

SMITH, D.B.A. SMITH'S C. B. SERVICE, APPELLANT, v. TRACY, TAX COMM.,

APPELLEE.

[Cite as *Smith v. Tracy* (1997), 80 Ohio St.3d 541.]

Taxation — Sales tax — R.C. 5739.12 — Dispute whether vendor timely filed August 1995 sales tax return and made payment — Board of Tax Appeals' decision reversed and remanded, when.

(No. 97-588 — Submitted September 30, 1997 — Decided December 31, 1997.)

APPEAL from the Board of Tax Appeals, No. 96-T-566.

Willie Smith, d.b.a. Smith's C. B. Service, appellant, holds a sales tax vendor's license. Under this license, he must file monthly sales tax returns and remit collected sales taxes to the State Treasurer. R.C. 5739.12. Smith participated in the District Office Direct Deposit Program ("DODD"), in which the Treasurer has deputized the Tax Commissioner, appellee, to receive tax returns and payments at the commissioner's district offices.

The commissioner found that the return for August 1995 was filed late and that he did not receive the August payment. He also concluded that Smith had filed the September 1995 return and payment late. Consequently, the commissioner assessed Smith for the August payment and late filing charges and penalties for both returns.

In his brief and at oral argument, the commissioner concedes that Smith had timely filed the September return and timely remitted payment. The commissioner consents to the court's so holding. However, the August return and payment still remain at issue.

Smith appealed the commissioner's order to the Board of Tax Appeals ("BTA"). At the BTA, he testified that he had delivered the August return and payment to the Youngstown district office and that the commissioner had

mishandled it. He provided a canceled check for the September payment but testified that his bank could not locate the check for payment of the August return.

The BTA ruled that Smith, under R.C. 5739.12, needed to file the return and make the payment to the State Treasurer. Since Smith, according to the BTA, had not filed either of the returns with the Treasurer, he had not filed the returns or made the payments timely. The BTA made no finding on if or when Smith had filed the August return with the commissioner's district office. Consequently, the BTA affirmed the commissioner's order as to both returns.

This cause is now before this court upon an appeal as a matter of right.

Willie Smith, pro se.

Betty D. Montgomery, Attorney General, and Richard C. Farrin, Assistant Attorney General, for appellee.

Per Curiam. Smith asks this court to resolve his dilemma. According to Smith, the commissioner requires him to file returns and make payments at the commissioner's district office. The BTA, to the contrary, tells him that he has not filed the returns timely unless he files them with the Treasurer. Smith concedes that he owes tax for August 1995, but claims that he has paid this amount and that the commissioner should credit his account and vacate the penalty and late-filing charges.

The commissioner acknowledges that he operates the DODD program and that Smith participated in it. He also declares that the BTA incorrectly decided this case on the basis that Smith needed to file a return with and make payments to the Treasurer. Finally, the commissioner notes that he had not alerted the BTA

about DODD. Nevertheless, he claims that Smith has not established the filing of the August return or payment of the August remittance.

Under DODD, the Treasurer has deputized the commissioner to receive returns and payments for sales taxes at the commissioner's district offices. The Treasurer receives the returns and payments when the commissioner's district office receives them. Smith participated in this program, filing returns and making payments at the district office. Thus, as the commissioner concedes, if Smith timely filed his August 1995 return and remitted the tax at the commissioner's district office, he satisfied the timely filing requirements of R.C. 5739.12.

Because the BTA ruled that only a filing with the Treasurer satisfied the timely filing requirements of R.C. 5739.12, it made no factual finding as to the filing of the August return or the remitting of the collected sales tax at the district office. Making such findings is the BTA's province, not ours. See *Youngstown Sheet & Tube Co. v. Mahoning Cty. Bd. of Revision* (1981), 66 Ohio St.2d 398, 20 O.O.3d 349, 422 N.E.2d 846.

Accordingly, we reverse the BTA's decision as to the August 1995 return and payment and remand this matter to the BTA for it to decide whether Smith timely filed the August 1995 return and payment at the district office. We also reverse the BTA's decision as to the September return and payment, and vacate the late-filing charge and penalty for the September return, in accordance with the commissioner's concession.

*Decision reversed
and cause remanded.*

MOYER, C.J., DOUGLAS, RESNICK, F.E. SWEENEY, PFEIFER, COOK and
LUNDBERG STRATTON, JJ., concur.