

OHIO BTA ISSUES FIRST DECISIONS ADDRESSING CAT SITUSING PROVISIONS

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Are Forward Contracts the Sale of Tangible Personal Property or the Sale of an Investment or Trading Asset?

Recently, the Board of Tax Appeals (“BTA”) issued its first two decisions addressing the Commercial Activity Tax (“CAT”) situsing provisions in R.C. 5751.033. In *Central State Enterprises, LLC v. Testa*, BTA No. 2016-380 (July 5, 2017),¹ the BTA concluded that gross receipts from forward contracts for agricultural commodities should be sitused pursuant to R.C. 5751.033(E), as sales of tangible personal property. Central State Enterprises, LLC (“Central State”) is an agricultural commodities trader. Central State enters into forward purchase and sale commitment contracts, which it hedges through futures contracts for agricultural commodities such as corn, wheat, soybeans, etc. The Ohio Department of Taxation (“ODT”) issued a CAT assessment including gross receipts from the portion of Central State’s forward contracts in which the agricultural commodities were delivered to Ohio. The record indicates that the receipts from futures contracts were not included in the assessment. Presumably, ODT found that the futures contracts were hedging transactions, which are excluded from CAT gross receipts. The assessment was affirmed by the appeals division of ODT and Central State appealed the Final Determination to the BTA.

R.C. 5751.033(H) provides that “gross receipts from dividends, interest, and other sources of income from financial instruments” are sitused based on the former franchise tax situsing

¹For purposes of this SALT Buzz, only the CAT gross receipts situsing issue is discussed. The taxpayer also raised additional arguments including that the “gross receipt” base should be the net receipts included in federal gross income and that that the taxpayer did not have nexus with Ohio.

provisions for financial institutions set forth in R.C. 5733.056. Central State argued that R.C. 5751.033(H) governed because a “forward contract” is specifically listed in R.C. 5733.056(F) (13) as an example of an investment and/or trading asset. Central State argued that the gross receipts from the forward contracts were “other sources of income from financial instruments” situated under R.C. 5733.056(F)(3), which effectively situates the gross receipts from financial instruments to the location where the financial instruments are managed. The assessment issued by ODT treated the gross receipts from the forward contracts as receipts from the sale of tangible personal property pursuant to R.C. 5751.033(E), which are situated based on the ultimate destination of the property.

The BTA was not persuaded by Central State’s argument that R.C. 5751.033(H) applied, noting that Central State “takes title to commodities to provide them to consumers, and recognizes revenue when title is transferred upon shipment of such commodities to customers.” The Tax Commissioner had argued that the forward contracts did not fall within the definition of “financial instruments,” that the types of income included as “dividends, interest, and other sources of income from financial instruments” in R.C. 5733.033(H) should be narrowly interpreted to not include the receipts from the forward contract sales, and that the siting provisions in R.C. 5733.056 should only apply to a business that was not a regulated financial institution or similar business. The BTA did not explicitly endorse any of these arguments raised by the Tax Commissioner. However, it concluded that Central State did not meet its burden of proving that the forward contracts were the type of gross receipts intended to be situated by R.C. 5751.033(H), and thus should be situated using R.C. 5751.033(E) to the location that the tangible personal property was delivered.

Are Customer Pick Up Sales Situated Based on Their Ultimate Destination?

In *Greenscapes Home and Garden Products, Inc. v. Testa*, BTA No. 2016-350 (July 19, 2017),² the BTA concluded that the gross receipts from the sale of tangible personal property should be situated to Ohio if “[a]t the time the appellant sold products to its customers, it knew their ultimate destination to be Ohio, based on its customer’s orders and the bills of lading it provided to the drivers transporting the products.” Greenscapes Home and Garden Products, Inc. (“Greenscapes”) is a wholesaler of lawn and garden products and sells its products to many national retailers. The ODT issued a CAT assessment to Greenscapes for sales of tangible personal property that included an Ohio “ship to” address on the bill of lading, even though Greenscapes’ customers (or designees) picked up the tangible personal property at a Georgia facility. The ODT appeals division affirmed the assessment and Greenscapes appealed the Final Determination to the BTA.

Greenscapes argued that the gross receipts were not properly situated to Ohio. At the BTA hearing, a Greenscapes executive testified that Greenscapes “sells its products directly to its retailer customers by providing its product at its Georgia location, loading it onto the customer’s selected mode of transportation, i.e., pre-arranged truck, and providing a bill of lading to the truck driver indicating the ultimate ‘ship to’ address.” The title to the tangible personal property transfers from Greenscapes to its customer when the property is loaded on the truck. After this time, Greenscapes does not track the location of the tangible personal property. Greenscapes argued that the sales should not be situated to Ohio based on the plain language of R.C. 5751.033(E).

The BTA disagreed and used the same siting methodology applied to the provision siting the sale of tangible personal property under the former franchise tax. The CAT siting provision in R.C. 5751.033(E) contains almost identical language to the franchise tax siting

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provision. Legislation that would have required that R.C. 5751.033(E) be interpreted consistent with the judicial authority developed under the franchise tax was vetoed by Ohio Governor Taft when the CAT was enacted. However, the BTA relied on the decision in *Dupps Co. v. Lindley*, 62 Ohio St.2d 305 (1980), a franchise tax decision with similar facts, which determined that the sale of tangible personal property should be situated based on its ultimate destination. In *Dupps*, the taxpayer entered into Ohio, purchased a piece of equipment, took possession of the equipment, and transported the equipment back to Indiana. The Ohio Supreme Court held that a “customer pick-up” is considered “other transportation” and the sale should be included in the sales factor numerator of the state where the equipment is ultimately received (i.e., Indiana in the *Dupps* decision). The BTA determined that the decision in *Dupps* should be applied to the CAT because the statutes contained nearly identical language.

The BTA implied that Greenscapes did not meet its burden of proof with respect to Greenscapes’ argument that some of the goods were removed from Ohio by its customers, and delivered to an ultimate location outside Ohio, because there was no evidence confirming this occurred. Thus, the BTA concluded that for purposes of the CAT, the ultimate destination that is known by the seller of tangible personal property, based upon information known to the seller, will be used to situs the gross receipts of the tangible personal property.

Conclusion

As outlined in an earlier [ZHF SALT Buzz](#), the siting of tangible personal property for the CAT is not always a simple exercise. While the issues discussed in *Central State* and *Greenscapes* were complex, many of the matters still pending before the BTA have even more complex issues and considerations. Taxpayers that sell tangible personal property should consider how their products are delivered to their customers. The *Greenscapes* decision seems to allow a taxpayer to situs receipts to the ultimate destination, if the seller has sufficient documentation of its customer’s destination but the case does not indicate what evidence is sufficient. ZHF will continue to keep you updated on new BTA decisions that may impact your CAT liability.

If you would like to discuss decisions in *Central State* or *Greenscapes*, please contact Tom Fagan, Deb McGraw, or any of the other professionals at Zaino Hall & Farrin LLC.

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