OHIO BOARD OF TAX APPEALS

GREENSCAPES HOME AND GARDEN PRODUCTS, INC., (et. al.),	CASE NO(S). 2016-350
Appellant(s),	(COMMERCIAL ACTIVITY TAX)
vs.	DECISION AND ORDER
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),	
Appellee(s).	

APPEARANCES:

For the Appellant(s) - GREENSCAPES HOME AND GARDEN PRODUCTS, INC.
Represented by:
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For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
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Entered Wednesday, July 19, 2017

Mr. Harbarger, Ms. Clements, and Mr. Caswell concur.

This matter is now considered upon a notice of appeal filed by the above-named appellant from a final determination of the Tax Commissioner affirming commercial activity tax ("CAT") assessments for the period of July 1, 2005 through September 30, 2014, and denying appellant's refund claims for CAT paid from January 1, 2011 through December 31, 2012. We proceed to consider the matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, the record of this board's hearing ("H.R."), and the parties' written argument.

Appellant is a wholesaler of lawn and garden products headquartered in Georgia. Appellant sells primarily

to "big box" retailers, including Lowe's, Home Depot, Wal-Mart, and Floor and Décor Outlets of America. Appellant was audited as a result of research by the Ohio Department of Taxation indicating that appellant was doing business in Ohio. S.T. at OFAST, Audit Remarks. Although it initially registered as a CAT taxpayer effective January 1, 2011, and filed returns for 2011 and 2012, appellant subsequently indicated it disagreed with the situsing of its sales to Ohio and an assessment for tax years 2005 through 2014 was issued.

Appellant filed a petition for reassessment, and an application for refund of CAT paid for 2011 and 2012, arguing that its receipts are not properly sitused to Ohio. The commissioner denied appellant's arguments, finding that its sales were properly sitused to Ohio under R.C. 5751.033(E) based on the sales information provided, which indicated "ship to" addresses in Ohio. Appellant thereafter appealed to this board.

In our review, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121 (1989). It is incumbent upon a taxpayer challenging a decision of the Tax Commissioner to rebut the presumption and establish a clear right to the relief requested. *Kern v. Tracy*, 72 Ohio St.3d 347 (1995); *Ball Corp. v. Limbach*, 62 Ohio St.3d 474 (1992); *Belgrade Gardens v. Kosydar*, 38 Ohio St.2d 135 (1974). The burden is on the taxpayer to present credible evidence to support its claim that an assessment is in error. *Kern*, supra; *May Co. v. Lindley*, 1 Ohio St.3d 6 (1982); *Federated Dept. Stores v. Lindley*, 5 Ohio St.3d 213 (1983).

Ohio imposes the CAT on taxpayers with substantial nexus with Ohio. R.C. 5751.02. Here, the Tax Commissioner found that appellant had nexus with Ohio by virtue of it having at least $500,000 of taxable gross receipts sitused to Ohio. R.C. 5751.01(I)(3). For sales of tangible personal property, R.C. 5751.033(E) provides the situsing rule:

> "Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by motor carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase 'delivery of tangible personal property by motor carrier or by other means of transportation' includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale."

In his final determination, the commissioner indicated that appellant had failed to meet its burden by "failing to submit any evidence indicating that any of the goods invoiced with a 'ship to' address marked for Ohio were not ultimately received by the [appellant's] customer in Ohio." S.T. at 3.

At this board's hearing, Donald Hayes, Executive Vice President of Greenscapes, testified that appellant 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. H.R. at 14-16, 32-38. Mr. Hayes testified that the product becomes the property of its customers as it crosses appellant's dock to the truck. Id. at 36. After that point, appellant no longer tracks the location of its product. Id. at 18.

The commissioner, both in the final determination, and again on appeal, cites to *Dupps Co. v. Lindley*, 62 Ohio St.2d 305 (1980), which analyzed a nearly identical statute situsing sales for purposes of the corporation franchise tax, i.e., R.C. 5733.05(B)(2)(c). In *Dupps*, the court was confronted with the opposite situation of the present – Dupps was an Ohio-based manufacturer who argued that sales picked up at its

facility in Ohio by its customers, and then transported out of Ohio, should be sitused outside Ohio. The court agreed, holding that "[s]ince the equipment herein was 'ultimately received' outside of Ohio, such sales should not have been" sitused to Ohio. Id. at 308. Addressing the same corporation franchise tax statute, the court in *House of Seagram v. Porterfield*, 27 Ohio St.2d 97, 101 (1971), held that "sales of tangible personal property to an Ohio buyer, delivered by the seller to a common carrier outside Ohio and ultimately received in Ohio after all transportation has been completed, are deemed business done in Ohio, *** regardless of whether the buyer or the seller has designated the common carrier." Given this guidance, in this matter, we therefore look to the "ultimate destination" of the products sold by appellant after all transportation has been completed, and agree with the commissioner that appellant's sales were properly sitused to Ohio.

While it may be true that the goods appellant sells *may* be removed from Ohio, after being shipped from appellant to Ohio, for ultimate sale in one of its customers' retail locations, the lack of information about any such further transportation forecloses appellant's argument. At the time 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. Our inquiry ends here, as did the commissioner's, in the absence of any evidence indicating that goods were ultimately received elsewhere. As the court noted in *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15, "mere speculation is not evidence." We therefore find that appellant has failed to demonstrate error in the Tax Commissioner's final determination.

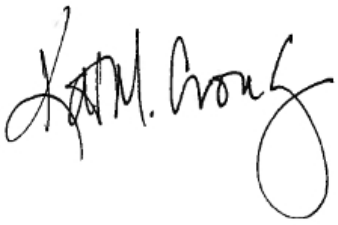
Appellant also argues in its notice of appeal and written argument that application of the CAT to its sales is unconstitutional under the Commerce Clause and Due Process Clause of the United States Constitution. This board makes no findings with regard to such arguments, as such arguments may only be addressed on appeal by a court which has the authority to decide constitutional challenges. *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195 (1994); *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229 (1988).

Finally, appellant requests abatement of the penalties imposed, arguing that it relied, "in good faith, on the text of R.C. 5751.033(E) and on Federal constitutional principles for the conclusion that it was not subject to Ohio's Commercial Activity Tax." Notice of Appeal at 4. Initially, we agree with the Tax Commissioner's argument that this board lacks jurisdiction over appellant's claim for abatement, as such error was not raised in the petition for reassessment. See *CNG Dev. Co. v. Limbach*, 63 Ohio St.3d 28 (1992); *Am. Fiber Sys., Inc. v. Levin*, 125 Ohio St.3d 374, 2010-Ohio-1468; *Buehler Food Markets, Inc. v. Tracy* (July 11, 1997), BTA No. 1996-T-643, unreported; *Indresco, Inc. v. Tracy* (Apr. 25, 1997), BTA No. 1996-T-981, unreported. However, even if such error had been properly raised, we find that appellant has failed to demonstrate that the Tax Commissioner abused his discretion in imposing the penalty. See *Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67 (1984); *Huffman v. Hair Surgeon, Inc.*, 19 Ohio St.3d 83 (1985); *J.M. Smucker, L.L.C. v. Levin*, 113 Ohio St.3d 337, 2007-Ohio-2073.

Based upon the foregoing, we find that appellant has failed to meet its burden on appeal. Accordingly, the final determination of the Tax Commissioner must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Harbarger		
Ms. Clements		
Mr. Caswell		

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



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Kathleen M. Crowley, Board Secretary