

COURT OF APPEALS
GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

GUERNSEY COUNTY	:	JUDGES:
COMMISSIONERS	:	Hon. W. Scott Gwin, P.J.
	:	Hon. John W. Wise, J.
	:	Hon. Patricia A. Delaney, J.
Plaintiffs-Appellees	:	
	:	
-vs-	:	Case No. 2010-CA-28
	:	
CAMBRIDGE PROPERTY	:	
INVESTORS, LTD., ET AL	:	<u>OPINION</u>
	:	
Defendants-Appellants	:	

CHARACTER OF PROCEEDING: Civil appeal from the Guernsey County Court of Common Pleas, Case No. 09-CV-346

JUDGMENT: Affirmed

DATE OF JUDGMENT ENTRY: December 29, 2010

APPEARANCES:

For Plaintiff-Appellee For Defendant-Appellant

DANIEL G. PADDEN
Guernsey County Prosecutor
139 W. Eighth Street
Cambridge, OH 43725

DONALD D. BROWN
803 Steubenville Avenue
Cambridge, OH 43725

Gwin, P.J.

{¶1} Defendants-appellants Gerald A. Zamensky, Gloria J. Zamensky, Carl Barker, Jr., and Joseph G. Vrabel, who make up the members of the Cambridge Property Investors, Ltd., appeal a judgment of the Court of Common Pleas of Guernsey County, Ohio, which found the members are personally liable for the lodging excise tax their company should have paid. Appellees are the Guernsey County Commissioners. Appellants assign a single error to the trial court:

{¶2} “I. THE TRIAL COURT COMMITTED ERROR, AS A MATTER OF LAW, BY GRANTING THE MOTION FOR SUMMARY JUDGMENT AND MOTION FOR DECLARATORY JUDGMENT OF THE PLAINTIFF-APPELLEE ORDERING PERSONAL LIABILITY FOR UNPAID EXCISE TAXES (BED TAX/LODGING TAX) AGAINST THE MEMBERS OF THE LIMITED LIABILITY COMPANY KNOWN AS CAMBRIDGE PROPERTY INVESTORS, LTD.”

{¶3} The record indicates defendants-appellants Gerald A. Zamensky, Gloria J. Zamensky, Carl Barker, Jr., and Joseph G. Vrabel were members of an Ohio Limited Liability Company known as Cambridge Property Investors, Ltd. The parties do not dispute the company failed to pay six months of hotel lodging taxes, sometimes referred to as bed taxes, due on the operation of the Holiday Inn in Cambridge, Guernsey County, Ohio. The parties agreed the amount due is \$30,953.58. The sole issue before the trial court and before us is the personal liability of the members of the company; the company is no longer in business. The trial court granted summary judgment in favor of appellees. Appellants argue the judgment is erroneous as a matter of law on the undisputed facts.

{¶14} We review a summary judgment de novo. *Doe v. Shaffer*, 90 Ohio St.3d 388, 2000-Ohio-186.

{¶15} In 1980, plaintiff-appellee, the Guernsey County Commissioners enacted a lodging/bed tax for the purpose of collecting funds to support various programs. Citing R.C. 5739.024 as the enabling statute, the resolution required each owner, operator, lessee of, a hotel, to file a monthly lodging excise tax.

{¶16} R.C. 5739.024 has been renumbered as R.C. 5739.09. The statute provides:

{¶17} “(A)(1) A board of county commissioners may, by resolution adopted by a majority of the members of the board, levy an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests. The board shall establish all regulations necessary to provide for the administration and allocation of the tax. The regulations may prescribe the time for payment of the tax, and may provide for the imposition of a penalty or interest, or both, for late payments, provided that the penalty does not exceed ten per cent of the amount of tax due, and the rate at which interest accrues does not exceed the rate per annum prescribed pursuant to section 5703.47 of the Revised Code.***”

{¶18} R.C. 5739.33 states:

{¶19} “If any corporation, limited liability company, or business trust required to file returns and to remit tax due to the state under this chapter, including a holder of a direct payment permit under section 5739.031 of the Revised Code, fails for any reason to make the filing or payment, any of its employees having control or supervision of or charged with the responsibility of filing returns and making payments, or any of its

officers, members, managers, or trustees who are responsible for the execution of the corporation's, limited liability company's, or business trust's fiscal responsibilities, shall be personally liable for the failure. The dissolution, termination, or bankruptcy of a corporation, limited liability company, or business trust shall not discharge a responsible officer's, member's, manager's, employee's, or trustee's liability for a failure of the corporation, limited liability company, or business trust to file returns or remit tax due.***"

{¶10} Ohio Administrative Code 5703-9-49(B), cited by the court, provides for joint and several liability of the officers, employees, or trustees of a limited liability company that fails to file returns and pay taxes. The trial court found pursuant to R.C.5739.33, the members are personally liable because their limited liability corporation failed to file mandatory returns and remit taxes due.

{¶11} Appellants argue the tax at issue is an excise tax rather than a sales tax, and the tax is not payable to the State of Ohio.

{¶12} R.C. 5739.01 contains the definitions used in the chapter. It states:

{¶13} (1) "Sale" and "Selling" include all the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever: ***

{¶14} (2) All transactions by which lodging by a hotel is or is to be furnished to transient guests.***"

{¶15} The statute clearly defines the tax in question as a sales tax. See also, R.C. 5739.02, which uses the term excise tax as that which is levied on a retail sale

made in the state of Ohio. We conclude the tax at issue in the case is classified as a sales tax, and as the trial court found, an excise tax is a sales tax.

{¶16} Appellants also argue Title 57 of the Revised Code which provides for sales taxes applies only to the state of Ohio, and thus, the appellees cannot use this section as authority for holding them personally liable.

{¶17} R.C. 5739.01 defines the term “person” as, among other things, the state and its political subdivisions, and does not distinguish between state authority and political subdivisions. In addition, the enabling statute, R.C. 5739.09, which applies to county government and permits appellees to levy the tax, is contained in Title 57. Title 57 is applicable to the state and its subdivisions.

{¶18} Appellants argue appellees’ resolution which established the bed tax makes owners, operators, or lessees of the hotel obligors, cites the Revised Code, but does not contain specific language making them personally liable for payment of the tax. Appellants assert because there is no such provision in the original resolution appellees lack authority to hold them personally liable.

{¶19} Nothing in R.C. 5739.09 requires the appellees to utilize the language of the statute in the resolution. We agree with the trial court the fact that there is no county enabling resolution for collection is not dispositive as the parties are put on notice of their legal rights from the Ohio Revised Code and the Ohio Administrative Code. In the absence of a provision in a resolution or city ordinance, the state statute controls. *Great Plains Exploration L.L.C. v. Willoughby*, Lake App. No. 2006- L - 022, 2006- Ohio - 7009 at paragraph 31, citing *Deemer v. Ashtabula City Civ. Serv. Commission* (1997), 124

Ohio App.3d 630, 634, 707 N.E.2d 20. Although the *Willoughby* case dealt with a Home Rule issue, the principle is the same.

{¶20} We find the trial court did not err in finding appellants are personally liable for the unpaid taxes. Accordingly, the trial court did not err in entering summary judgment as a matter of law in favor of appellees.

{¶21} The assignment of error is overruled.

{¶22} For the foregoing reasons, the judgment of the Court of Common Pleas of Guernsey County, Ohio, is affirmed.

By Gwin, P.J.,

Wise, J., and

Delaney, J., concur

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY

WSG:clw 1216

IN THE COURT OF APPEALS FOR GUERNSEY COUNTY, OHIO
FIFTH APPELLATE DISTRICT

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-vs-	:	JUDGMENT ENTRY
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INVESTORS, LTD., ET AL	:	
	:	
	:	
Defendants-Appellants	:	CASE NO. 2010-CA-28

For the reasons stated in our accompanying Memorandum-Opinion, the judgment of the Court of Common Pleas of Guernsey County, Ohio, is affirmed. Costs to appellants.

HON. W. SCOTT GWIN

HON. JOHN W. WISE

HON. PATRICIA A. DELANEY