

GREENSCAPES' CONSTITUTIONAL NEXUS CLAIMS AGAINST CAT WITHER IN OHIO TENTH DISTRICT COURT OF APPEALS

FEBRUARY 8, 2019



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The Tenth District Court of Appeals of Ohio (“Tenth District”) affirmed the Ohio Board of Tax Appeals (“Board”) decision upholding an assessment of Commercial Activity Tax (“CAT”) against Greenscapes Home and Garden Products, Inc. (“Greenscapes”). *Greenscapes Home and Garden Products, Inc. v. Testa*, 2019-Ohio-384 (February 7, 2019). The decision relies heavily on the fact that Greenscapes knew its products would be delivered to Ohio, that the siting methodology for the CAT is consistent with other states, and that by selling to a national retailer Greenscapes had purposefully availed itself of the Ohio market.

Greenscapes is a Georgia based seller of home and garden products. Almost all of its sales were to “big-box” retailers such as Walmart, Home Depot, and Lowes. The CAT assessment related to product that the retailers picked up at Greenscapes’ dock and then shipped to the retailer’s distribution center in Ohio (commonly referred to as “customer pick-ups”), from which the product was then delivered to the retailer’s stores. Greenscapes had information on the states where the distribution centers were located. Greenscapes also knew generally the retailer shipped the goods to retail stores in Ohio and elsewhere but did not have specific shipping information on the retail store

shipments.

The Board had previously affirmed the Tax Commissioner's situsing of such sales to Ohio under R.C. 5751.033(E), which applies an ultimate destination standard. The Board determined that Greenscapes had not provided evidence to show that some of the product was ultimately shipped to a non-Ohio store of the retailer. The Tenth District reiterated the Board's affirmation of the ultimate destination situsing applied in the assessment, noting both in a footnote and later in more detail in the analysis of whether Greenscapes had substantial nexus under the Commerce Clause, that the CAT situsing statute was consistent with the situsing of customer pick-ups in other states.

The bulk of the Tenth District's opinion grappled with the constitutional nexus claims asserted in the appeal, which the Board stated it had no authority to consider. Greenscapes argued that its activities were insufficient to create substantial nexus under the Commerce Clause of the U.S. Constitution. Citing the Ohio Supreme Court's decision upholding the sales portion of the CAT's bright-line nexus standard in *Crutchfield Corp. v. Testa*, 151 Ohio St.3d 278 (2016) and the U.S. Supreme Court's decision in *South Dakota v. Wayfair*, 138 S.Ct. 2080 (2018), the Tenth District noted that physical presence in Ohio is not required under the Commerce Clause for imposing a tax obligation under the CAT. The Tenth District also rejected Greenscapes' reliance on the decision in *McLeod v. J.E. Dilworth Co.*, 322 U.S. 327 (1944), noting that the case was overruled by the decision in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274, 279 (1977). "[G]reescapes 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." *Greescapes*, at ¶ 27.

The Tenth District noted that the Ohio Supreme Court had previously determined there was "ample nexus" under a similar situsing statute under the corporation franchise tax. *Greescapes*, at ¶ 28, citing *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97(1971). The Tenth District also cited the fact that the same destination situsing methodology is utilized by many of the states. Finally, the Tenth District indicated that there was no evidence that the sales at issue in Ohio would result in double taxation to Greenscapes. Because Greenscapes satisfied the \$500,000 of sales-receipts threshold in the CAT's bright-line nexus standard, the Tenth District concluded that Greenscapes had substantial nexus with Ohio.

Greenscapes had also argued that the application of the CAT violated the Due Process Clause of the U.S. Constitution because Greenscapes did nothing to purposefully direct sales to Ohio. Greenscapes also argued that it did not have minimum contacts with Ohio. Greenscapes had relied heavily on the decision in *Asahi Metal Industry Co. v. Superior Ct. of California*, 480 U.S. 102, 112-113 (1987) arguing that passive knowledge that goods may end up in Ohio is insufficient to satisfy the “purposefully direct” standard of the Due Process Clause. The Tenth District rejected Greenscapes’ reliance on *Asahi* as a product liability case and cited to several federal court decisions that, “* * * found a defendant who sells products to a national or regional retailer for the resale to ordinary, individual customers in the forum state has purposefully availed itself of the privilege of doing business in the forum state.” *Greenscapes*, ¶ at 41. The Tenth District determined that Greenscapes sales were made possible due to a market for goods in Ohio and that Greenscapes’ “systematic sale of goods” that are delivered to Ohio created a definite link between Ohio and Greenscapes. “Greenscapes has purposefully taken advantage of the distribution ability of national retailers and knows that its products are shipped to Ohio.” *Greenscapes*, ¶ at 42. Therefore, the Tenth District concluded that the application of the CAT to Greenscapes in this manner did not violate the Due Process Clause of the U.S. Constitution.

Historically and under current law, decisions of the Board related to Tax Commissioner cases, such as the CAT, could be directly appealed to the Ohio Supreme Court. The Board’s decision in *Greenscapes* was decided in a one-year period from September 29, 2017 to September 12, 2018 when such decisions were only directly appealable to an Ohio Court of Appeals. Greenscapes can file an appeal requesting the Ohio Supreme Court to grant a discretionary appeal of the Tenth District’s decision. One issue with the case being decided by an Ohio Court of Appeals is that the other Ohio District courts are not necessarily bound by the Tenth District’s decision.

If you would like to discuss this article, please contact Debora McGraw, Rich Farrin, or any of the other professionals at Zaino Hall & Farrin LLC.

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