

THE OHIO BOARD OF TAX APPEALS GOES RETRO
— GRANTS CONSOLIDATED ELECTED TAXPAYER
STATUS RETROACTIVELY

OCTOBER 29, 2019



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The Ohio Board of Tax Appeals (BTA) granted Nissan North America, Inc. (Nissan) retroactive consolidated elected taxpayer (CET) status, thereby eliminating the portion of the commercial activity tax (CAT) assessment in *Nissan North America, Inc. v. McClain*, BTA Case No. 2016-1076 (10/9/2019) that was based on gross receipts from intermember transactions.

Nissan and a number of its affiliated entities were audited for CAT purposes for the periods 1/1/2009 to 12/31/2011 (including a refund that was filed by Nissan for the period 7/1/2009 to 12/31/2011). Three issues were appealed to the BTA as a result of a final determination issued by the Commissioner:

- 1. Sales of leased automobiles**—Nissan Infiniti Lease Trust (NILT) purchased leases of automobiles that were originated through Nissan and Infiniti dealers. NILT sold the automobiles at the end of the lease and generated gross receipts. The Commissioner assessed CAT on a portion of these gross receipts;
- 2. Sales of retail installment contracts**—As part of its financing business, Nissan Motor Acceptance Corporation (NMAC) purchased retail installment contracts (RISCs) from dealers. NMAC packaged the RISCs and transferred them as part of a securitization using a bankruptcy remote entity to obtain additional capital. The Commissioner determined that the transfers of the RISCs generated gross receipts and assessed CAT based on the portion of the gross receipts he determined were properly situated to Ohio; and
- 3. Denial of a retroactive consolidated elected taxpayer status**—Nissan did not elect

to be a CET filer until 10/25/2011. On November 6, 2013, Nissan received a CAT assessment. On November 8, 2013, Nissan requested that its CET election be effective retroactive to 1/1/2009. The Commissioner denied such request in April 2014.

The BTA decided that the Commissioner abused its discretion in denying the retroactive application of the CET. The BTA based its decision on:

- Taxpayers are required to request CET status in writing on the form prescribed by the Commissioner. Nissan did so.
- While the statute provides for only prospective application of CET status, the statute does not foreclose retroactive application. Further, the Commissioner provided a process for retroactive application by administrative rule. Nowhere in the statute or the rule is retroactive application foreclosed by the beginning of an audit. The BTA found that the Commissioner has discretion to grant a retroactive CET status even after an audit has begun.
- The substance of Nissan's CAT returns, which excluded intercompany transactions. Nissan argued that there was no difference in the CAT liability reported on its CAT returns and the liability that would have been reported on a consolidated return, which indicated its intent to file as a CET.
- Taxpayers are permitted to amend returns to correct mistakes, citing *Procter & Gamble Co. v. Evatt*, 142 Ohio St. 373 (1943) and *First Banc Group of Ohio, Inc. v. Lindley*, 68 Ohio St.2d 81 (1981). This last point suggests that the BTA found that Nissan had made a mistake in its CAT registration and was allowed to correct the mistake. This appears to be a different basis for allowing the CET election than the claim that the Tax Commissioner abused his discretion in denying a claim for a retroactive election.

Because the BTA held that the Commissioner should have granted the retroactive CET status, it concluded that it did not need to address the taxability of the sales of leased automobiles or the sales of the RISCs because such gross receipts would be excluded intermember gross receipts under R.C. 5751.011(C). While this is correct regarding the RISCs, the sales of the automobiles at the end of the lease terms were not intermember sales and would not be excluded under R.C. 5751.011(C). The BTA remanded the case to the Commissioner for further proceedings consistent with its decision.

ZHF Observations

The BTA's decision clearly stands for the proposition that the denial of a request for a retroactive CET election is appealable to the BTA. It is also clear that the taxpayer must follow the process of requesting a retroactive CET election, as set forth in Ohio Adm. Code 5703-29-02(C)(4)(b). The BTA determined that there was nothing in the statute or rule that prevented the Tax Commissioner from accepting a retroactive CET election after the commencement of an audit and, therefore, Nissan's request was within the Commissioner's discretion.

The BTA can review whether the Commissioner's decision was "unreasonable, arbitrary, or unconscionable." The scope of the BTA's decision is less clear. The BTA's decision clearly allows a retroactive CET election to be filed after audit. The decision focuses on the testimony and evidence that the returns that were filed were consistent with a CET return, which is

more consistent with a mistake than just requesting retroactive CET after an audit. The BTA's decision cites to page 63 of Nissan's merit brief where Nissan admitted it did not file a CET election in the fall of 2005 when it first registered for the CAT. However, Nissan argued in that section of the merit brief that it had mistakenly checked the combined return option instead of the CET election and the fact that the returns included all the entities was evidence of such an intent. The BTA seems to accept the argument that the returns were filed consistent with a CET election, suggesting a mistake. The cases quoted by the BTA also refer to the correction of a mistake. "As the court stated in *Lincoln Electric Co. v. Limbach*, 66 Ohio St.3d 176 (1993), the commissioner is 'not allowed 'to crystallize the defective return made by the appellant and to assess it accordingly,' and the taxpayer has 'the right to correct what it claims was a mistake on its part in making the return.' Id. at 178, citing *Procter & Gamble*, supra, at 378." Thus, the decision indicates that the Commissioner must accept a retroactive CET election where there is evidence that the taxpayer's made a mistake in its election.

It is less clear if the Commissioner has to accept a retroactive CET election where an audit resulted in additional tax from intercompany transactions. Interestingly, Nissan's merit brief also describes how NMAC, the entity with the CAT receipts at issue in the case, had filed a Dealer in Intangibles return for 2004 through 2010. As a Dealer in Intangibles, NMAC would have been excluded from the CAT. It was later determined NMAC did not qualify as a Dealer in Intangibles and, therefore, was subject to the CAT but that issue does not appear to have been resolved until late in 2010. Since this fact was not mentioned in the BTA's decision, it is unclear whether it factored into the decision.

Please note that the State has until November 8, 2019 to file an appeal to the Ohio Supreme Court.

If you would like to discuss the Nissan case or any other CAT issues, please contact John Trippier, Richard Farrin or any other ZHF professional.

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