[Cite as *Hartzell Propeller Inc. v. Piqua*, 2004-Ohio-1936.]

IN THE COURT OF APPEALS FOR MIAMI COUNTY, OHIO

HARTZELL PROPELLER INC. :

Plaintiff-Appellant : C.A. CASE NO. 03CA16

vs. : T.C. CASE NO. 02-41

CITY OF PIQUA, OHIO : (Civil Appeal from Common Pleas Court)

Defendant-Appellee :

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O P I N I O N

Rendered on the 16th day of April, 2004.

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GRADY, J.

{¶1} This is an appeal from a judgment of the court of common pleas affirming a decision of the City of Piqua Income Tax Board of Review in an action brought pursuant to R.C. Chapter 2506.01, et seq., by Appellant, Hartzell Propeller, Inc. ("Hartzell").

{¶2} Pursuant to R.C. 2506.04, the common pleas court was required to affirm the Board's order unless the court found the

order deficient for one of the grounds set out in that section. Those are that the order is unconstitutional, illegal, arbitrary, capricious, unreasonable, or unsupported by a preponderance of the substantial, reliable, and probative evidence.

{¶3} The common pleas court's review is on both questions of fact and questions of law. In contrast, our review of that court's decision is confined to issues of law. *SMC, Inc. v. Laudi* (1975), 44 Ohio App.2d 325.

{¶4} Hartzell designs and manufactures constant speed variable pitch propellers for the aviation industry at Hartzell's facility in Piqua. Hartzell has customers of two types: (1) original equipment manufacturers and modifiers, and (2) repair and replacement facilities and companies that distribute to them.

{¶5} Article XVIII, Section 13, of the Ohio Constitution, a part of the Home Rule Amendment, provides that "[l]aws may be passed to limit the power of municipalities to levy taxes . . ." R.C. 718.02(A) establishes alternative methods for determination of income subject to taxation by municipalities. That section provides that the profits of a business conducted within a municipality are taxable, and that the net profits of a business operating both within and outside the municipality are taxable "in the same proportion as the average ratio of . . . (3) [g]ross receipts . . . from sales made . . . in such municipal corporation . . . to gross receipts . . . during the same period from sales . . ., wherever made or performed." Paragraph (B)(3) of that section states that "sales made in a municipal corporation includes:

{¶6} "All sales of tangible personal property shipped from a place within such municipal corporation to purchasers outside such municipal corporation regardless of where title passes if the taxpayer is not, through its own employees, regularly engaged in the solicitation or promotion of sales at the place where delivery is made."

{¶7} Section III B.2.b.1. of the Piqua ordinances states that for purposes of the calculations for which R.C. 718.02(A)(3) provides, "[t]he following sales shall be considered Piqua sales:

{¶8} ".04 All sales of tangible personal property shipped from an office, store, warehouse, factory or place of storage within the City of Piqua to purchasers outside the City of Piqua, if the taxpayer is not, through its own employees, regularly engaged in the solicitation or promotion of sales at the place of delivery."

{¶9} It appears that Hartzell paid the tax on its full net income for the tax years 1997, 1998 and 1999. Subsequently, in 2001, Hartzell sought a refund of the taxes it had paid for those years in proportion to its non-Piqua sales. The Piqua Board of Tax Review disallowed the refund, citing a Piqua ordinance that states: "A taxpayer may not change the method of accounting or apportionment of net profits after the due date for the filing of the original return." Hartzell filed a notice of appeal of the Board's decision in the court of common pleas.

{¶10} The trial court did not confine its review to the grounds on which the Board had denied Hartzell's request. Instead, the court granted Hartzell's R.C. 2506.03 motion to take

additional evidence, and then heard evidence that Hartzell offered to show that the net profit from all of its sales to original equipment manufacturers and to distributors for the years 1997, 1998 and 1999 were exempt under the test set out in Section III B.2.b.1.04 of the Piqua ordinances. The trial court thereafter affirmed the Board's decision. Hartzell filed a timely notice of appeal to this court.

{¶11} Hartzell presents four assignments of error on appeal. In various ways they attack the rationale that the trial court applied, arguing that the court erred (1) when it required a direct nexus between a particular sale and a corresponding promotion or solicitation activity by Hartzell's employees, and (2) because the evidence Hartzell offered was nevertheless sufficient to prove the more general nexus which the Piqua ordinance requires.

{¶12} Both R.C. 718.02(A) and (B) and the Piqua ordinance define an exemption from the tax Piqua levies. In construing those terms, they must be strictly applied against the exemptions, and the taxpayer must show his entitlement to it. *In re Estate of Roberts* (2002), 94 Ohio St.3d 311.

{¶13} It is undisputed that all the sales in issue were made to purchasers outside Piqua and that the products Hartzell sold were delivered to purchasers at places outside Piqua. The only real issue was whether Hartzell had "regularly engaged in the solicitation or promotion of sales at the place of delivery" during the tax years in question.

{¶14} Mike Disbrow, Hartzell's Senior Vice President for

marketing, applications, and customer support, testified that Hartzell is the largest manufacturer of variable speed propellers of its type in the world. He also testified that Hartzell has a policy of visiting its original equipment manufacturer customers at least annually to solicit and promote sales. Evidence presented to the Board demonstrates that in the twenty-one month period between January 1, 2000 and October 1, 2001, over one hundred such calls were made. During the same period, forty-six such calls were made by Hartzell's employees on distributor customers. Disbrow testified that this pattern of visits was also typical of the same activities for the tax years in question; 1997, 1998, and 1999.

{¶15} The City of Piqua did not dispute these contentions. Rather, it argued that Hartzell's evidence was insufficient to show that it "regularly engaged" in sales and promotion calls, as the ordinance requires. The City also relied on a letter dated June 19, 2001, to Piqua 's Director of Finance from Hartzell's Controller, Daniel O'Connell, in which he stated: "With respect to Distributors, we do not do any solicitation of sales from this customer class."

{¶16} The trial court rejected the showing that Hartzell made, stating: "I can't imagine a business going to an I.R.S. audit and offering such sweeping characterizations and such tenuous documentation." That statement appears to apply to the issue of regularity. Concerning the further "place of delivery" requirement of the Piqua ordinance, the court stated:

{¶17} "Even if Hartzell is right in its interpretation it

cannot prevail here for lack of substantiation. For example, Hartzell says that the solicitation or promotion of sales are always made at the place of delivery. Yet it offers no particulars or detailed information to assure the Board or the Court that the place where the salesperson calls on a corporate office in Dallas does not mean the propellers are delivered at that particular place. Probably, the delivery of the item is sometimes made to that place and sometimes not. The Court has not been sufficiently persuaded by Hartzell on this issue. From this, the Court understands the reluctance of the Board to allow the exemption and grant the tax refund." (Decision and Order, p. 3).

{¶18} Hartzell does not challenge the court's findings concerning the "place of delivery" requirement. Hartzell's general contention is that the court demanded too particular a nexus between its employee's activities and a given sale, and that its burden is satisfied by evidence that it offered showing that its employees "regularly engaged in solicitation or promotion at the place of delivery (i.e., its customer's place of business.)" (Brief, p.6).

{¶19} We are persuaded that regular solicitation and promotion is shown by the evidence Hartzell offered. And, we agree that no other nexus between those activities and any particular sale need be shown; more specifically, that a particular call produced a particular sale. However, both the Piqua ordinance and R.C. 718.02(B)(3) require a further showing that the product or merchandise sold was delivered to the place

where those activities occurred. That is not merely to a location where the customer does business, as Hartzell suggests, but to the locus of its employee's sales and promotional activities on Hartzell's behalf. The record does not show that connection.

{¶20} The trial court identified a weakness in both the Piqua ordinance and the statute. Both assume that deliveries occur where the seller's sales and promotional activity also took place. However, for customers that do business in multiple locations, that may not apply. A firm can have engineering facilities at one place, purchasing facilities at another, and manufacturing facilities in a third, all separated by hundreds of miles. A product may be delivered to the manufacturing facility when sales and promotion activities that resulted in the delivery occurred at one or both of the other two. Then, the exemption is not satisfied, no matter how regularly the sales and promotion activities occurred.

{¶21} Reasonably, the test should be whether the solicitation and/or promotion took place at the customer's place of business. We might so construe the exception, in which event the evidence of sales calls on customers that Hartzell offered might be sufficient. However, the Home Rule Amendment specifically confers the power to limit a municipality's tax authority on the General Assembly, which has adopted a "place of delivery" test in R.C. 718.02(B)(3). The General Assembly should consider amending R.C. 718.02(B)(3) to delete the place of delivery test in favor of a "purchaser's place of business" or similar test. Until

then, local ordinances such as Piqua's can require more specific proof that the delivery requirement was satisfied than Hartzell offered.

{¶22} Hartzell's assignments of error are overruled. The judgment of the trial court will be affirmed.

Judgment affirmed.

BROGAN and YOUNG, JJ., concur.

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