

OHIO BOARD OF TAX APPEALS

DEFENDER SECURITY COMPANY D/B/A
DEFENDER DIRECT, (et. al.),

CASE NO(S). 2016-1030

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) - DEFENDER SECURITY COMPANY D/B/A DEFENDER DIRECT
Represented by:
STEVEN A. DIMENGO
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For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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Entered Tuesday, March 6, 2018

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

This matter is now considered upon an appeal by Defender Security Company dba Defender Direct (“Defender”) from a final determination of the Tax Commissioner denying Defender’s application for refund of commercial activity tax paid from January 2010 through December 2013. We decide the matter upon the notice of appeal, the statutory transcript (“S.T.”) certified by the commissioner, the record of the hearing (“H.R.”) before this board, and the parties’ written arguments.

Defender is an authorized dealer for ADT Security Services, selling and installing security equipment, obtaining contracts for security monitoring services, and then selling those contracts to ADT for a fee. Defender filed an application for refund for commercial activity tax paid on its gross receipts related to its sale of security monitoring contracts to ADT. Although Defender included tax year 2010 in its application, it withdrew its application as to that year prior to the issuance of the final determination. S.T. at 8. The Tax Commissioner denied the application, finding that the gross receipts related to Defender’s sale of such contracts are properly situated to Ohio under R.C. 5751.033(I), stating:

“ADT realizes the benefit of the Ohio-based Alarm Services Contracts in Ohio. As the applicant puts it, the applicant obtains ‘the customer relationship’ for ADT. Likewise, ADT purchases ‘the customer relationship’ from the applicant. The customer is an Ohioan. The

customer relationship is established and maintained in Ohio. The monitoring services underlying Alarm Services Contract represents security provided to Ohioans; protection of persons and property located in Ohio. The marketplace to which ADT avails itself benefits from, and is protected by, Ohio's government and public service agencies. ADT's dependence on Ohio protection and services resounds in the Alarm Services Contract itself, which states that in specified circumstances, ADT will notify the appropriate police or fire department. Without Ohio, the Alarm Services Contract-fees at issue would be wholly impossible. Accordingly, ADT's benefit with respect to these Alarm Services Contract-fees must occur entirely within Ohio." S.T. at 2.

The commissioner also rejected the argument that Defender is ADT's agent based on express language disavowing any agency relationship in the contract between the parties. *Id.* at 2-3.

On appeal, Defender again argues that the gross receipts in question should be sourced outside Ohio because ADT receives the benefit of the contracts outside Ohio. Defender also argues that the commissioner's final determination is in violation of the Commerce and Due Process Clauses of the U.S. Constitution. At this board's hearing, Defender presented the testimony of Cathy George, its controller and director of accounting, and several exhibits. Both parties filed post-hearing briefs in support of their respective positions.

In our review, we are mindful that, although this board reviews the findings of the Tax Commissioner *de novo*, the findings are presumptively valid, subject to rebuttal. *Accel, Inc. v. Testa*, Slip Opinion No. 2017-Ohio-8798, ¶13-14; *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).

Initially, we note that the commissioner indicated in his final determination that the application for refund of amounts paid related to tax year 2010 were withdrawn by the appellant taxpayer. We therefore confine our decision to the remaining years, i.e., 2011 through 2013.

Pursuant to R.C. 5751.02, Ohio levies a commercial activity tax "on each person with taxable gross receipts for the privilege of doing business in this state." R.C. 5751.033 provides for the situsing of taxable gross receipts to Ohio. Relevant to this matter, R.C. 5751.033(I) provides:

"Gross receipts from the sale of all other services, and all other gross receipts not otherwise sitused under this section, shall be sitused to this state in the proportion that the purchaser's benefit in this state with respect to what was purchased bears to the purchaser's benefit everywhere with respect to what was purchased. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere. If a taxpayer's records do not allow the taxpayer to determine that location, the taxpayer may use an alternative method to situs gross receipts under this division if the alternative method is reasonable, in consistently and uniformly applied, and is supported by the taxpayer's records as the records exist when the service is provided or within a reasonable period of time thereafter."

Based on this provision, the focus of our inquiry is on the purchaser's benefit in this state. Defender argues that ADT, as the purchaser of the Alarm Services Contracts, receives the benefit of the contracts outside Ohio, i.e., at its principal place of business to which Defender sends the purchased alarm services contracts. H.R. at 40. The commissioner argues that the benefit to ADT of the alarm services contracts obtained by Defender is wholly received in Ohio, where the ultimate security monitoring services are provided to protect individuals and property located in Ohio.

Ohio Adm. Code 5703-29-17 provides for situsing of gross receipts from services. Although a significant number of examples are provided within such rule, none specifically address the situation here, where the taxpayer generates gross receipts from the sale of alarm services contracts. Defender points us to Ohio Adm. Code 5703-29-17(C)(4), which addresses the situsing of “agency services” not otherwise specified in the rule. The provision provides, in relevant part:

“(b) If agency services are performed for a purchaser with operations within and without Ohio, the gross receipts are sitused to Ohio if the services performed are of benefit to specific operations located in Ohio.

“For example, a national retailer hires an Ohio agency to develop an advertising campaign targeting its Ohio stores. The gross receipts from this service are sitused to Ohio.

“(c) At the election of the service provider, and as long as it is applied in a reasonable, consistent, and uniform manner, agency services may be sitused according to the purchaser’s ‘principal place of business’ ***. The term ‘principal place of business’ refers to the location where the business unit being provided the service primarily maintains its operations.”

There is no dispute in this matter that ADT does not maintain any locations within Ohio; ADT has locations in Colorado, Florida, Tennessee, New York, Texas, and Canada. H.R. at 62-63. Therefore, if Defender’s receipts are sitused under Ohio Adm. Code 5703-29-17(C)(4), they would be sitused outside Ohio. In addition, Defender cites examples of other services illustrated in the rule, which it describes as situations where “there is no specific property to which the service was provided,” under which its receipts would be sitused outside Ohio. Appellant’s Post-Hearing Brief at 11, citing Ohio Adm. Code 5703-29-17(C)(2), (4), (13), (16), (19), and (34). Defender draws a distinction between the service it provides to ADT, i.e., obtaining the customer relationship for ADT, and the service ADT provides to Ohio customers pursuant to such contracts, i.e., security monitoring services.

The commissioner disagrees as to the applicability of Defender’s examples, arguing, as he did in his final determination, that the benefit to ADT is received *because of* property in Ohio which ADT will monitor pursuant to the alarm services contracts Defender sells to it. Several examples within the administrative code provision support the commissioner’s position. For example, appraisal services, architecture services, and engineering services are sitused to Ohio if the property tied to such service is located wholly in Ohio. Ohio Adm. Code 5703-29-17(C)(5), (6), (20).




Upon review of the record, the arguments, and the statutory and administrative code provisions, we agree with the Tax Commissioner that Defender’s receipts from the sale of alarm services contracts to ADT, i.e. its “customer account revenue” is properly sitused to Ohio. It belies logic to argue that the purchaser (ADT) receives no benefit in Ohio from the contracts it purchases from Defender. The contracts would not exist without property in Ohio to be monitored and equipment located within such property in Ohio by which the monitoring is performed. The commissioner has already determined that Defender is not an agent of ADT, and that issue has not been raised as an error on appeal. Defender therefore may not avail itself of the situsing rules in Ohio Adm. Code 5703-29-17(C)(4). Certainly if it were an agent and the contracts underlying the gross receipts in this matter were unrelated to property located Ohio, for example life insurance, see Ohio Adm. Code 5703-29-17(C)(4)(c)(i), the receipts might be properly sitused outside Ohio. However, because of the nature of the contracts obtained by Defender and sold to ADT, we find the gross receipts from such sales are properly sitused to Ohio.

In light of our finding, we need not further address the Tax Commissioner’s arguments about the sufficiency of the documentation underlying Defender’s refund claim.

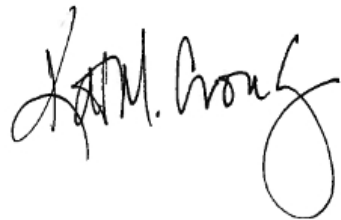
We further acknowledge that Defender has made constitutional arguments with regard to the commissioner’s final determination. While the Ohio Supreme Court has authorized this board to accept

evidence on constitutional points, it has clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229 (1988); *MCI Telecommunications Corp. v. Limbach*, 68 Ohio St.3d 195, 198 (1994). Therefore, we make no findings in relation to Defender’s constitutional arguments.

Based upon the foregoing, we find that Defender has failed to meet its burden on appeal. We therefore affirm the final determination of the Tax Commissioner.

| BOARD OF TAX APPEALS | | |
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| 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.



Kathleen M. Crowley, Board Secretary