool v. Columbiana Cty. Budget Comm., 116 Ohio St.3d 1201, 2007-Ohio-5505, 876 N.E.2d 575, ¶ 3
- Aultman Hosp. Assn. v. Community Mut. Ins. Co., 46 Ohio St.3d 51, 53, 544 N.E.2d 920 (1989)
- Excel Temporaries, Inc. v. Tracy, BTA No. 97-T-257, 1998 WL 775284, *2 (Oct. 30, 1998)
- Steak 'n Shake, Inc. v. Warren Cty. Bd. of Revision, 145 Ohio St.3d 244, 2015-Ohio-4836, 48 N.E.3d 535, ¶ 20
- Johnston Coca-Cola Bottling Co., Inc. v. Hamilton Cty. Bd. of Revision, 149 Ohio St.3d 155, 2017-Ohio-870, 73 N.E.3d 503, ¶¶ 32, 36
- Higbee Co. v. Cuyahoga Cty. Bd. of Revision, 107 Ohio St.3d 325, 2006-Ohio-2, 839 N.E.2d 385, ¶ 30
- NWD 300 Spring, L.L.C. v. Franklin Cty. Bd. of Revision, 2017-Ohio-7579, ¶ 14