

OHIO BOARD OF TAX APPEALS

JONES APPAREL GROUP/NINE WEST HOLDINGS, (et. al.),)	
)	
Appellant(s),)	CASE NO(S). 2020-53, 2020-54
)	
vs.)	
)	(COMMERCIAL ACTIVITY TAX)
JEFFREY A. MCCLAIN, TAX COMMISSIONER OF OHIO, (et. al.),)	
)	DECISION AND ORDER
)	
Appellee(s).)	

APPEARANCES:

For the Appellant(s) - JONES APPAREL GROUP/NINE WEST HOLDINGS
Represented by:
PAUL E. MELNICZAK
REED SMITH LLP
THREE LOGAN SQUARE, SUITE 3100
1717 ARCH STREET
PHILADELPHIA, PA 19103

For the Appellee(s) - PATRICIA HARRIS, TAX COMMISSIONER OF OHIO
Represented by:
DANIEL G. KIM
ASSISTANT ATTORNEY GENERAL
OFFICE OF OHIO ATTORNEY GENERAL
30 EAST BROAD STREET, 25TH FLOOR
COLUMBUS, OH 43215

Entered Wednesday, September 13, 2023

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

Appellant Jones Apparel Group/Nine West Holdings (“Nine West”) appeals final determinations of the Tax Commissioner rejecting refunds of commercial activity tax (“CAT”) paid during the periods of January 1, 2010 through December 31, 2013, and January 1, 2014 through December 31, 2016. This matter is now considered upon the notice of appeal, the statutory transcript certified by the Commissioner, the record of the hearing before this Board (“H.R.”), and the parties’ written argument.

BACKGROUND AND PROCEDURAL HISTORY

Nine West is a global designer, marketer, and wholesaler of apparel, footwear, jeans, jewelry, and handbags. Its brands include Jones New York, Anne Klein, Nine West, i.e.i., Easy

Sprit, and others. Nine West sells its products through its retail locations, its website, and other major retailers. Nine West ships products to Ohio-based distribution centers of major retailers DSW, Macy's, BonTon, Dressbarn, Kohl's, and Sears. For the periods at issue, Nine West paid CAT on receipts for all goods shipped to distribution centers in Ohio, including those ultimately received by customers in locations outside of Ohio.

Nine West's Refund Claims

Nine West applied to the Department of Taxation ("the Department") for refunds, asserting that it illegally or erroneously paid tax on gross receipts realized from products that it sent to Ohio distribution centers but were ultimately shipped to retail locations outside Ohio. Nine West claimed that it knew the proportion of its products that were ultimately shipped outside Ohio, that those products remained in Ohio only for a short time before shipping to ultimate destinations outside Ohio, and that they were not altered in any way at the distribution centers.

An audit was performed for the first refund request, and Nine West provided shipping labels for each of the Ohio distribution centers. The labels for Macy's, BonTon, Kohl's, and Sears tied specific store numbers or locations as the ultimate shipping address, while DSW and Dressbarn did not have corresponding "mark-for" addresses at the time of shipping. Instead, virtually all sales to DSW were shipped to DSW's sole distribution center in Columbus, Ohio, and substantially all sales to Dressbarn were shipped to Dressbarn's distribution center in Ohio. Nine West claimed that although the labels did not include a second address, all items shipped to distribution centers in Ohio were sold at retail locations throughout the country. The Department found the "mark-for" addresses at the time of shipping were sufficient to prove that Nine West knew at the time of sale where the productions would ultimately be delivered. The Department also found the information provided was satisfactory to adjust for the sales that were initially shipped to distribution centers outside of Ohio but had "mark-for" addresses in the State. However, for DSW and Dressbarn purchases, the Department situated those sales to Ohio because

Nine West did not know to which stores its customers would ultimately be distributing the products.

The Department reviewed total receipts and deducted the non-Ohio receipts for sales initially attributed to Macy's, Bon-Ton, Kohl's, and Sears. The sales that were not included in the original receipt number but were ultimately received in Ohio were then added in. No reduction was made for receipts from DSW or Dressbarn. A refund was issued, and a similar audit was conducted for the second refund request. The Department reached a similar conclusion, accepting the adjustments for those purchasers providing "mark-for" addresses to Nine West and denying them for DSW and Dressbarn. Nine West sought further review, and a hearing was held regarding the refund for tax years 2010-2013. The information obtained during this hearing was also considered for tax years 2014-2016. After a review of the facts of this case and relevant legal authority, the Commissioner issued final determinations denying these refund requests.

Appeal to This Board

Nine West appealed the denials of the refund requests for the goods shipped to DSW and Dressbarn to this Board. In addition to multiple Constitutional challenges, Nine West argued that it was entitled to situs its receipts from sales of the goods sold to DSW and Dressbarn to an ultimate destination outside Ohio under R.C. 5751.033(E). Nine West claimed that it provided detailed evidence demonstrating the proportion of the products that were sent to Ohio distribution centers and further shipped to retail locations inside and outside of Ohio. Nine West maintained that this case could be distinguished from earlier cases discussing the issue based on the evidence presented. Thus, Nine West asserted that the Commissioner erred in denying its applications for refund.

Neeman Testimony

This Board convened a hearing, at which Nine West offered testimony from George Neeman, who is vice president and assistant treasurer of the Premier Brands Groups Holdings,

LLC, which was formerly known as Nine West Holdings, Inc. Neeman, who is in charge of all income tax matters, described Nine West's business, including both retail and wholesale sales. He testified that "Nine West would hold various marketing sales and logistics meetings, and would discuss their marketing campaigns, their methods of distribution, and comparable sales over sales effectively seeing if our customers were doing better than expected in order to get more product available to ship to them for reorders." H.R. at 12. Neeman explained that the meetings included maps showing the locations of both Nine West retail stores and customers' retail stores and that marketing campaigns were done nationally. *Id.* Nine West tracked performance and sales trends on a weekly and monthly basis to help with reorders. H.R. at 17. He also stated that there are climate-related differences in sales of different products, such as the availability of sandals during the winter in Florida but not in Ohio. *Id.* Neeman testified that Nine West has visibility of which products were available at any given DSW at any point in time based on the "Get it Today" feature on DSW's website. H.R. at 16. This allows anyone to see which items were available at a particular DSW store anywhere in the country for same-day pickup. *Id.*

Neeman testified that Nine West performed different logistical services for different wholesale customers depending on the customer's request. H.R. at 18. For instance, Macy's would have Nine West include both the distribution center and ultimate destination. *Id.* DSW, on the other hand, performed that function itself, so Nine West shipped the items to the distribution center, and DSW picked and pulled the items to send to its individual retail stores. *Id.* "So it's basically the same process, except one happened up front and the other happened on the back end." *Id.* On cross-examination, he acknowledged that Nine West would not know how long goods remained in Ohio but asserted that the same was true for those goods shipped to Macy's with a "mark-for" address. H.R. at 36.

Oeler Testimony

Nine West also offered testimony from Jonathan Oeler, an assistant director of digital solutions development for Reed Smith. In that role, he manages a team that builds software for the legal practice groups at Reed Smith. His team builds custom business intelligence platforms that integrate with industry-available software. Oeler was offered as an expert in the development of software and business analytics tools. He testified that his team utilized DSW's "Get it Today" feature to build two applications. H.R. at 73. The team first manually confirmed the data available through that feature by using it for shopping in random stores in different cities. *Id.* Oeler's team created two separate programs for data integrity to ensure they both had comparable results. H.R. at 74.

The first application accessed the DSW web servers directly by API calls, and the second application used Puppeteer to simulate a person clicking through the process to order items. H.R. at 73. Oeler explained that an API call is a standard call akin to a computer asking another computer for information and is how basic web technology works. H.R. at 73-74. Team members then used the two applications to determine the cities in which DSW stores were located, which stores were in those cities, and which products were available at each store. H.R. at 75. This information was then used to create a report of the distribution of each product throughout all stores, including the product count for stores in Ohio versus outside Ohio. H.R. at 79. After concluding that both applications yielded comparable results, the team confirmed it by manually checking the data. H.R. at 85. The data was collected in August through October of 2018. H.R. at 89. Oeler indicated that there were no significant variances in the data pulled in August 2018 and October 2018. *Id.*

Testimony of Subpoenaed Witness

In response to a subpoena for an individual with knowledge of a final determination issued to taxpayer Moose Toys Pty. Ltd ("Moose Toys"), the Commissioner identified Jeffry Hartlage, an

audit manager with the Department. Hartlage described the Moose Toys audit and the method used by the Department to situs sales to Ohio. Hartlage explained that Moose Toys had two lines of sales: domestic and “FOB.” H.R. at 97. Domestic sales arrived in the United States and were stored in warehouses (none located in Ohio) before being shipped to customers. H.R. at 97. FOB sales were shipped directly to customers from the port in California. H.R. at 98. Moose Toys sold goods to Toys ‘R’ Us, which had a presence in Ohio, including both distribution centers and retail locations. H.R. at 98. Moose Toys apportioned 5% of its domestic sales to Ohio but reported no FOB sales. H.R. 98. Moose Toys submitted an apportionment schedule for its domestic line that “apportioned the sales according to the distribution center where the goods were being sold to, so anything that came to Ohio was coming to a distribution center located in Ohio.” H.R. at 100. To estimate the FOB sales to Ohio, the Department considered the presence of retail stores but relied on the domestic sale apportionment from Moose Toys’ records. H.R. at 104.

The Auditor’s Testimony

The Commissioner relied on testimony from a single witness, Allison Johnson, a tax auditor specialist for the Department. Johnson described the process for reviewing a CAT refund request, including the types of documentation the Department collects from the taxpayer. H.R. at 139. Johnson further explained that the Department must estimate receipts sitused to Ohio for initial assessments (e.g., Moose Toys), but not for refund requests because the tax was based on reported receipts. H.R. at 148. Johnson also explained her process specifically for reviewing Nine West’s refund requests. H.R. at 140. Johnson testified that she reviewed the sample of shipping documents provided by Nine West and noted that the Department did not receive any for purchases by DSW or Dressbarn that included the “mark-for” destination. H.R. at 145. She further indicated that the information submitted by Nine West at the hearing utilizing DSW’s website was not provided during the audit. H.R. at 147. Even if she had that information, Johnson testified that it would not have changed the outcome of the refund review. H.R. at 152. On cross-examination,

Johnson acknowledged, “I think everyone knows that shipments are going to leave a distribution center and end up nationwide, but that was not the documentation that was provided to show the shipment location at the time of sale, what was known.” H.R. at 156.

Post Hearing Arguments

Following the hearing, Nine West moved to strike testimony from a witness during the Board’s merit hearing and to compel a witness responsive to a subpoena, claiming that Hartlage lacked the requisite personal knowledge. The request was denied, and the parties filed written argument on the merits of the appeals. The parties agree that the tangible personal property must be situated to Ohio if it is ultimately received in the State after all transportation has been completed. Nine West attempted to distinguish the facts of the present appeal from prior cases in which taxpayers did not establish that the goods were ultimately received outside Ohio. Nine West asserts that to satisfy its evidentiary burden, it can rely on other documentation from its records or customer(s) records. It argues that such records would be sufficient if they show that the products at issue were ultimately received by the customer at a final destination outside of Ohio and provide a reasonable, consistent, and uniform basis for situsing its sales. Nine West maintains that the evidence it submitted satisfies this affirmative burden.

The Commissioner argues that the Board should affirm the final determination because she correctly determined that Nine West’s gross receipts were properly situated to Ohio. The Commissioner contends that the Board must consider only information in Nine West’s possession at the time it sold the items to DSW and Dressbarn. As far as Nine West knew at the time, the goods were delivered to those purchasers in Ohio. Nine West did not know whether or when DSW or Dressbarn sent the goods to any further destination outside of the state. Therefore, the Commissioner concludes, for purposes of situsing the transaction between Nine West and its

customers, the goods were delivered within the State. According to the Commissioner, any subsequent travel has no impact on whether the purchases from Nine West are properly situated to Ohio.

ANALYSIS

Burden of Proof

This Board reviews the Commissioner’s findings de novo, and those findings are presumptively valid, subject to rebuttal. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14 (finding the taxpayer’s burden for rebutting findings “is simply to prove that the findings were incorrect.”). As we consider the law, our role is “to provide a fair reading of what the legislature has enacted: one that is based on the plain language of the enactment and not slanted toward one side or the other.” *Stingray Pressure Pumping, L.L.C. v. Harris*, Slip Opinion No. 2023-Ohio-2598, ¶ 22.

Commercial Activities Tax

Ohio levies the CAT on taxpayers with substantial nexus with the state for the privilege of doing business in Ohio. R.C. 5751.02. The siting of the gross receipts in this case is governed by R.C. 5751.033(E):

Gross receipts from the sale of tangible personal property shall be situated 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 short, situs is based on where the purchaser receives the property after all transportation is complete.

Subjective Knowledge of Ultimate Destination at Time of Shipping Not Required

The Commissioner maintains that the purchaser receives the property in Ohio when the last destination known by the taxpayer is located within Ohio. Nine West, on the other hand, maintains that it can show through additional evidence that the goods were ultimately received outside Ohio regardless of whether it knew of such a destination at the time the goods shipped. The Commissioner relies on prior cases in support of this contention. *See, e.g., Greenscapes Home & Garden Prods. v. Testa*, 2019-Ohio-384, 129 N.E.3d 1060 (10th Dist.). In *Greenscapes*, the Court disagreed with the taxpayer who argued a retailer that shipped goods to Ohio distribution centers lacked substantial nexus with the State to justify the imposition of CAT. The Court observed:

Greenscapes ignores that its retail customers have a presence in Ohio and that they purchased goods for delivery to their Ohio distribution centers. Greenscapes knew that its products were destined for Ohio at the time the orders were placed. R.C. 5751.033(E) provides that the situs of the gross receipts from the sale of tangible personal property is the place at which such property is ultimately received after all transportation has been completed. In this case, the evidence established that that place is Ohio.

Id. at ¶27.

This Board later considered a similar argument and concluded the taxpayer failed to meet

its burden of proof. *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019). In *Mia Shoes*, the Board relied on *Greenscapes* and situated receipts to Ohio when the seller shipped its goods to Ohio, knew it was shipping goods to Ohio, and lost visibility of the goods once they were delivered to the customers in Ohio. We found that Mia Shoes did not affirmatively prove that the goods were then ultimately received elsewhere within the meaning of the statute. We did not conclude, however, that it could not have shown they were ultimately received outside of the State through other evidence.

As such, we clarify that the Commissioner has relied on too narrow of a rule. Neither the statute nor the case law have imposed a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation. Indeed, this Board can contemplate circumstances in which a taxpayer could present evidence that it obtained after transportation was complete that would successfully demonstrate that the goods were ultimately received outside of Ohio. Thus, we agree with Nine West in this respect.

Nine West Failed to Meet Its Burden

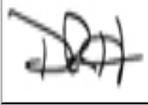
We agree that Nine West *could* show that the goods were received outside of Ohio, but we find that they did not do so here. The evidence presented was based on data collected from August through October 2018. However, the refund claims relate to receipts from January 1, 2010 through December 31, 2016. The representative sample is not only related to a time well after the tax period, but is also extremely short in comparison. Neeman testified that Nine West tracked performance and sales trends on a weekly and monthly basis. He stated that Nine West saw climate-related differences in sales for different products throughout the year. The data submitted by Nine West was too far removed and reflected too narrow of a time frame to establish the goods shipped to Ohio during the tax period were ultimately received outside Ohio. While the method used by Nine West may be sufficient in other circumstances, we find that it falls short in this case. Thus, we find that Nine West failed to meet its burden to establish its right to refund claims.

Constitutional Argument

We acknowledge that Nine West argued that the tax violates the Due Process Clause and Equal Protection Clause because it subjects Nine West to taxes not imposed on other taxpayers of the same class. We make no findings regarding the constitutional arguments, however, 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).

CONCLUSION

Based upon the foregoing, we find that Nine West has failed to meet its burden of proof to demonstrate that the goods were ultimately received outside of Ohio. Accordingly, the Commissioner's final determination is affirmed.

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

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.



Kathleen M. Crowley, Board Secretary