SLIP OPINION NO. 2023-OHIO-2974

PCM, INC., APPELLANT, *v.* HARRIS,[1] TAX COMMR., APPELLEE.

[Until this opinion appears in the Ohio Official Reports advance sheets, it may be cited as *PCM, Inc. v. Harris*, Slip Opinion No. 2023-Ohio-2974.]

Taxation—Use-tax assessments—Corporation's challenge to Board of Tax Appeals' assessment of use tax against it for certain items included in construction of one of its buildings fails because it does not cite any authority in support of proposition that when building contractor paid taxes on certain items during building's construction, board may not then assess use tax against corporation for same items—Decision affirmed.

(No. 2021-1217—Submitted May 2, 2023—Decided August 29, 2023.)

APPEAL from the Board of Tax Appeals, No. 2020-477.

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1. When this case was filed, Jeffery McClain was the tax commissioner. Patricia Harris is the current tax commissioner, and we have automatically substituted her for McClain as appellee in this case. *See* S.Ct.Prac.R. 4.06(B) and Civ.R. 25(D)(1).

Per Curiam.

{¶ 1} This is an appeal from a Board of Tax Appeals' decision upholding a final determination by appellee, Tax Commissioner Patricia Harris, who assessed a use tax against appellant, PCM, Inc. The assessment relates to items used in the construction of a data center that PCM contracted to have built in 2013. PCM raises four propositions of law. PCM argues in its first and second propositions of law that the board erred in denying its hearing request. PCM argues in its third proposition of law that it is not liable for the tax with respect to nine items, which it asserts are not subject to the use tax because they constitute real property rather than personal property or are otherwise nontaxable. PCM argues in its fourth proposition of law that the tax commissioner erred in imposing a penalty. Although not separately stated as a proposition of law, PCM also asserts that it is not liable for the use tax, because a contractor paid it on the items in question.

{¶ 2} We reach the merits only of PCM's argument that the contractor paid the use tax. We reject that argument because PCM has not cited any authority showing that a contractor's payment of the tax is legally significant for the purpose of this case. We conclude that PCM forfeited the arguments under its third and fourth propositions of law because it did not timely raise those arguments during the petition-for-reassessment phase of this case. As for PCM's first and second propositions of law, we conclude that they are moot. Even if we were to agree with PCM that the board erred in denying its hearing request, remanding this case to the board for a hearing would be futile because there would be nothing for PCM to litigate since it forfeited the arguments advanced in its third and fourth propositions of law.

{¶ 3} We affirm the board's decision upholding the tax commissioner's final determination.

I. BACKGROUND

{¶ 4} In 2013, PCM contracted with the Daimler Group for the construction of a data center in New Albany, Ohio. In 2016, after construction was complete, the tax commissioner commenced an audit of PCM for the period January 1, 2013, through December 31, 2015. One of the auditors toured PCM's data center and reviewed its trial balances, fixed assets, accounts payable, invoices, and construction contract with Daimler. The auditor found that certain items related to the data center's construction should be taxed to PCM rather than Daimler because the items constituted the acquisition of "business fixtures/tangible personal property," rather than real property. Based on the auditor's findings, the tax commissioner issued a $698,632.71 use-tax assessment against PCM, consisting of a tax of $555,512.49; preassessment interest of $59,793.35; and a penalty of $83,326.87.

{¶ 5} In March 2018, PCM's tax director, a nonattorney employee, filed a petition for reassessment with the tax commissioner. PCM checked a box on the petition-for-reassessment form requesting that the tax commissioner do the following: "Please decide this matter based upon the information submitted. No hearing is requested." PCM advanced two bases for reassessment in its petition. First, it quoted in part Ohio Adm.Code 5703-9-14(D)(1), which addresses the operation of the use-tax law in the construction setting. Second, it stated that "all of the taxes required in the materials incorporated in the real property were included in the billings and paid by The Daimler Group to each of its vendors." PCM included with its petition a letter from Daimler attesting to this second point.

{¶ 6} The tax commissioner issued a final determination in January 2020 upholding the assessment. The tax commissioner noted the bases advanced in PCM's petition for reassessment but observed that PCM had failed to "identify the objected [to] transactions" or "provide[] any rationale as to why the assessed items are not business fixtures." The tax commissioner also observed that PCM had

failed to "submit any invoices, spreadsheets, receipts, or other information to corroborate [its] blanket assertion" that Daimler had paid the tax. As a further ground for rejecting PCM's reliance on Daimler's letter, the tax commissioner cited the board's decision in *Meijer, Inc. v. Tracy*, BTA No. 97-M-1618, 2001 WL 128070 (Feb. 8, 2001), in which the board determined that Ohio's tax "statutes contain no provision for crediting taxes paid by one consumer to the account of another," *id.* at *10.

{¶ 7} In March 2020, PCM, again acting through its tax director, filed a notice of appeal with the board but did not ask for a hearing. Less than a week later, the board issued a scheduling order. Interpreting PCM's silence regarding a hearing as an "indicat[ion] * * * that a hearing [was] unnecessary," the board directed the parties to "submit written argument[s] in support of their respective positions" by June 8, 2020. In a joint motion, PCM's tax director and the tax commissioner asked the board to extend the briefing deadline to September 28, 2020, which the board did.

{¶ 8} On September 8, 2020, PCM's tax director filed a brief on PCM's behalf. And on September 28—the briefing deadline—PCM's tax director filed a combined "request for hearing" and "motion to remand case back to tax commissioner," which the tax commissioner opposed. In asking for a hearing, PCM's tax director stated that he "mistakenly, but honestly believed" that the notice of appeal he had filed with the board constituted a request for a hearing; he argued that it would be a "grave injustice" for the board to decide the case without a hearing.

{¶ 9} The board denied PCM's hearing request on the grounds that PCM had failed to show good cause why it did not request a hearing by the May 8, 2020 deadline as required by the board's rules and because the late request was filed by "a nonlawyer on behalf of a corporation." As to the latter point, the board cited *Oglethorpe of Cambridge, L.L.C. v. McClain*, BTA No. 2018-1304, 2020 WL

122755 (Jan. 8, 2020), a case in which the board struck the brief filed on behalf of the appellant by an out-of-state attorney who had not acquired pro hac vice status. The board denied PCM's motion to remand for similar reasons. On the merits, the board affirmed the tax commissioner's final determination. This appeal followed.

II. ANALYSIS

{¶ 10} "In reviewing a decision of the [Board of Tax Appeals], we determine whether the decision is reasonable and lawful, deferring to factual determinations of the [board] but correcting legal errors." *N.A.T. Transp., Inc. v. McClain*, 165 Ohio St.3d 250, 2021-Ohio-1374, 178 N.E.3d 454, ¶ 11. For ease of analysis, we address PCM's propositions of law out of order.

A. Daimler's alleged tax payments

{¶ 11} Although PCM intersperses its merit brief with statements that Daimler paid all applicable taxes and that the tax commissioner has overreached in taxing it for the same items, it did not raise this issue in a separate proposition of law. We disagree with PCM's statements in this regard.

{¶ 12} To begin with, PCM cites no authority for the proposition that the payments have any legal significance that would affect PCM's use-tax liability. Beyond this, the tax commissioner in a final determination addressed PCM's tax-payment argument. The tax commissioner cited the board's decision in *Meijer*, BTA No. 97-M-1618, 2001 WL 128070, in which the board held that Ohio's tax statutes "contain no provision for crediting taxes paid by one consumer to the account of another," *id.* at *10. PCM has not acknowledged the decision in *Meijer* in its argument before this court, let alone cited any authority that calls it into question.

B. Whether nine items included in the tax commissioner's assessment are taxable

{¶ 13} In its third proposition of law, PCM contends that the tax commissioner erred in imposing use tax on nine items. We do not reach the merits of this argument.

{¶ 14} There is a glaring discrepancy between the arguments asserted in this proposition of law and the findings set forth in both the tax commissioner's final determination and the board's decision. Neither the tax commissioner's final determination nor the board's decision addresses the taxability of the nine items that PCM contests are nontaxable. PCM says that the board "committed reversible error when it failed to properly address PCM's legal arguments on these points and [that] the [board's] decision is accordingly unreasonable and unlawful." The board did not err in failing to address the taxability of each item.

{¶ 15} "[W]ith regard to substantive issues presented in tax appeals, we must refrain from ruling on issues that have not been properly preserved or presented." *Abraitis v. Testa*, 137 Ohio St.3d 285, 2013-Ohio-4725, 998 N.E.2d 1149, ¶ 21. *Abraitis* arose from the tax commissioner's issuance of an income-tax assessment, but the above-quoted language is illustrative of a basic principle of administrative law: "[A]s a general rule * * * courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice," *United States v. L.A. Tucker Truck Lines, Inc.*, 344 U.S. 33, 37, 73 S.Ct. 67, 97 L.Ed. 54 (1952).

{¶ 16} Applying these precepts, we conclude that PCM has forfeited the opportunity to challenge in this court the taxability of the nine items it identifies, because it failed to object to the assessments against these items during the petition-for-reassessment phase of the case. R.C. 5739.13(B) provides that the "petition shall indicate the objections of the party assessed," but it permits the taxpayer to raise "additional objections * * * in writing" prior to the date of the final determination. And Ohio's use-tax law incorporates R.C. 5739.13's requirements. *See* R.C. 5741.14; *see also Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 6.

{¶ 17} When PCM filed its petition for reassessment, it set forth two bases for reassessment—it quoted Ohio Adm.Code 5703-9-14(D)(1) and it stated that Daimler had paid the applicable taxes. We have already rejected PCM's argument relating to Daimler's payments and direct our focus here on PCM's invocation of the administrative rule, which provides:

> A construction contractor who purchases materials or taxable services for incorporation into real property is the consumer of those materials or services and shall pay sales or use tax on their purchase price, except as provided by paragraph (F) of this rule. The construction contractor is the consumer, even if a subcontractor provides the actual labor to incorporate those materials into the real property.

Ohio Adm.Code 5703-9-14(D)(1).

{¶ 18} PCM's mere quotation of the rule does not constitute an "objection" within the meaning of R.C. 5739.13(B) to the assessment of use tax on the nine items identified by PCM. *See Merriam-Webster's Collegiate Dictionary* 855 (11th Ed.2020) (defining "objection" as "a reason or argument presented in opposition"). Indeed, as the tax commissioner correctly observed in her final determination, PCM's petition failed to "identify the objected [to] transactions" or advance "any rationale" as to why it should not be held liable for the assessment. Nor have we been presented with any evidence establishing that PCM asked the tax commissioner in writing to consider the taxability of the nine items prior to the date of her final determination. By failing to object to the taxability of the items in its petition for reassessment or in another writing filed before the date of the tax commissioner's final determination, PCM has forfeited the right to have this court consider the issue now.

C. Whether the tax commissioner erred by imposing a penalty

{¶ 19} In its fourth proposition of law, PCM contends that the tax commissioner erred by imposing a penalty. But PCM did not ask the tax commissioner to abate the penalty during the petition-for-reassessment phase. Therefore, for the same reasons that we do not reach PCM's third proposition of law, we do not reach its fourth proposition of law.

D. Whether the board should have granted PCM's hearing request

{¶ 20} In its first and second propositions of law, PCM faults the board for denying its request for a hearing. We conclude that these propositions are moot. Even if we were to agree with PCM that the board erred, remanding the matter to the board to hold a hearing and allow PCM to develop a record concerning the taxability of the nine items at issue and the imposition of the penalty would be futile because, as previously discussed, PCM forfeited its arguments concerning these issues.

III. CONCLUSION

{¶ 21} We affirm the board's decision upholding the tax commissioner's final determination.

Decision affirmed.

KENNEDY, C.J., and DEWINE, DONNELLY, STEWART, BRUNNER, and DETERS, JJ., concur.

FISCHER, J., dissents.

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