

SITUSING OF TANGIBLE PERSONAL PROPERTY FOR THE OHIO COMMERCIAL ACTIVITY TAX

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The situsing of gross receipts from the sale of tangible personal property for commercial activity tax (CAT) purposes is becoming a common controversy between taxpayers and the Ohio Department of Taxation (ODT). This ZHF SALT Buzz is intended to summarize certain Final Determinations issued by ODT that contain its analysis of the statute for situsing gross receipts from the sale of tangible personal property, R.C. 5751.033(E). While the Ohio Board of Tax Appeals has not issued a decision addressing R.C. 5751.033(E), the Final Determinations, while not precedential, give some insight on how ODT interprets R.C. 5751.033(E).

R.C. 5751.033(E) contains the CAT situsing provision for sales of tangible personal property and provides:

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 the *Lexmark International, Inc. ("Lexmark")* Final Determination (9/22/2015)¹, ODT provided its interpretation of R.C. 5751.033(E), which ODT has applied in subsequent Final Determinations. ODT interprets the first sentence of R.C. 5751.033(E) to plainly require "that taxable gross receipts from the sale of tangible personal property must be situated to Ohio, if the purchaser receives the tangible personal property in Ohio." Furthermore, ODT interprets this sentence to be applicable only to intrastate sales (i.e., the product is shipped from a location in Ohio and delivered to a location in Ohio).

ZHF Observation: The statute clearly states that tangible personal property is situated to Ohio if the tangible personal property is received by the purchaser in Ohio. However, ODT's conclusion that the first sentence of R.C. 5751.033(E) applies only to "intrastate" sales is not clearly supported by the statute. The statute does not distinguish between "intrastate" and "interstate" sales, but rather the location where the property is received by the purchaser. An equally reasonable conclusion is that the first sentence of R.C. 5751.033(E) provides the general situsing rule for tangible personal property, and the later sentences are intended to instruct the taxpayer where the specific situations described in those sentences exist.

ODT interprets the second sentence of R.C. 5751.033(E) to require that "whenever delivery is made by transportation, the gross receipts from the sale of tangible personal property must be situated to the location at which the purchaser ultimately receives the tangible personal property after all transportation, as between the seller and the purchaser (not the purchaser's customer) has come to an end." ODT interprets the term "transportation" to mean interstate transportation (i.e., the product is shipped from a location in Michigan and delivered to a location in Ohio or vice versa).

ZHF Observation: ODT focuses on transportation between the buyer and the seller of tangible personal property. Based upon ODT's analysis in the *Lexmark* Final Determination (09/22/2015) and in the *International Intimates, Inc.*

¹It is important to note that in an earlier *Lexmark* Final Determination (7/15/2014), the Tax Commissioner used a slightly different analysis of R.C. 5751.033(E). However, as subsequent Final Determinations use the analysis in the more recent *Lexmark* Final Determination (9/22/2015), the focus of this SALT Buzz will be on the analysis in the more recent *Lexmark* Final Determination (9/22/2015).

Final Determination (11/11/2016), if a taxpayer sells tangible personal property to a purchaser and the purchaser then resells the tangible personal property to its customer, ODT will look to the location where the purchaser takes possession of the tangible personal property. The fact that the purchaser then ships the tangible personal property to its customer outside Ohio is not applicable in determining the situsing of the taxpayer's sale.

However, in the *Butler Color Press, Inc.* Final Determination (11/2//2016), ODT seems to contradict earlier Final Determinations and conclude that delivery of tangible personal property to a third party distribution center for repackaging was not delivery to the purchaser despite the fact that the purchaser designee took possession of the property and then made changes to, and repackaged the tangible personal property. As part of its analysis, ODT reasoned that there is no requirement that "the item being sent must stay in its same form to be considered still in the process of being shipped to the ultimate location."

In the *4 What It's Worth, Inc.* Final Determination (02/08/2017), ODT acknowledged that "gross receipts for merchandise initially shipped to a purchaser's distribution center in Ohio and then ultimately shipped to the same purchaser's retail stores are not taxable in Ohio." The level of documentation required to support the ultimate store location in these situations is substantial. For example, using a ratio of Ohio to non-Ohio retail locations serviced by the distribution center to situs receipts delivered to an Ohio distribution center was not adequate evidence according to the *4 What It's Worth, Inc.* Final Determination (02/08/2017). It is unclear if ODT will accept third-party (i.e., the taxpayer's customer) data when evaluating the ultimate destination of gross receipts from the sale of tangible personal property. Additionally, there is also uncertainty as to when (i.e., prior to shipment, the following day or the following week) a taxpayer must have documentation supporting the ultimate destination location in order for the documentation to be acceptable to ODT.

In analyzing the third sentence of R.C. 5751.033(E), ODT states in the *Lexmark* Final Determination that, "it is of no consequence, for purposes of situsing, whether the seller, the purchaser, or a third party transports the tangible personal property to the location where the purchaser ultimately receives it." ODT interprets this sentence as codifying the Ohio Supreme Court's decision in *Dupps v. Lindley*, 62 Ohio St. 305 (1980).

ZHF Observation: The *Dupps* decision involved an out-of-state taxpayer that entered Ohio, picked up tangible personal property from the seller in Ohio, and then transported the property out-of-state. The Ohio Supreme Court analyzed the relevant statute, which was similar to R.C. 5751.033(E), and concluded that

for Corporation Franchise Tax purposes, the sale of tangible personal property should not be considered an Ohio sale for the apportionment calculation because the purchaser ultimately received it outside of Ohio. ODT has issued Final Determinations consistent with this holding. While not specifically stated, ODT would situs the reverse situation where property is picked up by the customer outside Ohio and brought back to Ohio.

In the *Lexmark* Final Determination, ODT interprets the fourth sentence of R.C. 5751.033(E) as pertaining only to sales involving the direct delivery of tangible personal property. “Direct delivery involves the situation where tangible personal property is directly delivered from the seller (either via its own trucks or via a third party) to the purchaser’s designee.” Thus, “whenever delivery is a direct delivery from the seller to the purchaser’s designee, the gross receipts from the sale of tangible personal property must be sitused to the location at which the purchaser’s designees receives the tangible personal property.”

ZHF Observation: ODT has not issued a Final Determination in which a taxpayer’s facts and circumstances fall under the fourth sentence of R.C. 5751.033(E). It is unclear how ODT would treat the situation of “direct delivery” where the purchaser’s designee then transports the property to or from Ohio. Additionally, ODT has stated previously that where title passes or other conditions of sale do not impact the ultimate destination determination. Based on a strict read of the statute, the language “regardless of where title passes or other conditions of sale” appears to apply only to direct delivery (i.e., sales to the purchaser’s designee) sales.

The situsing of tangible personal property can be complicated depending on a taxpayer’s facts and circumstances. ODT has been consistent in its interpretation of R.C. 5751.033(E) since it issued its Final Determination in *Lexmark*. Taxpayers should analyze their facts and circumstances in light of this information to determine if risk or opportunity exists.

If you would like to discuss CAT situsing provisions for tangible personal property, please contact Tom Fagan, John Trippier, or any of the other professionals at Zaino Hall & Farrin LLC.

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