OHIO BOARD OF TAX APPEALS

VVF INTERVEST, LLC, (et. al.), Appellant(s), vs. PATRICIA HARRIS, TAX COMMISSIONER OF OHIO, (et. al.), Appellee(s).	)	CASE NO(S). 2019-1233 (COMMERCIAL ACTIVITY TAX) DECISION AND ORDER

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Entered Wednesday, September 13, 2023

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

INTRODUCTION

VVF Intervest LLC ("VVF") appeals a final determination of the Tax Commissioner denying a commercial activity tax ("CAT") refund claim for the period January 1, 2010 through December 31, 2014. We decide the case on the notice of appeal, the statutory transcript ("S.T."), the record of this Board's hearing ("H.R."), and the parties' briefs. For the reasons that follow, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

The Manufacturing Process

VVF is a global manufacturer of oleochemicals and personal care products. H.R. at 76;

S.T. at 1. It contract manufactures bar soap, antiperspirant, deodorant, and similar items at its plant in Kansas. The location is twenty-seven acres improved with an approximately one million square feet plant. *H.R.* at 78. VVF acquired the plant from Colgate-Palmolive, which used it to manufacture its own brands, such as Irish Spring, for distribution in the United States and Canada. VVF has no property or employees in Ohio.

The main ingredient in bar soap is fat or oil. H.R. at 106. In some markets, vegetable or palm oil is preferred; however, tallow (animal fat) is common in North America. *Id*. VVF acquires the raw materials and adds fragrances, preservatives, and a color. *Id*. at 107. VVF's customers set the quality and recipe specifications, e.g., qualified raw material supplies, packaging. *Id*. at 81 (VVF CEO: "VVF is not at liberty to make any changes to the formula or the packaging * * *."). To operate, VVF uses a cost-plus agreement, and it is paid a "tolling fee," which is a fee to cover overhead, labor costs, etc. *Id*. It also receives a "finance fee" to compensate VVF for acquiring raw materials. *Id*. at 85. Depending on a customer's storage needs, a storage fee may also be due. *Id*. However, VVF's goal is to transfer the soap to trucks as quickly so it will not need to store the soap in its warehouse. *Id*. at 86, 88.

At the end of manufacturing and packaging, VVF has limited information about the ultimate destination of the soap. *Id*. at 88. VVF would know the next destination because it would prepare bills of lading, but VVF does not know where each bar will ultimately be delivered. The bars are free on board point of origin, and VVF has no control of the bars once they leave the docks. *Id*. at 88, 105-106.

High Ridge Brands

Relative to the receipts at issue in the claim, High Ridge Brands ("HRB") was by far VVF's largest customer. *Id*. at 83; Ex. B (manufacturing agreement between HRB and VVF Kansas Services LLC dated August 4, 2011); Ex. C (manufacturing agreement between same parties dated June 2014). HRB placed monthly orders with VVF based on demand forecasts, and

that information would be provided to VVF. H.R. at 16-17. HRB used VVF because its demand required a very large facility, which VVF had in Kansas City. HRB used warehouses/distribution centers in Columbus, St. Louis (Missouri), and California. *Id*. at 18-19. HRB would hold all products at its distribution centers and did not ship directly to stores. *Id*. Instead, HRB contracted with third-party trucking companies to transport goods from manufacturing facilities to the distribution centers. In the Columbus distribution center, HRB would hold approximately two months of inventory. H.R. at 21-22. HRB did not own the trucks or the distribution centers. No changes were made to the soap or its packaging at the distribution center. However, the distribution center would sometimes assemble product displays. *Id*. at 23 (HRB COO: "If Walmart was looking for promotional displays, you see them all the time when you walk through the stores, they're sitting in the aisles or at the end of the aisle. * * *."). Once a retailer such as Walmart or Target placed an order, HRB's third-party trucking company would transport the product to the retailer's distribution center. Goods from the Columbus distribution center were usually sent to retailer facilities in the Eastern United States. *Id*. at 24.

Procedural History

VVF filed its initial refund application seeking refund of CAT paid on bar soap receipts for the period January 1, 2010, through December 31, 2014. VVF originally sought a refund for CAT paid on receipts for sales to numerous customers, e.g., L'OREAL USA. The claim was initially denied, and VVF requested further review. S.T. at 11-23 (memorandum in support of refund). In that filing, VVF argued R.C. 5751.033(E) should apply, and the receipts should be sitused outside of Ohio. The Commissioner denied the refund claim, and this appeal ensued. This Board held a hearing, and VVF presented documentary and testimonial evidence. VVF specifically called Robert Kirk, Jr., COO and CFO of HRB for most of the refund period. He authenticated and testified to reports created by HRB for management showing the ultimate destination of units of soap. The reports are arranged by year and state. VVF also called a VP of finance, Jacob

Henderson, to testify about the refund claim. Finally, VVF called Kurussh Amrolia, president of VVF North America. We note that a small portion of VVF's refund claim related to a different purchaser, Dollar General. Henderson testified he estimated the ultimate destination percentage based on information obtained from Dollar General based on the number of stores served by the distribution center.

LAW AND THE PARTIES' ARGUMENTS

Standard of Review

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, ¶ 14, 95 N.E.3d 345 (finding the taxpayer's burden for rebutting findings "is simply to prove that the findings were incorrect."). Tax statutes should be interpreted neutrally and not interpreted as "favoring tax collection." *Stingray Pressure Pumping v. Harris*, Slip Op. No. 2023-Ohio-2598, ¶ 22.

The CAT

The CAT is a privilege of doing business tax measured by gross receipts. *Ohio Grocers Ass'n v. Levin*, 123 Ohio St. 3d 303, 2009-Ohio-4872, 916 N.E.2d 446. "Gross receipts" are defined as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person * * *. R.C. 5751.01(F); *see also* R.C. 5751.01(A) (defining "person"). The Ohio Supreme Court has recognized that "[b]ecause business is conducted across state and international boundaries, imposing the tax often raises the thorny issue of how to properly allocate receipts to Ohio for taxation." *Defender Sec. Co. v. McClain*, 162 Ohio St.3d 473, 2010-Ohio-4594, 195 N.E.3d 1236, ¶ 18. The CAT is imposed on those "persons with substantial nexus with this state." R.C. 5751.02(A).

R.C. 5751.033

There is some dispute about the correct situsing provision to be applied. R.C. 5751.01(G) defines "taxable gross receipts" as "gross receipts sitused to this state under section 5751.033 of the Revised Code." According to the Ohio Supreme Court, R.C. 5751.033 sets out "taxable categories" that govern where a particular kind of receipt should be sitused. *NASCAR Holdings, Inc. v. McClain*, Slip Op. No. 2022-Ohio-4131, 2022 Ohio LEXIS 2346, ¶ 7. In its brief, VVF argues the receipts should be sitused outside of Ohio pursuant to R.C. 5751.033(E) or (I). In her reply, the Commissioner argues this Board may only consider R.C. 5751.033(E) because VVF failed to raise arguments under R.C. 5751.033(I), e.g., in VVF's notice of appeal. We agree with the Commissioner that VVF forfeited its arguments under R.C. 5751.033(I) because they were not raised in the notice of appeal. *See Obetz v. McClain*, 164 Ohio St.3d 529, 2021-Ohio-1706, 173 N.E.3d 1200. VVF's refund claim has been premised on the application of R.C. 5751.033(E) since the claim was filed. *See* S.T. at 5. Accordingly, we limit our review to R.C. 5751.033(E), which states as follows:

> 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.

Both this Board and the Tenth District have had occasion to interpret this provision. Before reviewing those cases, we go back to three older corporate franchise cases that help analyze R.C. 5751.033(E) because of the similarities with the older corporate franchise sourcing statute.

Corporate Franchise Tax Cases

Because of the similarities between the CAT situsing statute and the defunct corporate franchise tax statute, the Commissioner, this Board, and the court of appeals have drawn insight from older corporate franchise tax case law. *See* S.T. at 5-8. The seminal cases are *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827 (1971); *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405 N.E.2d 716 (1980); and *Loral Corp. v. Limbach*, BTA Nos. 85-C-914, et al., 1988 Ohio Tax LEXIS 218 (Feb. 23, 1988).

We start with *House of Seagram*. There, the Ohio Department of Liquor Control purchased liquor from the House of Seagram, which was located in New York. A common carrier designated by the state of Ohio picked up the liquor in New York and delivered it to a warehouse in Ohio. The liquor would ultimately be distributed in Ohio since the Department would be distributing the liquor to Ohio retailers. The Commissioner assessed House of Seagram, in part, for the sale of liquor to the Department of Liquor Control. *House of Seagram* at syllabus. House of Seagram argued the sales were completed outside of Ohio and should not be included in the "numerator" of the business done fraction used in computing the franchise tax. The Court recognized a statutory "safeguard applicable to a situation where an Ohio purchaser brings goods through Ohio on their way to some ultimate destination outside Ohio * * *." *Id.* at 100-101. In such instances, the Court found "clearly there would be no delivery to the purchaser in Ohio * * *." *Id.*

Nine years later, the Court decided *Dupps*. Dupps was a meat processing equipment

manufacturer with out-of-state and international customers. *Id*. at 305. Dupps' customers were usually responsible for shipping the equipment from Dupps' plant in Ohio. *Id*. When Dupps calculated its formula it excluded "'customer pick-up" sales which "were sales to non-Ohio customers, where the purchaser either used his own vehicles to transport the equipment from" Dupps' plant. *Id*. at 306. The Commissioner assessed Dupps for those sales, finding they should have been included as Ohio sales in the apportionment formula because the equipment was "received in [Ohio] by the purchaser." *Id*. at 307. The Court sided with Dupps, holding the equipment should not have been included in the sales factors because the equipment was "ultimately received" outside of Ohio.

The taxpayer in *Loral* was a manufacturer of electronic radar equipment for aircraft. Its primary domestic customer was the United States Air Force. With regard to the transactions at issue, the planes and radar equipment were manufactured outside of Ohio. Title transferred from Loral to the Department of Defense (on behalf of the Air Force) outside of Ohio. Delivery would occur as follows:

> Delivery of the products is made either by common carrier or the Defense Department arranges for the product to be picked up at appellant's facility. In both cases, the costs of delivery are paid for by the Defense Department. In some instances, at the request of the Defense Department, appellant may ship products directly to the manufacturers of the aircrafts on which the product will be installed. The bills for appellant's products are sometimes invoiced to Wright-Patterson Air Force Base (Wright-Patterson) in Dayton, Ohio.

While there were various transactions at issue in *Loral*, we agreed with Loral that the relevant sales were not Ohio sales. We held the following:

> Again, we expressly find that the plain language of R.C. 5733.05 and the Court's holdings in *House of Seagram*, supra, and *Dupps Co.*, supra, establish the rule that

> where delivery of goods is made outside of Ohio, the sale does not occur in Ohio. Products which merely pass through Ohio or never enter Ohio cannot be said to be sold in Ohio for purposes of Ohio franchise taxation. * * * Here, we expressly find that the record before this Board includes uncontroverted testimony that the assessed property merely entered Ohio in route to non-Ohio destinations. We cannot accept appellee's conclusion that the transportation of the property was completed at the moment it arrived at Wright-Patterson. The testimony before this Board clearly indicates that the property was shipped from Wright-Patterson to points outside of Ohio. Appellee did not produce any evidence which would cause this Board to conclude that the later shipment of the goods from Wright-Patterson was not a continuation of the transportation beginning at appellant's New York facility.

The *Loral* case was clear that the transactions should not be sourced to Ohio simply because Ohio was one stop in a singular delivery process to a purchaser.

Greenscapes, Mia Shows, Henry RAC

We now return to cases directly interpreting R.C. 5751.033(E). In all three cases, we found the the taxpayer failed to show Ohio was merely a pit stop not the place where property was ultimately delivered after all transportation has been completed. In *Greenscapes*, the taxpayer delivered its goods to big box retailers within Ohio. BTA No. 2016-350, 2017 Ohio Tax LEXIS 1810 (July 19, 2017). The taxpayer claimed some of those goods were then transported out of Ohio to various distribution centers. This Board found all of the receipts should be sitused to Ohio in light of the lack of evidence about the ultimate delivery location. We found that "[w]hile it may be true that 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." *Id.* at 6. However, we did not

foreclose the possibility that a party could show the goods "were ultimately received elsewhere." *Id.*

We encountered similar fact patterns in *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 Ohio Tax LEXIS 1864 (Aug. 8, 2019), and *Henry RAC Holding Corp. v. McClain*, BTA No. 2019-787, 2020 Ohio Tax LEXIS 2101 (Nov. 10, 2020). In *Mia Shoes*, the taxpayer failed to show the goods were ultimately delivered outside of Ohio. The taxpayer "knew it was shipping goods to Ohio, and lost visibility of the goods once they were delivered to the customers in Ohio." *Id*. at 8-9. Again, we recognized the taxpayer could prevail if it had shown "the goods were then ultimately received elsewhere within the meaning of the statute." *Id*. at 9. *Henry* involved similar facts where goods were shipped to distributors in Ohio, but the taxpayer lost visibility in Ohio.

The Parties' Arguments

VVF argues this case requires a straightforward application of R.C. 5751.033(E) because delivery after all transportation did not occur in Ohio. VVF argues that "[s]ince the goods are initially transported by HRB to the Ohio DC only for further shipment, an interim stop within the distribution chain, the Ohio DC is not the location where HRB ultimately received the VVF-manufactured goods after all transportation is complete." VVF Br. at 10. VVF hones in on statements in both *Greenscapes*, *Mia Shoes*, and *Henry RAC* that provide that a taxpayer could prevail upon a showing that transportation ended outside of Ohio. For example, in *Greenscapes*, we stated "the lack of information about any such further transportation forecloses" the argument that the receipts should be sitused elsewhere. VVF Br. at 14, quoting *Greenscapes*. VVF supplements that argument with legislative intent arguments regarding qualified distribution centers. Accordingly, VVF argues 96.84% of its HRB receipts should not be sitused to Ohio, and VVF argues 52% of VVF's receipts to Dollar General should not be sitused to Ohio. In the

alternative, VVF argues we should apply Ohio Adm.Code 5703-29-17(C)(15)(b) and find all of the receipts should be sitused to Kansas because the ultimate destination is unknown. VVF also makes alternative situs method and constitutional arguments.

By contrast, the Commissioner argues the trip from Kansas to Ohio should be treated as a separate taxable event, and the trip from Ohio to another state should be treated as a separate taxable event. TC Br. at 3. The Commissioner believes these should be considered a "second sale transaction" unrelated to VVF. Br. at 8. The Commissioner places great emphasis on VVF's records and VVF's subjective knowledge of the time the bars left Kansas. Those documents show the bars were initially headed to Ohio, so the receipts should be sitused to Ohio under R.C. 5751.033 as explained in cases like *Greenscapes*.

ANALYSIS

VVF's subjective knowledge at the initial shipping point is probative but not dispositive

The Commissioner maintains that the purchaser receives the property in Ohio when the last destination known by the taxpayer is located within Ohio. Neither the statute nor the case law have imposed a requirement of contemporaneous knowledge of the ultimate destination at the time of transportation. Nonetheless, we recognize the Commissioner retains broad authority to assess taxpayers based on the best evidence available. Our cases and Tenth District's decision in *Greenscapes* reaffirm that if the only evidence available shows the products were shipped to Ohio then they may be properly sitused to Ohio.

VVF has carried its burden with regard to some of the receipts

We first reject VVF's argument that none of its receipts should be sitused to Ohio under Ohio Adm.Code 5751-29-17. It is simply untrue that there is no evidence of the location of ultimate delivery. VVF's position is inconsistent with *Greenscapes*, *Mia Shoes*, and *Henry RAC*, because the receipts in those cases would have necessarily been sitused outside of Ohio under VVF's theory.

We also find VVF has not carried its burden with regard to the Dollar General Receipts. We find VVF's evidence to be speculative. The evidence, much of it hearsay, purportedly came from statements by Dollar General, but we have no other credible evidence to corroborate. VVF also used a stores-supplied model, but stores vary in sales, which is one reason we rejected the unsupported theory in *Mia Shoes*.

By contrast, we find VVF has carried its burden with regard to the HRB receipts for bars that were ultimately delivered outside of Ohio. Under R.C. 5751.033(E), VVF meets its burden when it shows through sufficient evidence that the goods were not ultimately delivered to its customer in Ohio. VVF presented the Board with testimony from its customer, showing the bars were not ultimately delivered in Ohio. The testimony from VVF's witnesses was corroborated by reports created for management for purposes of operations.

The Commissioner argues that these are two separate transactions, i.e., the trip from Kansas to Ohio and the trip from Ohio to another state. In one sense, we agree with the Commissioner that there are two transactions: the sale of goods to HRB and the subsequent sale of those goods from HRB to its customers. In that way, the Commissioner is correct that the pertinent transaction relates to HRB's purchase. Thus, the situsing of goods must be based on the ultimate delivery to HRB.

Nevertheless, the ultimate delivery to HRB is not the Columbus distribution center. This destination ends just one leg of HRB's transportation and continuous delivery process. VVF sends the goods from Kansas to a third-party facility in Ohio under the title and control of HRB. From this Ohio facility, HRB again contracts to transport the goods to destinations outside of Ohio based on its customer needs. Ohio does not become the ultimate delivery point simply because the bars are temporarily held here in a distribution center owned by an entirely unrelated third party.

The fact that HRB may later direct drivers to move the bars from Ohio to other specific locations (in other states) based on the needs of customers is wholly irrelevant for purposes of R.C. 5751.033(E).

To be clear, our analysis is appropriately confined to VVF's receipts. We make no findings with regard to receipts realized by HRB, the trucking companies, the warehouse, or any other company. The only question we must answer is if HRB's ultimate delivery occurred in Ohio, but the ultimate delivery did not occur in Ohio. We agree, however, that we should stand back for a full picture. VVF manufactures a substantial number of soaps, and the Ohio distribution center temporarily houses all soaps destined for the entire Eastern United States. If the Commissioner is correct, *all* of those receipts should be sitused to Ohio simply because Ohio is the first stop. We find R.C. 5751.033(E) does not compel such a result.

CONCLUSION

In sum, we reverse the Commissioner's final determination with regard to the sales to HRB for bars that were transported out of this state (96.84%). We affirm the Commissioner in all other aspects. We acknowledge VVF has leveled constitutional claims, but we lack jurisdiction to consider those claims.

Ms. Allison, concurring in part and dissenting in part.

I concur with the majority regarding the receipts from Dollar General and HRB receipts for bars that remain in Ohio. However, I must respectfully dissent from its conclusion that VVF has proven the remaining receipts from HRB should be sitused outside of Ohio.

With respect to the receipts for sales of soap to HRB, the majority considered and rejected two arguments. Initially, I agree with the majority that the Commissioner has imposed too narrow a rule that a seller's subjective knowledge of an ultimate delivery outside of Ohio is necessary to situs receipts outside of Ohio. Neither the statute nor the case law have included such a

requirement. While the seller's knowledge of the ultimate destination is certainly relevant for consideration, I agree it is not dispositive. I concur with the majority that a seller of tangible personal property could demonstrate through other evidence that goods it shipped to Ohio were ultimately delivered to the purchaser outside of the State even if its visibility of such goods ended when the goods reached Ohio.

I dissent from the majority's conclusion that VVF's receipts for sales of soap to HRB should be sitused based on the ultimate destination of the goods at the end of the distribution process – i.e., to the location where HRB's customers ultimately receive the goods. The taxable gross receipts at issue resulted from VVF's sale of soap to HRB. R.C. 5751.033(E) mandates "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." HRB is the purchaser in the VVF transactions and, in my opinion, a plain reading of the statute requires VVF's receipts to be sitused to the location where delivery was ultimately made to HRB. It should not expand to purchasers further down the supply chain. Accordingly, we must look to where HRB receives the goods and any subsequent sale after the VVF sale is irrelevant for purposes of situsing VVF's gross receipts.

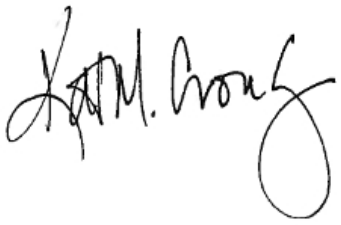
VVF sold soap to HRB. According to the testimony of appellant's witness, Mr. Kirk, VVF's sales to HRB are based upon HRB's sales forecast and projections, not upon current sales orders from HRB's retail customers. HRB maintains approximately two months of inventory at the Ohio distribution facility. Goods may be stored at the distribution facility for as long as one year. HRB then sells the inventory to retail purchasers such as Walmart, Target, and Walgreens. Once HRB sells the goods to the retailer, HRB transports (or contracts to transport) the goods to the retailer's distribution center. Any transportation that takes place following delivery to the Ohio distribution facility occurs only because HRB resells the goods to a new purchaser. I agree with the Commissioner that HRB's sale to its customers constitutes a separate transaction from VVF's

sale to HRB. For purposes of situsing these goods, I would deem them delivered to HRB in Ohio. Any subsequent transportation is related to a separate transaction between HRB and its purchaser and has no bearing on where the goods were delivered to HRB.

In my opinion, *Greenscapes* and *Mia Shoes* are inapplicable herein as those cases involved continuing transportation by the purchaser to a location where the property would be resold by the purchaser. The cases did not involve a second sale by the initial purchaser. For example, in *Greenscapes* the appellant wholesaler sold lawn and garden products to big box retailers. The goods were shipped to a distribution center in Ohio. From there, the purchaser transported goods to its retail locations outside of Ohio. Therein, we held that appellant failed to provide sufficient information regarding the purchaser's subsequent transportation outside of Ohio to meet its burden of proof. Similarly, in *Mia Shoes* we found that appellant failed to provide sufficient evidence to support its claim that the footwear sent to Ohio distribution centers was merely received initially in Ohio but ultimately received by those same customers elsewhere. In this case, VVF sold soap to HRB and HRB received the goods at the Ohio distribution facility. Transportation was complete when the goods were received at the distribution facility. HRB stored the goods at this facility until the goods were resold and HRB's delivery to HRB's retail customers outside of Ohio would be relevant for situsing HRB's taxable gross receipts arising from HRB's sale to its customers. However, in my opinion, HRB's sale to its retail customers is a separate transaction and is irrelevant to the proper situsing of VVF's taxable gross receipts arising from VVF's sale to HRB. Contrary to the majority's finding, I would find R.C. 5751.033(E) requires taxable gross receipts to be sitused where ultimately received by the purchaser in the sale generating the gross receipt, not where received by the ultimate purchaser.

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.



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Kathleen M. Crowley, Board Secretary