[Cite as *R.L Best Co. v. Testa*, 2018-Ohio-5400.]

IN THE COURT OF APPEALS OF OHIO

SEVENTH APPELLATE DISTRICT
MAHONING COUNTY

THE R.L. BEST COMPANY,

Appellant,

v.

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO,

Appellee.

OPINION AND JUDGMENT ENTRY
Case No. 18 MA 0001

Administrative Appeal from the
Board of Tax Appeals, Mahoning County, Ohio
Case No. 2015-2237

BEFORE:
Kathleen Bartlett, Gene Donofrio, Cheryl L. Waite, Judges.

JUDGMENT:
AFFIRMED

Attys. Steven Dimengo, Matthew Duncan, and Richard Fry, 3800 Embassy Parkway, Suite 300, Akron, Ohio 44333, for Appellant and

Atty. Barton Hubbard, 30 East Broad Street, 25th Floor, Columbus, Ohio 43215, for Appellee.

Dated: December 28, 2018

BARTLETT, J.

{¶1} Appellant R.L. Best appeals the Decision and Order ("Decision") of the Board of Tax Appeals ("BTA") affirming the final determination of the Tax Commissioner ("Commissioner"), which denied Appellant's petition for reassessment of use tax liability and request for remission of the assessed penalty. Because the Decision is neither unreasonable nor unlawful, it is affirmed in its entirety.

I. Procedural History

{¶2} Appellant was audited by the Ohio Department of Taxation ("ODT") for the period January 1, 2008 through December 31, 2012 ("audit period"), and was assessed use tax and penalties on costs associated with the use of various trucks and trailers. Appellant filed a petition for reassessment with the ODT. On October 9, 2015, the Commissioner issued its final determination that the vehicles were not used primarily to transport tangible personal property belonging to others, and Appellant did not receive consideration for transporting customers' property because there were no separate charges for transportation on most of the customer invoices.

{¶3} On December 7, 2015, the Commissioner's decision was appealed to the BTA. Appellant's President, Ted Best ("Best") testified at the hearing before the BTA on November 8, 2016. On December 4, 2017, the BTA issued the Decision before us upholding the use tax and penalty. This timely appeal followed.

II. Law

{¶4} Pursuant to R.C. 5739.02, an excise tax is levied on all retail sales in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed on the storage, usage, or consumption of any tangible personal property in this state. The legislature has provided numerous exceptions and exemptions to the collection of sales tax, and, through R.C. 5741.01(C)(2), has mandated, if the acquisition of an item within the state would not be subject to sales tax, then the item's use within the state is likewise exempt.

{¶5} Among the laundry list of exemptions provided in R.C. 5739.02(B), subsection (32) reads, in pertinent part, "The sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used

for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire * * *." Relevant to this appeal, "Highway transportation for hire" is defined as "the transportation of personal property belonging to others for consideration by any of the following: (1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare." R.C. 5739.01(Z)(1).

{¶6} "Tax-exemption statutes 'must be strictly construed, because exemptions are in derogation of the rights of all other taxpayers.' " *Cincinnati v. Testa*, 143 Ohio St.3d 371, 2015-Ohio-1775, 38 N.E.3d 847, ¶ 16, quoting *Panther II Transp., Inc. v. Seville Bd. of Income Tax Rev.*, 138 Ohio St.3d 495, 2014-Ohio-1011, 8 N.E.3d 904, ¶ 23. Further, the well-established rule in tax-exemption cases places the burden on the taxpayer to show that the exemption statute's language clearly expresses the exemption in relation to the claim. *Id.* ¶ 14, citing *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, 937 N.E.2d 547, ¶ 16.

III. Facts

{¶7} Appellant manufactures, rebuilds, and repairs custom extrusion presses and handling systems, which can weigh 1,200 to 9,000 tons, measure up to 200 feet long and 100 feet wide, and cost three million dollars or more ("Equipment"). Approximately 73% of Appellant's revenue during the audit period was generated by the sale of Manufactured/Rebuilt Equipment, while the remaining 27% was generated by the repair, refurbishment, and reconditioning of Customer Equipment. (11/8/16 Hrg. Tr. 77).

{¶8} Appellant occasionally repaired Customer Equipment at the customer's location during the audit period. However, Appellant typically retrieved Customer Equipment from the customer's location in the trucks and trailers at issue and transported it to Appellant's plant. Customer Equipment was most often repaired at Appellant's plant where Appellant had the necessary equipment to perform the repairs. Further, the repair services were often time and labor intensive making them too disruptive and too expensive to perform at the customer's location.

{¶9} Appellant's transportation of the Equipment was regulated by the Public

Utilities Commission of Ohio and the Interstate Commerce Commission. Transportation costs incurred by Appellant when transporting Customer Equipment included the cost of the trucks, fuel, drivers, meals, and lodging.

{¶10} Appellant does not employ dedicated truck drivers. Instead, one of the service people who performed the field work transported the Customer Equipment to/from the customer's location. (*Id*. 88-90). When additional service people were needed to retrieve Customer Equipment, they typically drove to the customer's location in a pick-up truck. When more than three trucks were required for a delivery or retrieval, Appellant hired a third-party transportation service. (*Id.* 96).

{¶11} None of the trucks or trailers at issue here is dedicated to a specific purpose. In other words, a truck may be used to deliver Manufactured/Rebuilt Equipment by Appellant one day then to retrieve Customer Equipment for repair the next day.

{¶12} The vehicles at issue are used for one of three purposes: (1) to deliver Appellant's Manufactured/Rebuilt Equipment that has been sold to customers: (2) to retrieve/return Customer Equipment for the repair services performed at Appellant's plant; and (3) to transport Appellant's tools to be used for Equipment removal or installation at a customer's location. Appellant concedes that that the trucks and trailers used to transport tools were not being used for an exempt purpose.

{¶13} The auditor prepared a chart, which summarizes Appellant's truck/trailer usage based on bills of lading provided to the auditor ("usage chart"). Each number on the usage chart represents one leg of a round trip. Each leg falls into one of three "trip movement" categories on the usage chart: Customer Goods, New Products (Manufactured/Rebuilt), or Appellant's Tools. The usage chart shows 505 loaded truck/trailer trips in the audit period, consisting of:

> -292 for Customer Goods (transportation of Customer Equipment picked up from and returned to the customer's site for repair);
>
> -56 for New Products (transportation of newly Manufactured/Rebuilt Equipment, sold and delivered to customers); and

-157 for Tools (transportation of tools to and from a customer's site to be used for Equipment installation or removal).

{¶14} Appellant argues the transportation of tangible personal property belonging to others for consideration constituted 68.91% of the vehicles' usage during the audit period [(292 + 56 = 348)/505]. However, the auditor reduced the "Customer Goods" and "New Products" categories by one-half based on "dead mileage," that is, the leg of the trip with an empty truck/trailer, thereby reducing the numerator by 174. As a consequence, the Commissioner concluded that the transportation of tangible personal property belonging to others constituted only 34.46% of the trucks and trailers' usage during the audit period [174/505].

{¶15} At the hearing, Best explained that the trucks and trailers are empty one leg of every trip because it is not commercially viable to coordinate the transportation of the Equipment. Appellant is only authorized to haul aluminum extrusion equipment, which is a very narrow category of property. Further, the repair of Customer Equipment is extremely time-sensitive, because it is typically involved in a substantial portion of the customer's business.

{¶16} In addition to reducing the number of trips in the two relevant categories by one-half, the auditor also concluded that Appellant did not transport Customer Equipment for consideration because Appellant did not include a transportation fee in the majority of its invoices during the audit period. Exhibit D consists of representative invoices, bills of lading, and Appellant's internal work papers during the audit period. Exhibit D shows that Appellant determined the transportation cost in its internal work papers, but never included the actual fee in any of the customer invoices.

{¶17} Best conceded that Appellant, with rare exception, did not include a transportation fee in customer invoices. When a transportation fee was included in a customer invoice, the fee was far less than the actual cost assessed in the internal work papers. For instance, page five of Exhibit D shows an internal transportation calculation of $3,423.95, while the transportation fee charged to the customer was $1,244.00. On page 17, the transportation fee was $200.00 but Best estimated the actual cost of transportation to be $2,000.00. (*Id.* 50.)

{¶18} At the hearing, Best explained that Appellant typically does not charge its

customers a separate fee for transportation, because the transportation fee is "a pretty high number that the customer would object to if he saw it as a separate line item." (*Id.* 42.) When Appellant included a transportation fee in a customer's bill, the fee was what Best characterized as "a token amount that [customers] are willing to accept." (*Id.* 76).

{¶19} Best explained at the hearing that "it's simple marketing 101," because Appellant did not want customers to negotiate transportation costs. (*Id.* 74.) He testified that "[Appellant] state[s] less than the amount of [its] actual costs when [Appellant does] charge because [Appellant] want[s] to make it so [customers] don't talk about it." (*Id.*) He testified that customers "* * * know it's in there somewhere * * * ." (*Id.*)

{¶20} According to Best, Appellant is neutral with respect to customers arranging for third-party transportation, but explained "[Appellant's] trucks have the advantage of being ready to go most any time they need to be there and [Appellant] – it's usually an urgent situation, and [Appellant] can have trucks on site pretty quick." (*Id.* 75.) Best further testified that Appellant's use of its own trucks "allows [Appellant] to be more efficient and a better service to [Appellant's] customers." (*Id.*)

{¶21} At the hearing, Best was asked, "[i]f a customer were to say, hey, look, I'm willing to do my own delivery, I see the bill here, would you knock this down if, you know, I do – I take care of getting the part from your shop? And would you knock the bill down?" Best responded, "Probably not." When asked why he would not reduce the bill, he responded, "I wouldn't if we don't have to." (*Id.* 95).

{¶22} At oral argument, counsel for Appellant argued that Best provided the foregoing testimony in response to a pre-invoice hypothetical. However, it is clear from the record that the hypothetical proposed a post-invoice situation ("I see the bill here"), where the Customer Equipment was already at Appellant's shop undergoing repair/refurbishment/reconditioning, and the customer was attempting to reduce the total cost of the repair by contracting third-party transportation to return it to the customer's location.

{¶23} Best testified that Appellant would not need the trucks and trailers at issue if it only sold Manufactured/Rebuilt Equipment, and discontinued its repair business. He stated, "the only time we would need [the trucks and trailers] is if we had to haul the part

and our tools to a jobsite to put in new equipment or new replacement parts that we've made." (Hrg. Tr. 39.) Best further stated that "[Appellant] strictly [has] the trucks as a convenience to [Appellant] and [its] customers," and that transport is "built * * * into the cost of the project, not a direct." (*Id.* 37, 41).

IV. Standard of Review

{¶24} Our scope of review is limited to whether the decision of the BTA is "reasonable and lawful." R.C. 5717.04. We must defer to the BTA's factual findings, so long as they are supported by " 'reliable and probative' " evidence in the record. *Lafarge N. America, Inc. v. Testa*, 153 Ohio St.3d 245, 2018-Ohio-2047, 104 N.E.3d 739, ¶13, quoting *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14, quoting *Am. Natl. Can Co. v. Tracy*, 72 Ohio St.3d 150, 152, 648 N.E.2d 483 (1995).

{¶25} Legal issues are reviewed de novo. *Lafarge* ¶ 13, citing *Crown Communication, Inc. v. Testa*, 136 Ohio St.3d 209, 2013-Ohio-3126, 992 N.E.2d 1135, ¶ 16. Because the issues presented here involve the application of law to undisputed facts, we exercise de novo review. *Id.*, citing *Cincinnati v. Testa*, 143 Ohio St.3d 371, 2015-Ohio-1775, 38 N.E.3d 847, ¶ 15. The Ohio Supreme Court has emphasized that a reviewing court should not hesitate to reverse BTA decisions that are based on incorrect legal conclusions. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954, ¶ 14. Interpretation of tax-exemption statutes must be reasonable and not defeat the legislative intent. *Id.* ¶ 16.

V. Decision

{¶26} The BTA concluded that "[Appellant] is not engaged in transportation for hire for consideration. It is engaged in repair and manufacturing services, for which transportation is provided as a courtesy." (Decision 2.) The BTA found that Appellant's reliance on its undisclosed internal transportation calculation effectively read the consideration requirement out of R.C. 5739.01(Z). The BTA predicated its conclusion on two cases, *Kurtz Bros., Inc. v. Tracy* (Dec. 15, 1995), BTA No. 1994-P-614, et seq., unreported, 1995 WL 752290, discretionary appeal not allowed, 77 Ohio St.3d 1495, 673 N.E.2d 150 (1977), and *Pallet World, Inc. v. Levin* (June 22, 2010), BTA No. 2007-M-116, 2010 WL 2548349, in which the BTA "previously rejected claims for exemption

under R.C. 5739.02(B)(32) and R.C. 5739.01(Z), where transportation charges were not separately stated." (Decision 2).

{¶27} The BTA also agreed with the Commissioner's conclusion that dead mileage was properly omitted from the exempt usage calculation based on the primary use test announced in *Ganley Dodge, Inc. v. Tracy*, BTA. Nos. 1992-Z-344,345, 1994 WL 662404 (Nov. 18, 1994). The BTA recognized in *Ganley Dodge* that "[t]he primary use test looks to several factors, including the amount of time devoted to the exempt use, the amount of revenue brought in by that use, and the importance of essentiality of that use to the overall business operation." *Id.* *3. Based on the evidence in the record, the BTA concluded that "the majority of the time spent in transporting property of others is unclear given the lack of specificity of such charges on invoices, and that such transportation is a convenience provided to [Appellant's] customers, rather than a necessity, as some customers do actually arrange transportation on their own." (Decision 3). As a consequence, the BTA concluded that transportation for hire was not the primary use of the vehicles.

{¶28} Finally, the BTA found that the Commissioner did not abuse its discretion when he denied Appellant's request for remission of the penalty. The BTA summarily concluded there was "no indication of an abuse of discretion* * *." (Decision 3).

VI. Analysis

{¶29} Three issues are raised in this appeal. First, Appellant argues the BTA erred in finding a company must charge a specific transportation fee in a customer invoice for transportation for hire to be "for consideration." Second, Appellant contends that the BTA erred in concluding the trucks and trailers at issue were not transporting tangible personal property belonging to another, and, also, by reducing the exempt usage percentage by one-half based on dead mileage. Finally, Appellant asserts the Commissioner abused its discretion in declining to abate the penalty.

{¶30} Because Appellant's six assignments of error fall into one of the three foregoing categories, they will be grouped together for clarity of analysis. For the same reason, they will be taken in the order that they were analyzed by the BTA, rather than the order presented in the appellate brief.

{¶31} In the fourth and fifth assignments of error, Appellant asserts:

> The Board erred in affirming the Tax Commissioner's determination that the Appellant did not charge, or receive consideration from, its customers for transporting their property using the trucks and trailers that are the subject of this appeal.
>
> The Board erred in affirming the Tax Commissioner's determination that Appellant did not engage in transportation for hire for consideration under R.C. 5739.01(Z) and R.C. 5739.02(B)(32) and must have separately stated a charge for the transportation of customer property.

{¶32} The BTA predicated its holding with respect to the "for consideration" element of transportation for hire on its decisions in *Kurtz Bros.* and *Pallet World*, supra, where, as here, the customer invoices did not provide a separate fee for transportation. Appellant contends that these cases are distinguishable because they involved the sale of goods, that is, the BTA's holdings were based on the taxpayer's failure to establish that ownership transferred to the customer prior to actual delivery. Because there is no question the Customer Equipment was the property of Appellant's customers at all times, Appellant argues *Kurtz Bros.* and *Pallet World* are inapposite. (Appellant's Brf. 20). To the contrary, the rule of law applied in both cases, which was separate from the BTA's analysis regarding ownership, applies with equal force here.

{¶33} Kurtz Bros. sold and delivered landscape materials and claimed the trucks used for delivery were non-taxable pursuant to the transportation-for-hire exemption. Although testimony at the hearing established the company "[took] transportation costs into account" in setting its pricing policy, no separate fee was charged for the deliveries. The BTA concluded that "[s]ince there was no separate consideration charged for the deliveries in question, [Kurtz Bros.] was not engaged in transportation for hire within the meaning of R.C. 5739.02(B)(33) [now (B)(32)] and R.C. 5739.01(Z)." *Id.* *12.

{¶34} Pallet World's business included the retrieval, repair, and replacement of customer pallets, and the sales of pallets to brokers, with a separate contract to transport the pallets directly to the broker's customer. Although the pallets were fungible commodities in the retrieval/repair/replacement business, a representative of Pallet World testified that bills of lading were prepared that indicated ownership of the

pallets remained with the customer. Testimony was also offered to show that the pallets became the broker's property prior to transport and, further, transportation was a separate component of the sale. Further, although a representative of Pallet World conceded delivery charges were not separately stated on any of its invoices, he testified that the industry practice was to bill all costs in a single line. Because no evidence of Pallet World's bills was presented, the BTA rejected Pallet World's arguments, citing *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638, for the rule of law that testimonial evidence alone is insufficient to establish exempt use. *Id.* *5.

{¶35} Appellant argues "consideration" is broadly defined in Ohio, consistent with fundamental contract law, and includes monetary consideration or an act/promise that the transferee is obligated to perform. See *General Motors Corp. v. Kosydar*, 37 Ohio St.2d 138, 147, 310 N.E.2d 154 (1974); *G&J Pepsi Cola Bottling, Inc. v. Limbach*, 48 Ohio St.3d 31, 548 N.E.2d 936 (1990); *Procter & Gamble Co. v. Lindley*, 17 Ohio St.3d 71, 477 N.E.2d 1109 (1985). Despite the fact that there were no dollar amounts for transportation costs built into the repair charges, Appellant argues that customers received a substantial benefit from the transportation of Customer Equipment. However, Appellant's argument misunderstands that the "for consideration" requirement applies to consideration received by Appellant, not its customers. According to the statute, Appellant must provide transportation services in exchange for consideration.

{¶36} Regardless of the nature of the consideration provided, the plain meaning of the phrase "for consideration" in the exemption statute requires Appellant to have held itself out to its customers as a transportation-for-hire business. The "for consideration" requirement speaks directly to the "for hire" portion of the phrase "transportation for hire."

{¶37} There is nothing in the record to establish that Appellant's customers knew they were contracting transportation services from Appellant. Best admitted that Appellant either completely omitted transportation costs from customer invoices or included a reduced fee that did not reflect the actual value of the service provided by the company. Best further admitted that Appellant did not include the actual transportation costs because it did not want to negotiate the cost of transportation with customers. By

omitting or misstating the actual transportation cost in customer repair bills, Appellant avoided two hallmarks of conducting a business for hire, negotiating a bargained-for price for services, and losing a customer's business to a lower-priced competitor. Nonetheless, Appellant contends that it was engaged in a transportation-for-hire business, as that phrase is defined in the exemption statute.

{¶38} Appellant urges us to find that all of its customers knew they were being charged for the full cost of transportation as part of the overall repair fee. The only evidence in the record that supports Appellant's assertion that customers knew they were paying for transportation was the inclusion of a substantially-reduced transportation fee in a handful of invoices, and Best's testimony that Appellant's customers "know [transportation cost is] in there somewhere * * *." (Hrg. Tr. 74.)

{¶39} First, the illusory value assigned to transportation in a handful of invoices belies Appellant's argument that it was engaged in transportation for hire when it transported Customer Equipment. The fact that Appellant dramatically undervalued its transportation service to its customers is directly at odds with the company's assertion that it was conducting a transportation-for-hire business. Further, the sporadic nature of the transportation charges in customer invoices supports the BTA's conclusion that transportation was part and parcel of the repair business.

{¶40} Turning to the argument that all of the customers knew they were paying for transportation, the Ohio Supreme Court has repeatedly recognized that the taxpayer has the burden of proof in exemption cases, and, further, that unsupported testimonial evidence is insufficient to established exempt use. Best's testimony that Appellant's customers were aware that transportation fees were included in the repair bill is unsupported by the record. In fact, it is directly at odds with his later testimony that he would refuse to reduce the repair/refurbish/recondition bill if a customer asked for a price reduction based upon the arrangement of third-party transportation back to the customer's location.

{¶41} Finally, Best's testimony at the hearing supports the BTA's conclusion that transportation services were an integral part of the repair business. Technicians, rather than dedicated truck drivers, drove the trucks and trailers at issue. Appellant's trucks had the advantage of being ready to go at any time, which was an asset to the business

because repairs typically presented an urgent situation. Best conceded that use of its own trucks allowed Appellant to be more efficient and a better service to its customers. He further testified that that the trucks were a convenience to the company and its customers, and, consequently, transport was built into the cost of the project and was not specifically billed.

{¶42} On November 21, 2018, following oral argument in this case, the Ohio Supreme Court released its opinion in *Cincinnati Reds, L.L.C. v. Testa*, __ Ohio St.3d __, 2018 Ohio 4669, __ N.E.2d __ (J. Fischer, with J. French concurring, three justices concurring in judgment only, and two justices dissenting). In a pleading captioned, "Statement of Additional Authority Decided Post-Oral Argument" filed November 28, 2018, Appellant asserts that the recent decision further supports its argument that "Appellant need not separately state a dollar amount to meet the 'consideration' requirement of the transportation for hire exemption of R.C. 5739.02(B)(32)." (Statement 2).

{¶43} In *Cincinnati Reds*, the majority of the Court held that the distribution of unique promotional items at baseball games on specifically-advertised nights, i.e., Luis Castillo Bobblehead night, constituted the resale of goods in Ohio, and, therefore, the promotional items were exempt from sales and use tax. "Sale" is defined in R.C. 5739.01(B)(1) to include "[a]ll transactions by which title or possession, or both, of tangible personal property, is or is to be transferred* * *" but this definition applies only if those "transactions [are] for a consideration," R.C. 5739.01(B).

{¶44} The lead opinion recognized that "[c]onsideration, in the contract-law sense, is important here: the question whether the Reds purchased [unique advertised] promotional items for resale entails asking whether fans furnished consideration for the Reds' promise to hand out the promotional items at games. *Cincinnati Reds* ¶ 17. It further recognized that "[w]hether there is consideration at all is a proper question for a court," *Id.* ¶ 20, quoting *Williams v. Ormsby*, 131 Ohio St.3d 427, 2012-Ohio-690, 966 N.E.2d 255, ¶ 17, and if consideration is found to exist, the court must determine " 'whether any "consideration" was really bargained for.' " *Id.*

{¶45} Because the promotional items were advertised as "free" or "giveaways," and were intended to increase interest in targeted games or generally increase interest

among a broader audience, the BTA concluded that patrons did not provide bargained-for consideration. The BTA reasoned that the cost of the promotional item was not included in the ticket price, insofar as the ticket price for every seat was the same throughout the season. *Id.* ¶ 12. The Reds argued, to the contrary, that the advertisement of a unique promotional item on a particular night created a contractual expectation on the part of patrons, who purchased tickets and attended games as consideration for receiving the promotional item. *Id.* ¶ 18.

{¶46} In reversing the decision of the BTA, the lead opinion relied on the testimony of Reds' Chief Financial Officer that the organization offered advertised promotional items at games where attendance was projected before the season to be low. In other words, the purpose of distributing promotional items at the selected games was to drive ticket revenue at games that would otherwise be attended by fewer patrons. He further testified that the increased ticket revenue generated by the advertised promotional items more than offset their cost. *Id.* ¶ 7.

{¶47} Based on the foregoing evidence, the lead opinion concluded that "rather than offering discounted ticket prices to these less desirable games, it stands to reason that by including the cost of the promotional item in the ticket, one portion of the ticket price accounts for the right to attend that less desirable game and a separate portion of the ticket price accounts for the right to receive the promotional item." *Id.* ¶ 22. In distinguishing the advertised promotional items from a foul ball or free t-shirt tossed into the stands, the lead opinion characterized the advertised promotional items as an "explicit part of the bargain, along with the right to attend the game, that the fans obtained in exchange for paying the ticket fee." *Id.* ¶ 25.

{¶48} Therein lies the distinction. In order to fulfill the consideration requirement of the resale exemption, the lead opinion presupposed that patrons made a conscious choice to pay the standard ticket price, in exchange for a less desirable game plus the unique advertised promotional item. The lead opinion characterized the promotional item as an "explicit part of the bargain." Appellant's customers were not able to make a conscious choice here, because, unlike the static cost of an admission ticket, they were unaware of the actual cost of repairs as distinguished from the cost of transportation. Moreover, Best testified that the company intentionally withheld the information from

customers, or deceived them, in order to avoid any effort by the customer to negotiate a lower price. Accordingly, the lead opinion in *Cincinnati Reds* does not affect our decision here.

{¶49} In the absence of specific transportation fees in customer invoices, we find that Appellant has not shown the BTA's conclusion that Appellant's transportation services were a part of the repair service, rather than a separate service for consideration, was unreasonable or unlawful. Accordingly, Appellant's fourth and fifth assignments of error have no merit.

{¶50} In the first, second, and third assignments of error, Appellant asserts:

> The Board erred in affirming the Tax Commissioner's determination that Appellant's purchases related to its trucks, trailers and associated expenses (including truck operating expenses and truck repairs) were subject to tax even though such property was primarily used to transport customer property so that the Appellant qualified for the transportation for hire exemption under R.C. 5739.02(B)(32).
>
> The Board erred in affirming the Tax Commissioner's determination that the Appellant's trucks and trailers were not primarily used for transporting tangible personal property belonging to others for hire.
>
> The Board erred in determining that the Appellant's use of its trucks and trailers while empty on either a trip to pick up property of others or returning therefrom should not be included as time spent in transporting the property of others for hire. The full round-trip mileage pertaining to customer property, including such "dead mileage" where the trucks/trailers are empty, counts as part of the exempt transportation purpose.

{¶51} Because we affirmed the BTA's Decision that Appellant did not meet the "for consideration" requirement of the exemption statute, we find that Appellant's first, second, and third assignments of error are moot.

{¶52} In the sixth assignment of error, Appellant asserts:

The Board erred in determining that the Tax Commissioner did not abuse his discretion in not abating the full tax penalty assessed by the Tax Commissioner upon the Appellant.

{¶53} The Commissioner may add a penalty of up to fifteen percent of the amount assessed under R.C. 5739.13 to 5739.15. R.C. 5739.133(A)(3). Pursuant to R.C. 5747.15(C), the Commissioner has discretion to abate a penalty "if the taxpayer, qualifying entity, or employer shows that the failure to comply with the provisions of this chapter is due to reasonable cause and not willful neglect."

{¶54} The statute prescribes a standard for abating the penalty and entrusts the imposition or abatement of the penalty to the Commissioner's ultimate discretion. The latter point is expressed by the statute's use of the word "may," which the Ohio Supreme Court has held in similar contexts to constitute a grant of discretionary authority. *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073, 865 N.E.2d 866, ¶ 14-15. The Ohio Supreme Court has defined an abuse of discretion as connoting a decision that is unreasonable, arbitrary or unconscionable. *Id.* ¶ 16.

{¶55} In *Frankelite Company v. Lindley,* 28 Ohio St.3d 29, 502 N.E.2d 213 (1986), the Commissioner refused to remit a penalty even though the taxpayer had a history of timely and fully paying its taxes, an established procedure to obtain exemption certificates from its customers to support exemption on its sales, and had fully cooperated with the ODT during the audit. The BTA affirmed the assessment, but reversed the penalty, because the record established that the taxpayer reasonably relied in good faith on the certificates. The Ohio Supreme Court affirmed the BTA decision, finding it neither unreasonable nor unlawful. *Id.* at 34.

{¶56} Appellant argues that it fully cooperated with the audit, and had no reason to know that it would be subjected to use tax on the trucks and trailers. Appellant further argues that *Kurtz* and *Pallet World,* supra, are not applicable to the facts of this case since both involved a company transporting goods for sale to customers, while Appellant "mostly used its trucks/trailers to transport Equipment already owned by its customers." (Appellant's Brf. 26).

{¶57} It is important to note that the BTA reversed the decision of the Commissioner imposing the penalty in *Frankelite,* supra. Here, the BTA affirmed the

Commissioner's imposition of the penalty. Therefore, the deferential standard on appeal, which favored abatement in *Franklite*, favors imposition of the penalty in this case.

{¶58} The BTA announced its decision in *Kurtz*, supra, in 1995, roughly thirteen years before the audit period in this case. Because the BTA had plainly stated that a separate fee for transportation must be charged in order to meet the requirements of the use exemption, we find that the BTA's decision affirming the Commissioner's decision to impose the penalty is neither unreasonable nor unlawful, and, as a consequence, Appellant's sixth assignment of error has no merit.

V. Conclusion

{¶59} Tax exemptions statutes are strictly construed. Because Appellant has failed to meet at least one of the requirements of the transportation-for-hire exemption, and Appellant's invocation of the use exemption was specifically at odds with longstanding BTA precedent, we find that the BTA's Decision upholding the use tax and penalty is neither unreasonable nor unlawful. Accordingly, the Decision of the BTA is affirmed in its entirety.

Donofrio, J., concurs.

Waite, J., concurs.

For the reasons stated in the Opinion rendered herein, the assignments of error are overruled and it is the final judgment and order of this Court that the judgment of the Board of Tax Appeals, Mahoning County, Ohio, is affirmed. Costs to be taxed against the Appellant.

A certified copy of this opinion and judgment entry shall constitute the mandate in this case pursuant to Rule 27 of the Rules of Appellate Procedure. It is ordered that a certified copy be sent by the clerk to the trial court to carry this judgment into execution.

NOTICE TO COUNSEL

This document constitutes a final judgment entry.