2009
Ohio Tax Update

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Legislative Matters

Sales & Use

Am. Sub. H.B. 429 (relevant portions effective January 1, 2010) amended R.C. 5739.033(B) to require all vendors to use origin-based sourcing for all intrastate sales. Accordingly, the act also discontinues the temporary compensation offered to vendors for complying with destination-based sourcing.

Excise and Motor Fuel Taxes

Am. Sub. H.B. 1 (effective January 1, 2010) amended R.C. 5743.61 to create a new fee structure for the other tobacco products distributor licenses. The new annual fee will be $1,000 and will be prorated by the effective calendar date.

Am. Sub. H.B. 1 (effective January 1, 2010) also amended the fee structure for cigarette wholesaler licenses under R.C. 5743.15. The new annual fee will be $1,000 and will be prorated by the effective calendar date. Wholesale cigarette licenses will no longer be issued by the county auditors and instead will be issued by the Department of Taxation. Additionally, licensed cigarette wholesalers will still be required to verify customers as licensed cigarette retail dealers.

Sub. H.B. 318 (effective April 7, 2009) provides that, for purposes of calculating the distribution to townships of the revenue generated by one component of the state motor vehicle fuel tax, the number of lane miles within the boundaries of a township does not include any lane miles of township roads that have been placed on nonmaintained status.

Am. Sub. H.B. 2 (effective July 1, 2009) amended 5735.06 to reduce motor fuel shrinkage allowances for motor fuel dealers. The licensed dealer shrinkage allowance will be reduced to 1 percent and the retail shrinkage allowance will be reduced to 0.5 percent.

Omnibus Changes

Am. Sub. H.B. 1 (effective July 17, 2009) made numerous changes to various tax provisions.

The act expanded three existing credits and created two additional credits. Requirements to qualify for the Jobs Creation Tax Credit in R.C. 122.17 and the Jobs Retention Tax Credit of R.C. 122.171 were eased and the time period during which a business must continue to occupy the space was shortened. The act expanded the Research and Development Investment Credit by amending R.C. 122.151(D) to increase the total amount of credits available each year. New credits created by the act are the New Markets Tax Credit and the Movie and Television Production Tax Credit. The New Markets Tax Credit in R.C. 5725.33 is an income tax credit for insurance companies and financial institutions for investing in qualified active low-income community businesses in Ohio. The Movie and Television Production Tax in R.C. 122.85 is a refundable credit for a motion picture company that produces at least part of a motion picture or television show in Ohio.

In addition to the tax credit amendments, various sections of the commercial activity tax laws were amended. Several of the exclusions listed in R.C. 5751.01(F) have been modified, added or eliminated.

R.C. 5751.051(A)(1) was amended so that all tax returns are due on the 10th day of the second month following the end of each calendar year.

R.C. 5751.012 was amended so that a consolidated elected taxpayer group that initially elected to consolidate at the 80% level may change that election to the 50% level.

The act also provides for a limited refund for taxpayers that registered and paid the CAT in 2005 and 2006, but later determined that they didn't have nexus with Ohio, or that their taxable gross receipts was less than $150,000.

The act also reorganized some provisions of Chapter 5751 regarding the CAT. It also added a new division (I) to R.C. 5751.07 to provide a notice and penalty provision for taxpayers who bill or invoice a third party for the CAT.

The act also amended R.C. 5751.20 and R.C. 5751.22 to earmark 30% of all CAT revenue for distribution to local jurisdictions.

Various changes were made in miscellaneous notice provisions, including the amendment of R.C. 5703.37 to eliminate the requirement that notices be "certified" by the Tax Commissioner.

Medical services provided or arranged by a Medicaid health-insuring corporation will be subject to sales tax, unless the tax is determined to be an "impermissible health-care related tax" for federal Medicaid purposes. These changes are found in R.C. 5739.01, 5739.03, 5739.033 and R.C. 5739.051.

R.C. 5747.13(E) was amended so that a person challenging a personal income tax assessment no longer has to prepay any portion of the assessment, except where the taxpayer is, essentially, a tax protester. R.C. 5747.75 was amended to provide that taxpayers organized as a pass-through entity may allocate the historic preservation tax credit among owners in proportions other than according to their respective ownership interests.

R.C. 5727.81 was amended to modify the computation of the tax liability for kilowatt hour tax by a self-assessing purchaser, beginning January 1, 2011, to one based solely on a per-kilowatt hour rate, eliminating the existing price component.

R.C. 5727.881 was amended to increase from 50,000 to 70,000 the number of customers that a natural gas distribution company may have and still compute its tax by aggregating all customers.

Uncodified section 757.10 authorizes the exemption and remittance of taxes paid on airport property leased by a port authority that was precluded from exemption under prior law because the property was not owned by the port authority at the time the application for exemption was filed.

R.C. 5739.09 was amended so that the definition of a "hotel" that is subject to local lodging taxes includes establishments at which rooms may be located in several structures and accessible by separately keyed entries.

And finally, various changes are proposed to Ohio's tax levy law, R.C. Chapter 5705, that will permit a school district to enact a "conversion" levy that will permit some if its taxes to grow with inflation. Recognizing the short-term reduction in revenue that this will create, there is a reimbursement provision that applies until either the levy loss is reduced to zero, or 2026.

Cases & Rulings

Franchise & Income

Personal Income

In *Information Release IT 2009-01*, "Required Tax Preparer Use of Electronic Filing for Tax Year 2009 Ohio Individual Income Tax Returns—Issued July 2009," the Department announced that, pursuant to R.C. 5747.082, paid tax preparers who filed more than 75 tax returns during the 2008 calendar year or during any subsequent year must, beginning January 1, 2010, use electronic filing technology to file state income tax returns. For taxable year 2009, the Tax Commissioner will require tax return preparers to use electronic technology only for filing the IT 1040 Ohio individual income tax return. Acceptable methods of electronically filing the year 2009 IT 1040 include the IRS federal/state e-file program, Ohio I-File and Ohio eForms.

In *Information Release IT 2009-02*, "Announcement of Ohio Offshore Voluntary Disclosure Program—Issued December 2009," the Department announced the release of the Ohio offshore Voluntary Disclosure Program under which taxpayers with undisclosed foreign accounts and entities may resolve income tax issues with limited penalties. Taxpayers must contact the Department by March 2010 with the requisite information in order for the Tax Commissioner to consider the requests for partial penalty abatement.

In *Wagenknecht v. Levin*, 121 Ohio St.3d 13, 2008-Ohio-6812, the Supreme Court affirmed earlier holdings and concluded that a taxpayer's right to a hearing under R.C. 5717.02 does not encompass a right to present evidence on points that are not jurisdictionally before the BTA. Taxpayer lacked jurisdiction as he failed to file an amended Ohio return that incorporated a new adjusted gross income figure and failed to prepay the assessment in order to receive consideration of his petition for reassessment.

In *Busa v. Levin*, Cuyahoga App. Nos. 90421 & 90422, 2009-Ohio-114, 2009 Ohio App. LEXIS 109 (January 15, 2009), the court of appeals upheld the assessment of personal income tax upon the income earned from the taxpayers' Electing Small Business Trusts (ESBT) during the year 2000. Even though taxpayers complied with 26 C.F.R. § 1.641(c)-1(c) by terminating their ESBTs prior to December 29, 2000, the income generated by the trusts was still taxable as grantor trust income under Section 671 of the Internal Revenue Code. The court of appeals held that neither the Tax Commissioner nor the BTA engaged in improper rulemaking—they simply applied the law.

In *Senser v. Levin*, BTA No. 2007-M-1299, 2009 Ohio Tax LEXIS 875 (June 23, 2009), the BTA upheld the Tax Commissioner's denial of abatement of a penalty assessment for personal income tax. The BTA held that the Tax Commissioner appropriately exercised its discretion to not abate penalties under R.C. 5747.15 when the taxpayer admitted that she did not remit income taxes due the state until after the time provided by the law.

Corporation Franchise

In *Information Release CFT 2009-01*, "No. 2010 Franchise Tax Filing or Payment Obligation for Corporations Subject to the Phase-Out—Issued September 2009," the Tax Commissioner reminded taxpayers that for most corporations, the franchise tax had been phased out; as a result, there was no need to file a report for the 2010 tax year.

In *Information Release CFT 2009-02*, "Waiver of Corporation Franchise Tax Filing Requirement for 2010 for S Corporations—Issued October 2009," the Tax Commissioner noted that for tax year 2010, it would not be necessary for S corporations to file notice of their annual election for franchise tax purposes. This was waived because the general franchise tax is phased out for most corporations beginning with the 2010 tax year.

In *Nestle R&D Center, Inc. v. Levin*, 122 Ohio St.3d 22, 2009-Ohio-1929, the Supreme Court reversed a decision of the BTA and held that the three-year statute of limitations for a refund claim based on the jobs creation tax credit began to run from the date the certificate was issued by the Department of Development, and not from the date the taxes were paid. The taxpayer argued, and the Court agreed, that the payment did not become "erroneous" or "unlawful" until such time as the certificate was issued, even though that was more than three years after the tax was paid.

Municipal Income

In *Seasongood & Mayer, LLC v. City of Cincinnati Income Tax Bd. of Rev.*, BTA No. 2006-T-1505, 2009 Ohio Tax LEXIS 1775 (November 24, 2009), the BTA held that the municipal income taxation of the income of a dealer in intangibles was not preempted by the state dealers in intangibles tax. However, it did conclude that to the extent the income derived from the sale or exchange of stocks, bonds and other similar property, it constituted income from intangible property that the City was prohibited from taxing under R.C. 718.01(A)(5).

In *Boyer v. St. Bernard Municipal Board of Appeal*, BTA No. 2007-Z-139, 2009 Ohio Tax LEXIS 874 (June 23, 2009), the issue before the BTA was whether stock options became subject to municipal income tax when earned or when the stock options were exercised. The BTA found that the taxpayer earned compensation in the form of stock options in 1996 while he worked in St. Bernard and the city had the authority to tax this compensation as it constituted qualifying wages earned by a nonresident earned in the city. St. Bernard necessarily had to wait until the option-exercise date to assign a value to the compensation because the value of the options could not be determined until then. Thus, although the taxpayer did not reside or work in St. Bernard at the time when he exercised the options, St. Bernard was authorized to tax the stock options at that time.

In *Koenig v. Village of Botkins Bd. of Review*, BTA No. 2005-T-1692, 2009 Ohio Tax LEXIS 1499 (Oct. 6, 2009), the BTA held that because Botkins had in fact imposed its tax on resident shareholders of their distributable share of income from non-resident S corporations. A law change in 2004 prohibited municipalities from imposing tax on the distributable shares from nonresident pass-through entities unless they had done so previously. Although Botkins' ordinance was unclear regarding the taxation of the distributable share from an S corporation, evidence indicated that, in fact, tax was imposed upon such income. Therefore, Botkins was not precluded from imposing tax on the distributable shares after the law change.

Procedure

In *Austintown Ambulatory v. Levin*, BTA No. 2009-M-696, 2009 Ohio Tax LEXIS 1687 (November 10, 2009), the BTA dismissed an appeal where the taxpayer failed to file a copy of the notice of appeal with the Tax Commissioner within 60 days of the date the final determination was mailed. R.C. 5717.02 requires notices of appeal to be filed with both the BTA and the Tax Commissioner within the 60-day appeal period. The failure to file with either party within the appeal period means the BTA has no jurisdiction to consider the appeal.

In *Academy Electronics Repair, Inc. v. Levin*, Ohio BTA No. 2009-M-532, Ohio Tax LEXIS 808 (May 19, 2009), the BTA held that the Tax Commissioner had no jurisdiction to consider a taxpayer's petition for reassessment. The taxpayer failed to satisfy a requirement of R.C. 5747.13 that a portion of an assessment be paid prior to review of the petition for reassessment.

In *Ross v. Levin*, BTA No. 2007-M-117, 2009 Ohio Tax LEXIS 942 (July 14, 2009), the BTA held that an individual was personally liable for a corporation's failure to pay withholding taxes under R.C. 5747.07(G). The BTA concluded that the individual was an officer of the corporation where there was abundant evidence, including records submitted to the secretary of state, indicating that the individual was responsible for the execution of the corporation's fiscal responsibilities.

Ad Valorem

Personal Property Tax

In *Cleveland OH Realty I, LLC v. Cuyahoga Cty. Bd. of Revision*, 121 Ohio St. 3d 253, 2009-Ohio-757, the Supreme Court affirmed a decision of the BTA that concluded the sale of real estate where the price was based on above-market lease rates nevertheless represented the value of the property for tax purposes. This case represents yet another case in which the Supreme Court continues to hold that a sale is conclusive evidence of value, regardless of its terms or the interest transferred.

In *Zupancic v. Wilkins*, Franklin App. No. 08AP-472, 2009-Ohio-3688, 2009 Ohio App. LEXIS 3143 (July 28, 2009), the court of appeals concluded that county auditor's action for declaratory judgment was not the proper vehicle to challenge the Tax Commissioner's tax treatment of nuclear fuel rod assemblies. The county auditor argued that the Tax Commissioner misconstrued the term "cost" for purposes of public utility property tax purposes. However, recent amendments to R.C. 5727.23 eliminated the right of the county auditor to appeal preliminary assessments of the Tax Commissioner and the county auditor could not directly appeal the construction of the term "cost." The court of appeals concluded that declaratory judgment was not the proper avenue to challenge the Tax Commissioner's decision and remanded the case to be dismissed.

In *The Robbins Co. v. Levin*, Ohio BTA No. 2006-V-2345, 2009 Ohio Tax LEXIS 794 (May 19, 2009), the BTA found the taxpayer failed to demonstrate that the personal property in question was idle and no longer in use during the tax years in issue. The taxpayer also claimed that one machine had been reconditioned and leased to another company located outside Ohio. However, since this issue had not been presented to the Tax Commissioner, the BTA did not have jurisdiction to consider it.

In *Retail Trust IV v. Wood Cty. Bd. of Revision*, Ohio BTA Nos. 2006-T-1130 & 1134, 2009 Ohio Tax LEXIS 26 (January 13, 2009), the BTA ruled that even where a property has not transferred in a sale and changes in valuation are based on appraisal reports, the appraiser must consider all sales in the market data approach, even if the sales involve factors, such as build-to-suit or sale-leaseback, that render them financing transactions. Previously, such transactions had to be considered only when the property was subject to a sale within a reasonable time of tax lien date. The result is likely to be higher values, and hence higher taxes, to property owners.

In *CCAE, Incorporated v. Wilkins*, Ohio BTA No. 2006-H-1612, 2009 Ohio Tax LEXIS 833 (June 9, 2009), the BTA held the taxpayer who was notified that personal property tax returns had not been filed nevertheless qualified for tax amnesty under Am. Sub. H.B. 66, effective June 30, 2005. The bill disqualified from amnesty taxpayers who had received a notice of assessment, had received a bill for taxes owed, or who were undergoing an audit or notified of an impending audit. CCAE had only been notified that tax returns had not been filed; hence it qualified for the amnesty.

In *Trunkline Gas Co. v. Wilkins*, Ohio BTA No. 2005-K-578, 2009 Ohio Tax LEXIS 1145 (July 7, 2009), and *Panhandle Eastern Pipe Line Company v. Wilkins*, Ohio BTA No. 2005-K-579, 2009 Ohio Tax LEXIS 1145 (July 7, 2009), the BTA rejected the refund claim of the taxpayer that it had misclassified certain costs as physical property located in Ohio, rather than as costs in aid of construction. Although the taxpayer demonstrated that it was not authorized to own or operate pipeline in Ohio, it failed to present any documentary evidence surrounding the circumstances of the construction of the property and relationship between it and Panhandle.

Valuation

In *HealthSouth Corp. v. Levin*, 121 Ohio St. 3d 282, 2009-Ohio-584, the Supreme Court affirmed a decision of the Board of Tax Appeals that granted a personal property tax refund to a taxpayer that had erroneously overstated the value of its tangible personal property. The overstatement had been the result of a deliberate overstatement of assets on the taxpayer's books that was part of an elaborate accounting fraud by management. The Tax Commissioner argued that it would be inequitable for the taxpayer to receive the refund where the overpayment was the result of deliberate fraud. The Court disagreed on the basis that the statutes provided no discretion to the Tax Commissioner; if property was reported at an excessive value, then that official was required to make the reduction. However, because the BTA failed to identify the evidence on which it relied in granting the refund, the case was remanded for the BTA to make such a determination.

In *Progressive Plastics, Inc. v. Levin*, Cuyahoga App. No. 91614, 2009-Ohio-2033, 2009 Ohio App. LEXIS 1706 (April 30, 2009), the Court of Appeals agreed with the BTA that the

FIFO method of costing inventory more accurately reflected the true value of the taxpayer's inventory than did the LIFO method. The taxpayer argued that it was entitled to use any method of accounting it chose, and that absent a finding that such method failed to reflect the true value of its inventory, such value was binding on the Tax Commissioner. In this case, testimony of the auditing agents demonstrated that the FIFO method more closely reflected the taxpayer's actual manner of doing business; hence the Tax Commissioner could substitute that method for LIFO.

In *Rich's Department Stores, Inc. v. Wilkins*, Ohio BTA No. 2005-T-1609 (February 3, 2009), App. Docketed No. 09-437 (Sup. Ct., March 5, 2009), the BTA held that vendor markdown allowances, granted by a vendor to a retailer in order to preserve the retailer's predetermined margin, reduced the cost of inventory, and hence the value of the inventory, even though the allowance was recorded on the taxpayer's income statement rather than its balance sheet. Evidence showed the Tax Commissioner routinely reviewed the income statement for costs to increase the cost of inventory. In addition, testimony of the Tax Commissioner's expert witness supported the conclusion that the allowances reduced the cost of the inventory, consistent with the concept of the lower of cost or market.

Real Property Tax Valuation

The Valuation of "Big Box Stores"

In a series of cases, the Board of Tax Appeals ("BTA") and the Supreme Court of Ohio considered the valuation of "big box" stores. *See Meijer Stores L.P. v. Franklin County Bd. of Revision* (July 22, 2009), Slip Opinion No. 2009-Ohio-3479 (affirming BTA Case Nos. 2005-T-441 & -443) (affirming BTA's decision to find value based on school district's appraisal testimony); *Target Corp. v. Greene County Bd. of Revision* (June 3, 2009), Slip Opinion No. 2009-Ohio-2492 (affirming BTA Nos. 2006-V-751) (affirming BTA's decision to find value based on property owner's appraisal); *Retail Trust IV v. Wood County Bd. of Revision* (July 13, 2009), BTA Case Nos. 2006-T-1130 & -1134 (granting reduction in value based on uncontroverted testimony of owner's appraiser); *Credit Suisse Leasing v. Cuyahoga County Bd. of Revision* (Sept. 22, 2009), BTA Case Nos. 2006-A-2293 & -2383 (finding higher value based on board of education's appraisal testimony).

In a subset of these cases, the property owners appealed from adverse decisions from the county Board of Revision ("BOR") to the BTA. *See Target Corp*., 2009-Ohio-2492; *Retail Trust IV*, BTA Case Nos. 2006-T-1130 & -1134; *Wal-Mart Real Estate Business Trust v. Darke County Bd. of Revision* (Feb. 6, 2009), BTA Case No. 2006-V-773; *Lowes Home Centers, Inc. v. Clinton County Bd. of Revision* (Feb. 6, 2009), BTA Case No. 2006-K-1016. In these cases, the owners typically presented appraisal testimony that excluded evidence of sales of comparable properties that were subject to build-to-suit and long-term lease provisions. Build-to-suit arrangements involve a developer building a big box store for a store tenant, and then encumbering the property with a long-term lease to finance the big box's construction while also turning a profit for the owner-developer. *See Retail Trust IV*, BTA Case Nos. 2006-T-1130 & -1134, at 9. By excluding such examples of owners' uses of comparable properties, the owners' appraisers considered only comparable properties that had "gone dark" or were in otherwise adverse circumstances.

Combined with an analysis of arguably "distressed" properties, the owners' appraisers also testified that sales between big box stores rarely occur because each retailer designs and builds its big box stores to match its individualized marketing plan. This limited secondary use of big box stores by other big box retailers is termed "economic obsolescence," and formed one of the owners' justifications for requesting reduced valuations of their stores.

In these cases, the BTA and the Court observed that consideration of sales that were related to properties that were subject to long-term leases could be considered as evidence of value of big box stores. Indeed, the BTA and Court noted that encumbering property with a long-term lease typically represents an owner's attempt to realize the full value of the property. *See Retail Trust IV*, BTA Case Nos. 2006-T-1130 & -1134, at 13. However, because the Boards of Education and county entities that opposed the property owners' requested reductions had failed to introduce their own appraisal testimony (which would presumably have taken account of the build-to-suit and long-term lease arrangements), the BTA and the Court were confined to rely upon the evidence submitted by the owners. Where big box store owners presented unrebutted appraisal testimony, they generally achieved reductions in value. *See Target Corp*., 2009-Ohio-2492; *Retail Trust IV*, BTA Case Nos. 2006-T-1130 & -1134; *Wal-Mart Real*, BTA Case No. 2006-V-773; *Lowes*, BTA Case No. 2006-K-1016.

However, in other cases, the Boards of Education did present appraisal testimony that relied, in part, on evidence of long-term leases related to build-to-suit arrangements. *See Meijer Stores*, 2009-Ohio-3479; *Credit Suisse Leasing*, BTA Case Nos. 2006-A-2293 & -2383. In particular, the school boards' appraisers were able to rebut the owners' appraisers' claims regarding economic obsolescence by basing their opinions of value upon the value of first-generation properties, including properties subject to build-to-suit and long-term lease arrangements. Where Boards of Education have provided the BTA with their own appraisals, rather than merely relying on the cross-examination of owners' appraisals, Boards of Education have met with success in opposing reductions in the valuation of big box stores. *See Meijer Stores*, 2009-Ohio-3479; *Credit Suisse Leasing*, BTA Case Nos. 2006-A-2293 & -2383.

Low Income Housing Tax Credits that Impose Use Restrictions Should be Valued According to Actual Rent-Restricted Income

In *Woda Ivy Glen L.P. v. Fayette County Bd. of Revision* (Feb. 26, 2009), 121 Ohio St. 3d 175, the Supreme Court of Ohio held that properties that are subject to federally-imposed use restrictions as a result of the properties' participation in the Low Income Housing Tax Credit ("LIHTC") program should be valued, under the income approach, based on their actual rent-restricted incomes, rather than market rents, because the LIHTC program imposes strict use restrictions that take the form of rent restrictions that the government imposes for the general welfare. The Court deemed the LIHTC use restrictions to be "police power limitations on use," which prevented the owners from charging market rents. The Court also instructed that the affirmative benefit of tax credits that participation in the LIHTC confers upon property owners should not be considered as a benefit to the property that might increase an LIHTC property's value.

In *NBC-USA Housing, Inc. Thirteen v. Franklin County Bd. of Revision* (October 6, 2009), BTA Case Nos. 2006-H-1212 & 1213, the BTA held that where the owner of a subsidized housing property presented an appraisal that utilized an income approach based on analysis of market rents, rather than actual contract rents, the Board of Tax Appeals ("BTA") granted the owner's requested reduction in value. The County entities failed to introduce evidence opposing the reduction, and the BTA found that the appraiser's analysis was appropriate.

Bulk Sales

In *HK New Plan Exchange Property Owner II, L.L.C. v. Hamilton County Bd. of Revision* (July 28, 2009), Slip Opinion No. 2009-Ohio-3546, the Supreme Court of Ohio held that the owner's counsel's statement that the sale of the property was part of a sale from an institutional investor of a number of properties, but did not clearly and unequivocally state that a bulk sale occurred; therefore, the Court deferred to the BTA's determination that a bulk sale had not occurred. The statement did not require the BOR or the BTA to have found that the sale was a bulk sale, nor did the statement require the property owner to prove that it had accurately allocated the purchase price appearing on the conveyance fee statement.

In *Bd. of Education of Hilliard City Schools v. Franklin County Bd. of Revision* (August 25, 2009), BTA Case No. 2007-A-474, the BTA ruled that where an owner acquired a particular property in the course of a "bulk sale" of many properties, additional evidence must be introduced to prove that a proposed allocation of the bulk sale price is correct. Where evidence from the owner showed that the properties' purchase prices appearing on the conveyance fee statements and purchase and sale agreements had been determined based on internal underwriting requirements and federal tax consequences on gains, the BTA held that there was insufficient evidence to conclude that purported allocation of the bulk sale price was accurate. Also, the bulk sale had occurred 38 months after the relevant tax lien date.

Earlier Determinations of Value Enjoy no Presumption of Validity in Subsequent Tax Year

In *Olmstead Falls Bd. of Educ. v. Cuyahoga County Bd. of Rev.* (June 2, 2009), 122 Ohio St.3d 134, the Supreme Court held that even if a property's value in an earlier tax year has been adjudicated recently, that decision does not operate to bar the subsequent litigation of the property's value in a subsequent tax year. The Court held that the property's value may be different in each tax year, and a prior determination of value does not have the effect of res judicata or collateral estoppel.

Impact of "Above-Market Lease" on Value

In *Cleveland OH Realty I, L.L.C. v. Cuyahoga County Bd. of Revision*, (Feb. 25, 2009), Slip Opinion No. 2009-Ohio-757, the Supreme Court affirmed the BTA's decision to reject a property owner's claim that the true value of property that it

had purchased recently should have been reduced below the purchase price on account of a long-term lease that encumbered the property and that generated an above-market stream of income. The Court and the BTA rejected this argument, holding instead that the recent arm's-length purchase price of the property reflected its true value.

Similarly, in *Bd. of Education of the Olentangy Local Schools v. Delaware County Bd. of Revision* (Feb. 10, 2009), BTA Case Nos. 2006-M-1507 & 1549, the BTA found that the acquisition of an anchor store building in a mall was arm's length, and therefore held that the purchase price enjoyed a presumption of constituting the property's true value, even though the building was subject to a "mall operating agreement," which imposed certain use restrictions. Further, even though the sale of the building had occurred 20 months from the relevant tax lien date, testimony showed that the market for anchor department stores had remained stable during this time period, and the BTA therefore held that the sale of the anchor store building was sufficiently recent for the purchase price to be presumed to constitute the property's true value.

Where Evidentiary Record Before the BTA Does Not Affirmatively Negate Validity of Auditor's Original Valuation of Property, BTA Need Not Perform Independent Valuation of Property

In *Colonial Village, Ltd. v. Washington County Bd. of Revision* (September 29, 2009), Slip Opinion No. 2009-Ohio-4975, the Supreme Court explained the circumstances in which the BTA's duty to conduct an independent valuation of property is triggered. In an earlier case relating to the same property, the evidence in the record—most notably, the County Auditor's property record card—showed that the Auditor had based his original valuation of the subject property on the cost approach, which the Court especially disfavors for use in valuing subsidized properties. Thus, the evidence in the record affirmatively negated the validity of the Auditor's valuation of the property. As a result, in the earlier case, the Court held that the BTA had a duty to conduct an independent valuation of the property, rather than to merely evaluate the evidence in the record and render an opinion of value.

In the instant case, testimony from the Auditor's appraiser showed that, while the property record card did list the cost approach, in reality, the Auditor had valued the property based on a blend of all three approaches—cost, income and sales comparison. Because the evidence in the record for these cases did not indicate that the County had used an invalid approach, the Court held that the BTA did not need to perform an independent valuation.

BTA's Factual Determination of Value of Property is Entitled to Supreme Court's Deference

In *Blatt v. Hamilton County Bd. of Revision* (October 8, 2009), Slip Opinion No. 2009-Ohio-5260, the Supreme Court ruled that where the BTA obtained additional evidence of a residential property's value by requesting past years' property tax cards from the County Auditor, the BTA acted appropriately and the Court deferred to the BTA's determination of value.

Supreme Court Does Not Dismiss Appeal Relating to Application of 10% Property Tax Roll-Back to Apartment Properties

In *Ohio Apartment Assoc. v. Levin* (July 22, 2009), 122 Ohio St. 3d 1231, the Court declined to dismiss a property owner's challenge to the validity of the administrative rule that limits the 10% property tax reduction for property that is not intended primarily for use in a business activity in R.C. 319.302 to properties containing 3 or fewer dwellings. The Tax Commissioner attempted to interpose various jurisdictional arguments that the Court dismissed summarily.

Standing to File Valuation Complaints

In *Springfield City School Dist. v. Clark County Bd. of Revision* (July 9, 2009), BTA Case No. 2008-A-2527, the BTA granted a school district's motion to dismiss a property tax valuation complaint that an entity filed on behalf of a property owner. The evidence showed that the complainant, which filed the valuation complaint on behalf of the actual property owner, did not itself own property in the county and therefore lacked standing to have filed the complaint.

In *Predevelopment, Ltd. v. Summit County Bd. of Revision* (Nov. 10, 2009), BTA Case No. 2007-V-1387, the BTA ruled that even though the entity that filed a property tax valuation complaint failed to identify the owner of the property on the valuation complaint, because the complainant owned property in the county, it had standing to have filed the valuation complaint.

BOR's Decision to Vacate a Prior Decision is Effective When the Board Votes and Journalizes its Decision

In *Columbus City Schools v. Franklin County Bd. of Revision* (Feb. 26, 2009), 121 Ohio St. 3d 218, the Supreme Court held that a BOR decision to vacate a previous determination of a property's value becomes effective when the BOR votes and the results of that vote are entered on the record of the BOR's proceedings, regardless of when the BOR certifies notice of its decision to vacate an earlier decision to the parties.

When a Property Owner Fails to Respond to Discovery Requests, the Board of Tax Appeals May Impose Sanctions Against the Property Owner

In *Pulte Homes of Ohio, LLC v. Cuyahoga County Bd. of Revision* (July 28, 2009), BTA Case No. 2008-V-26, the BTA granted a Board of Education (BOE)'s motion for sanctions following a property owner's failure to respond to the BOE's discovery requests and subsequent failure to comply with the BTA's order to respond to the BOE's discovery requests. As a sanction for failing to have complied with the BTA's order to respond to the BOE's discovery requests, the BTA precluded the property owner from introducing certain evidence to support its proposition that a "downturn of the market" had caused the property's value to decline. Attorney fees were not awarded because the attorneys for the BOE failed to submit the cost of pursuing the sanctions.

Valuation: Disfavors Room Rate Multiplier

In *Second Berkshire Properties, LLC v. Cuyahoga County Bd. of Revision* (August 18, 2009), BTA Case No. 2005-T-1654, the BTA considered two appraisals of property used as a hotel. In a detailed analysis of both appraisals, the BTA criticized the owner's appraisal because, in its sales comparison approach, it utilized a gross rent multiplier ("GRM"), known as a room rate multiplier, to make adjustments to comparable sales. Thus, the owner's appraiser did not subject his sales comparisons to individual adjustments.

BTA Rejects Appraisal of Property that Lacked Effective Date of Value as of January 1 Tax Lien Date of Relevant Tax Year

In *Andress v. Erie County Bd. of Revision* (July 21, 2009), BTA Case No. 2007-N-1027 the BTA declined to place any weight on an appraisal that a property owner submitted that was dated 11 months after the relevant tax lien date for each tax year.

Failure to Present Evidence at BOR Hearing

In *WPH Cherry Valley, LLC v. Licking County Bd. of Revision* (October 6, 2009), BTA Case No. 2006-K-1294, a property owner seeking a reduction in its property's value contacted its primary out-of-state witness the day before the BOR's hearing of the case. Its counsel arrived late to the BOR hearing and stated that the witness was unable to attend and requested that the BOR continue its hearing of the case. The BOR declined to do so. On appeal, the BTA prohibited the owner from introducing the out-of-state witness's testimony because R.C. 5715.19(G) provides that if a complainant fails to provide evidence in his possession to the BOR, then he will generally be precluded from introducing such evidence on appeal.

Continuing Complaint Extends Between Reappraisal Periods

In *AERC Saw Mill Village, Inc. v. Franklin County Bd. of Revision* (Sept. 1, 2009), BTA Case Nos. 2007-A-764, 2008-A-157, the BTA held that a complaint that was filed for a tax year in one reappraisal period, but was not decided until a tax year in the next reappraisal period, continued in effect pursuant to R.C. 5715.19(D), notwithstanding the intervening reappraisal year. However, because the owner had filed a new complaint for a subsequent tax year in the new three-year period, the BTA's decision was not carried forward to that year and the BTA had to make an independent determination of value for tax year.

What Constitutes an Arm's-Length Sale

In *Bd. of Education of the Columbus City Schools v. Franklin County Bd. of Revision* (October 13, 2009), BTA Case Nos. 2007-Z-501–503, the property owner bought certain apartment buildings from two sellers with whose daughter-in-law the property owner had been childhood friends. The owner paid the sellers' asking price, which was itself based on an appraisal. The properties had neither been advertised for sale, nor had they been listed with a realtor. Rather, the owner learned of the sellers' interest in selling based on conversations with her friend, the sellers' daughter-in-law. The BTA found that the owner had failed to rebut the presumption that an arm's length had occurred that gave rise to a presumption that the price that the owner paid reflected the property's true value. The BTA explained that advertising and negotiation are not necessary

elements of an arm's length sale; rather, the BTA found that the parties had acted in their own interest and concluded that the sale had been arm's length.

In *Bd. of Education of the Kettering City Schools v. Montgomery County Bd. of Revision* (March 10, 2009), BTA Case No. 2007-A-1124, the BTA similarly concluded that even though a property had not been advertised publicly, the recent transfer still bore the indicia of being arm's length, and the price therefore was presumed to constitute the property's true value.

Auction Sale Price Indicative of Value

In *Mt. Vernon City School Dist. Bd. of Education v. Knox County Bd. of Revision* (June 16, 2009), BTA Case No. 2007-H-476, the BTA reiterated its past holdings and ruled that, provided the elements of an arm's-length sale are met, the price paid to acquire property at a recent auction shall enjoy a presumption of reflecting the property's true value. In this case, the owner acquired the property at an auction that had been advertised. The owner testified that she had no special relationship with the seller and stated that the acquisition was not subject to special financing. The BTA concluded that the sale of the property was voluntary, took place on an open market, and the buyer and seller had each acted in their own self-interest.

The Party That Appeals to BTA Bears Burden of Persuasion

In *Bd. of Education of the Columbus City Schools v. Franklin County Bd. of Revision* (August 18, 2009), BTA Case No. 2007-T-82, a property owner seeking to reduce the valuation of its property presented appraisal testimony to the BOR. The BOR found the appraisal persuasive and granted a reduction in value. The Board of Education ("BOE") opposed the reduction in value, but did not present any evidence to the BOR or during the BOE's appeal to the BTA. The BTA noted that the party that appeals a BOR's decision—in this case, the BOE—bears the burden of persuasion. While the appellant may choose to rely on mere cross examination, such an approach carries substantial risk, and the BTA decided to affirm the requested reduction in value that the BOR had granted.

In *Bd. of Education of the Columbus City Schools v. Franklin County Bd. of Revision* (July 14, 2009), BTA Case No. 2007-K-210, where a BOE appealed a BOR's decision to reduce a property's value and where the BOE declined to introduce its own evidence, the BTA retained the BOR's value, even though the BTA accorded no weight to the owner's appraisal.

In *7700 Tyler Blvd. Co., LLC v. Lake County Bd. of Revision* (May 19, 2009), BTA Case No. 2006-N-1135 the owner appealed from the BOR to the BTA and presented appraisal testimony that the BTA found credible. The BOE declined to rebut the owner's credible evidence with evidence of its own; the BTA granted the owner a further reduction in its property's value.

"Owner's Opinion of Value" Rejected by BTA

In *The Toledo Trust Co. v. Erie County Bd. of Revision* (June 20, 2009), BTA Case No. 2007-A-1071, A property owner presented an "owner's opinion of value," which included certain unauthenticated figures and calculations. It was not clear who authored the owner's opinion of value, and the BTA found that the owner's opinion's conclusion lacked a sufficient foundation. Further, the BTA had no reason to conclude that the unidentified author of the owner's opinion was an expert appraiser or was otherwise qualified to render an opinion about the property's value. Finally, the BTA highlighted a number of other flaws in the methodology used to arrive at the opinion of value.

Sale that Occurred 28 Months Before Tax Lien Date Not Recent

In *Alliance BP LP v. Franklin County Bd. of Revision* (Feb. 3, 2009), BTA Case No. 2006-M-2279, the BTA concluded that where a property had been sold 28 months before the relevant tax lien date and the owner submitted the testimony of an appraiser who explained that significant changes in the market had affected the property's value since the sale 28 months before, the sale was not recent. While the BTA noted its skepticism of the appraiser's use of an estimated gross income multiplier ("EGIM"), the BTA concluded that the appraiser's use of an income approach, as well as his discussion of market changes, warranted a departure from the earlier sale price.

Real Property Tax Exemption

Public Worship Exemption

In *Church of God in Northern Ohio, Inc. v. Levin* (Nov. 18, 2009), 2009-Ohio-5939, the Supreme Court held that property that a religious denomination owns and uses primarily as administrative offices in support of public worship conducted

at other locations cannot enjoy exemption under R.C. 5709.12, which provides for exemption of property that an institution uses exclusively for charitable purposes. The Court's decision relied on its adherence to the principle that public worship does not fall within the definition of charity. Additionally, because the property owner did not use the property primarily for public worship, the property could not enjoy exemption under R.C. 5709.07(A)(2), which provides for the exemption of "houses used exclusively for public worship."

In *Mt. Olive Community Development Corp. v. Wilkins* (May 19, 2009), BTA Case No. 2006-H-1487, the BTA held that when a church-controlled community development corporation buys an old school house with the hope and expectation of eventually demolishing the school and constructing a church or community center, the property may not enjoy exemption. The property owner failed to show that the property was used primarily for public worship; moreover, the owner failed to prove that it was capable of financing the demolition (much less the multi-million-dollar improvement) of the property.

In *Trinity Fellowship Church, Inc. v. Levin* (June 23, 2009), BTA Case No. 2007-H-566, the BTA denied the majority of a church's property tax exemption application where the church failed to show that it had taken concrete steps to use the property for public worship. In the church's exemption application, it stated that it planned to improve the property with a "future dream cente," however, during the pendency of the exemption application, the church noted that it might create soccer and baseball fields, a pavilion, church facilities or an outdoor chapel to be constructed by members of the congregation. The church explained in correspondence that its shifting plans for the use of the unimproved property arose because "God began to move in our church, shifting our focus." Because the church was not using the property primarily for public worship, it was not making a sufficient present use of the property to enjoy exemption under R.C. 5709.07. Further, the church's request for exemption under the "prospective use doctrine," because the church lacked finalized blueprints, building permits or financing for any type of structure on the property.

In *True Praise and Deliverance Ministries, Inc. v. Levin* (May 12, 2009), BTA Case No. 2007-M-530, the BTA held that the Tax Commissioner improperly "split-listed" the exemption of a church's single tract of land, which it used for its church building, driveway and parking lot. The Tax Commissioner had granted exemption to the church, driveway and parking lot, but had denied exemption for the remaining unimproved portions of the tract. The BTA held that the Church used the tract for public worship, and concluded that the entirety of the parcel was necessary for the church's proper occupancy, use and enjoyment of its church building. The BTA contrasted its holding with situations in which separate tracts of land, subject to different uses, are at issue.

Charitable Exemption

In *Northeast Ohio Psychiatric Institute v. Levin* (Feb. 17, 2009), Slip Opinion No. 2009-Ohio-583, the Supreme Court of Ohio denied a non-profit corporation's property tax exemption application that related to certain property that the corporation leased to a related charitable entity that provided mental health care services. The owner was a non-profit corporation that the I.R.S. had recognized as a 501(c)(3) organization; however, the Tax Commissioner concluded that the owner failed to demonstrate, for the purposes of R.C. 5709.121, that it was a charitable institution. The Court affirmed the Tax Commissioner's finding, observing that the owner's activities included leasing property and providing staffing services that generated substantial revenue.

The Court also noted that the owner had failed to argue in its notices of appeal to the BTA and the Court that its federal certification as a 501(c)(3) organization should have resulted in a legally conclusive presumption that it was a charitable institution under R.C. 5709.121. Thus, the Court was barred from considering the owner's argument that its certification as a 501(c)(3) organization compelled the Tax Commissioner to conclude that it was also a charitable institution.

In *The Dialysis Clinic, Inc. v. Wilkins* (Nov. 24, 2009), BTA Case No. 2006-V-2389, a non-profit corporation that owns several dialysis clinics filed an exemption application seeking exemption for one of its clinics. The clinic charged patients for dialysis services, and entered into contracts with the government (through Medicare and Medicaid) and private insurers to assess charges for the provision of these services. It donated a portion of the proceeds it derived from these charges to dialysis research. The BTA held that the owner was not a charitable institution for the purposes of achieving exemption under R.C. 5709.121, and further held that the owner did not use the property exclusively for charitable purposes under R.C. 5709.12.

In *Consortium for Economic & Community Development, Inc. v. Levin* (June 16, 2009), BTA Case No. 2007-H-1217, a property owner appealed the denial of its claimed charitable

exemption. In the notice of appeal to the BTA, it claimed that its property should enjoy exemption because the Internal Revenue Service had determined that it enjoyed federal income tax exemption under section 501(c)(3) of the Internal Revenue Code. The BTA dismissed the appeal, finding that, even if the corporation was a non-profit corporation, that fact alone did not entitle it to property tax exemption and the notice of appeal failed to specify what error in the Tax Commissioner's final determination.

In *NBC-USA Housing, Inc.-Thirteen dba New Salem Manor v. Wilkins* (July 14, 2009), BTA Case No. 2007-A-110, and *NBC-USA Housing, Inc.-Five dba Love Zion Manor v. Wilkins* (April 21, 2009), BTA Case No. 2006-N-1492, the BTA held that property owned by a non-profit corporation that is used to provide private residential housing, even where the corporation may subsidize the residents' rent, fails to qualify for property tax exemption. The BTA followed prior rulings of the Supreme Court of Ohio and concluded that "property used for private residential housing, including properties where low-income individuals are not fully responsible for their rent, is not entitled to exemption under R.C. 5709.12."

In *German Village Society, Inc. v. Levin* (Aug. 18, 2009), BTA Case No. 2006-V-1356, the BTA determined that a meeting house owned by a non-profit corporation that the corporation makes available to some 40 community groups should enjoy property tax exemption. Although the owner charged 3 groups, including a church, a business group, and a yoga instructor, fees to defray the costs of janitorial services, and although the owner operated a gift shop that sold items related to the historical nature of the neighborhood in which the property was located, the BTA found that the owner used the property primarily for charitable purposes, without a view to profit.

Public Education Exemption

In *Anderson/Maltbie Partnership v. Wilkins* (Aug. 18, 2009), BTA Case No. 2007-A-11, The BTA granted the request for an exemption when a for-profit partnership leased a building to a non-profit corporation that used the property to operate a charter school under R.C. 5709.01(A)(1). The BTA emphasized that, unlike the charitable exemption statute, its enquiry in cases regarding exemption for schoolhouses focused on the actual use of the property as a schoolhouse, not the nature of the owner or the fact that the owner made money by leasing the property to the school. Even though the for-profit owner derived substantial revenue from leasing the property to the non-profit school, the BTA followed earlier court rulings in other cases and held that "'[w]here the property is used for educational purposes, the property is exempt from taxation even though it produces income for its true owner.' (Quoting *Bexley Village, Ltd. v. Limbach* [1990], 68 Ohio App. 3d 306, 311.)

Procedure

In *State ex rel. City of Lorain v. Stewart* (Aug. 14, 2008), Slip Opinion No. 2008-Ohio-4062, the Lorain Housing Director certified that certain properties were tax exempt due to their location in community reinvestment areas. The County Auditor refused to place the properties on the exempt list, believing the properties did not qualify for exemption. Following the Auditor's refusal to include the properties on the list of tax-exempt properties, Lorain and the Lorain Housing Director filed a mandamus action in the Supreme Court to compel the Auditor to place the properties that had been certified by the Lorain Housing Director as tax exempt on the list of tax-exempt property. The Court granted the writ of mandamus and found that even though an Auditor has the power to remove property from the exempt list, the Auditor does not have power to refuse to add property to the exempt list following a housing officer's certification of their exemption under R.C. 3735.67.

In *Alderwoods (Ohio) Cemetery Holdings, Inc. v. Levin* (June 2, 2009), BTA Case No. 2007-H-239, the BTA affirmed the Tax Commissioner's decision to deny the owner's request for property tax exemption for tax years 2001 and 2002 with respect to property acquired during 2002, even though the Tax Commissioner granted property tax exemption for tax years 2003 and forward. To qualify for exemption or remission of taxes for a particular tax year, the applicant must have owned the property for which the exemption is claimed as of that tax year's January 1 tax lien date. Because the property owner had not owned the property on January 1, 2002, the Tax Commissioner and the BTA held that the owner could not claim exemption for the property until the first year in which it held title to the property as of the January 1 tax lien date.

In *Cleveland Clinic Foundation v. Wilkins* (April 14, 2009), BTA Case No. 2005-V-1726 et seq., on remand to the BTA from the Supreme Court of Ohio, the BTA held that by filing a property tax exemption application, the property owner had not waived the opportunity to assert trade secret protection of certain documents that an adverse party had requested from the property owner during discovery. While R.C. 5715.27(G) provides that exemption applications, complaints and the

documents attached to them are public records, the BTA explained that the statute does not "reach untold documents sought by a party on appeal before this board." Thus, the owner was permitted to seek protection of its confidential documents.

In *Bd. of Education of Dublin City Schools v. Franklin Cty. Bd. of Revision*, BTA No. 2007-M-207, 2009 Ohio Tax LEXIS 1590, (Oct. 13, 2009) the BTA ruled that where a party failed to disclose the name of its expert witness or to provide opposing parties with a copy of the expert's appraisal report—even though the information had been sought during discovery—until 14 days prior to the BTA hearing, the appropriate corrective action is to offer to continue the hearing rather than to exclude the evidence that was not timely presented.

In *Schwartz v. Levin*, Ohio BTA No. 2009-A-428 and 429, 2009 Ohio Tax LEXIS 753 (June 2, 2009), the BTA dismissed the taxpayer's appeal because the taxpayer attempted to appeal a preliminary determination rather than a final order of the Tax Commissioner.

In *Erieview Metal Treating Co. v. Levin* (April 14, 2009), BTA Case No. 2008-Z-118, the BTA found that a lessee that leased property and then filed an exemption application relating to the property failed to invoke the Tax Commissioner's jurisdiction to consider the exemption application. R.C. 5715.27(A) provides that a lessee for an initial term of not less than 30 years may file a property tax exemption application for the property that it leases. In its exemption application, the lessee merely indicated that it leased the property from another entity with which it shared common ownership. The record lacked evidence showing that the initial term of the lease was at least 30 years.

In *City of North Royalton v. Levin* (June 2, 2009), BTA Case No. 2009-M-195, when a city applied for property tax exemption for certain property that it owned, the County Treasurer's certificate showed that unpaid taxes remained outstanding on the property. The Tax Commissioner sent notice of the outstanding taxes to the city, but the city failed to provide a corrected Treasurer's certificate within 60 days of the Tax Commissioner's mailing of notice of the deficiency. Pursuant to R.C. 5713.08, which provides that the Tax Commissioner may not consider an exemption application in the absence of a correct Treasurer's certificate showing that no unpaid taxes remain on the property, the Tax Commissioner dismissed the city's exemption application. The Board of Tax Appeals affirmed the Tax Commissioner's decision.

Sales & Use

In *Information Release ST 2009-01*, "Sales and Use Tax: Vendor Compensation—Issued July 2009," the Department announced that vendors of tangible personal property that converted to destination sourcing under prior Ohio law and received compensation for making the change may be eligible for compensation for converting back to origin sourcing. In order to be eligible for this one-time compensation, the vendor must have received temporary compensation for the original switch from origin-based sourcing to destination-based sourcing under R.C. 5739.123. The amount of the compensation is equal to the actual total costs incurred by the vendor in converting back to the origin-based sourcing requirements of Am. Sub. H.B. 429.

In *Information Release ST 2009-02,* "Sales and Use Tax: Car Allowance Rebate System (CARS)—Issued July 2009," the Department explained that the CARS credit is subject to the Ohio sales and use tax. Specifically, the Department concluded that the credit for the new vehicle purchase or lease was part of the sale price for purposes of computing the Ohio sales and use tax, rather than a "trade-in" deduction. The credit is consideration received from a third party (the federal government) and falls under the definition of "price" for sales tax purposes in R.C. 5739.01(H)(1)(b).

In *Information Release ST 2009-03*, "Sales and Use Tax: Sourcing—Issued December 2009," the Department explained the new sales tax sourcing rules enacted in H.B. 429, as part of the state's continued participation in the streamlined sales and use tax Agreement. The act amended R.C. 5739.033(B) to allow Ohio to retain origin sourcing for most sales of tangible personal property made by Ohio vendors to Ohio consumers. Other sales will be sourced to the location where the customer receives the property or service that was sold under R.C. 5739.033(C). The Department reiterated that the purpose of sourcing is to determine the location of the sales for sales tax purposes, rather than determination of the taxability of a sale.

In *Information Release ST 2007*-04, "Sales and Use Tax: Sales of Motor Vehicles to Nonresidents of Ohio, Issued August 2007; Revised March 2009," the Department explained the application of sales tax to nonresident purchasers of motor vehicles that are immediately removed from the state. The information release provides examples for each of the surrounding states that explain the application of the provision.

In *The Home Depot USA, Inc. v. Levin*, 121 Ohio St. 3d 403, 2009-Ohio-1432, the Supreme Court affirmed the BTA decision that denied to the taxpayer the benefit of a bad debt deduction for sales tax purposes. The taxpayer made sales that were transacted by means of private label credit cards. Part of the monthly fee paid by the taxpayer to the credit card company included a bad debt component. However, the Court denied the deduction because R.C. 5739.121 provides that the debt must be charged off an uncollectible on the books of the vendor. Since the debt was not charged off on the taxpayer's books, but rather on the books of the credit card company, the statutory provisions were not satisfied and the deduction was not permitted.

In *Marc Glassman, Inc. v. Levin*, 119 Ohio St. 3d 254, 2008-Ohio-3819 (2008), the Supreme Court ruled that transactions in which a pharmacy transmitted and received information regarding insurance coverage for customers were not electronic information services that were subject to sales tax. The taxpayer did not have access to information in a database, nor did it receive access to the computers of the service provider; instead, it merely received an answer to a request.

In *DirecTV, Inc. v. Levin*, Franklin App. No. 08AP-32, 2009-Ohio-636, 2009 Ohio App. LEXIS 532 (Feb. 12, 2009), appeal docketed Sup. Ct. No. 09-0647 (April 6, 2009), the Court of Appeals reversed the summary judgment of the trial court and held that the imposition of Ohio's sales tax on satellite television providers, but not on cable providers, did not violate the Commerce Clause of the United States Constitution. It noted that a difference in tax treatment did not violate the Commerce Clause when the differential treatment resulted from differences between the nature of the businesses, and not merely from the location of their activities. The Court of Appeals found substantial differences in the manner in which the two business models operated, and in the technology used, to provide television service. Therefore, it concluded the differing tax treatment was valid.

In *A.K.J., Inc. v. Wilkins*, Ohio BTA No. 2006-K-929, 2009 Ohio Tax LEXIS 1928 (December 29, 2009), the BTA held that it lacked jurisdiction to hear the taxpayer's claim that the Tax Commissioner's use tax assessment was erroneous under the "transportation for hire" exemption in R.C. 5739.02. Taxpayer failed to satisfy the notice requirements under R.C. 5739.13.

In *333 Elyria, Inc. v. Levin*, Ohio BTA No. 2007-B-1164, 2009 Ohio Tax LEXIS 582 (April 28, 2009), the BTA affirmed a decision of the Tax Commissioner that refused to abate the penalty on a sales tax case. The matter of the reduction of the penalty is a matter of discretion for the Tax Commissioner, which may only be reversed upon the showing of an abuse of discretion. In this case, the taxpayer failed to demonstrate the Tax Commissioner's action "palpably and grossly" defies fact and logic such that it demonstrates a perversity of will.

In *J.Z.E. Electric, Inc. v. Wilkins*, Ohio BTA No. 2006-A-2218, 2009 Ohio Tax LEXIS 800 (May 19, 2009), the BTA ruled that certain services by which labor was provided to the taxpayer were taxable employment services. While the arrangements were made pursuant to contracts of at least one year's duration, and were indefinite in nature, neither the employees involved, nor the services to be provided, were identified. Moreover, the taxpayer acknowledged that some employees were provided on a temporary basis, and the agreement made no distinction between those employees and those provided on a "permanent" basis.

In *International Business Machines Corporation v. Levin*, Ohio BTA Nos. 2007-Z-1140, 1141 and 1143, 2009 Ohio Tax LEXIS 867 (June 23, 2009), the BTA ruled that interest did not have to be paid to vendors of electronic information services under R.C. 5739.071 because that statute made no reference to interest. References to the general sales and use tax refund statutes merely incorporated the procedural aspects of those sections in claiming the refund and did not include references to interest on refund claims.

In G*lobal Knowledge Training, LLC, v. Levin*, Ohio BTA No. 2006-V-471, 2009 Ohio Tax LEXIS 1099 (July 28, 2009), the BTA ruled that computer training courses provided to individuals were computer services subject to sales tax. Generally, the courses were of such a nature to be useful only to programmers and others entering the technology field. Thus, the programs constituted training for those who used computers or computer equipment. The BTA also rejected the taxpayer's claim that only training services provided in conjunction with the sale or lease of computer equipment was taxable, noting the statute also referred to services provided in conjunction with the operation of equipment. However, the BTA did conclude that two courses related to the use of application software were not taxable under Ohio Adm. Code 5703-9-46(6).

In *Dorsz v. Wilkins*, Ohio BTA No. 2007-K-68, 2009 Ohio Tax LEXIS 1215 (August 18, 2009), the BTA affirmed a sales tax assessment against a taxpayer operating a drive-thru beverage store. Taxpayer objected to the "markup methodology" used during the sales tax audit. As the taxpayer failed to keep accurate and complete records of sales, the sales tax audit agent was required to gather information from other sources and estimate the amount of taxes which should have been collected and remitted.

Commercial Activity Tax

In *Information Release CAT 2009-01*, "Commercial Activity Tax: Change in Due Dates for the Annual Minimum Tax, Annual Returns, Quarterly Returns and Deadline for Cancellation of Accounts—Issued September 2009," the Department explained that pursuant to changes enacted in Am. Sub. H.B. 1, the budget bill, the annual $150 tax payment was now due May 10, instead of at the time of the fourth quarter return and payment for the prior year (February 9). In addition, it explained that returns and payments were now due on the 10th day of the second month after the end of each calendar quarter; previously, returns had been due 40 days after the end of each quarter.

In *Information Release CAT 2008-01*, "Commercial Activity Tax: Voluntary Disclosure Agreements—Issued July 2008; Revised May 2009," the Department announced a new voluntary disclosure program for the CAT. Taxpayers who have not previously been contacted by the Department may enter into an agreement pursuant to which they agree to register for the tax, file returns and pay tax and interest. While the returns are subject to audit, the Department will waive all penalties and will not go back for periods prior to the term of the agreement for past liability.

In *Ohio Grocers' Assn. v. Wilkins*, 123 Ohio St. 3d 303; 2009-Ohio-4872, the Supreme Court upheld the commercial activity tax (CAT) against a challenge that it was an unconstitutional tax on the sale of food in so far as receipts from the sale of food for consumption off the premises where sold were included in the tax base. While Ohio Const. art. XII, §§ 3(C) and 13 prohibited a sales tax on food, they did not prohibit the state from using gross receipts to compute the amount of a privilege-of-doing-business tax, even if those gross receipts included proceeds from the sale of food. A franchise tax could be measured by tax-exempt income or property and still be a valid tax on the franchise and not on the property. The CAT was what it purported to be: a permissible tax on the privilege of doing business, not a proscribed tax upon the sale or purchase of food.

In *Overstock.com, Inc. v. Levin*, Case No. 08CVH-11-16412, (Sept. 4, 2009), appeal docketed Franklin App. No. 09AP-____, the plaintiff has challenged the "bright line presence" standard for nexus that applies to companies located outside Ohio. Under the CAT, a taxpayer has "bright line presence" in Ohio if it has over $50,000 in property or payroll in the state, if it has over $500,000 in sales receipts from sales in Ohio, or if it has more than 25% of its property, payroll and sales in Ohio. Overstock has alleged that it has no property or employees in Ohio, and that the only basis on which the state has sought to impose the CAT on it is that receipts from its sales to Ohio customers exceed $500,000. According to Overstock, not only does this violate the Commerce Clause of the United States Constitution on the basis that a physical presence is not required, but it also violates the due process clause because it is impermissibly vague in that a seller cannot possibly know whether a customer uses or receives the property in Ohio. Plaintiffs seek to have the tax declared unconstitutional and to have the department of taxation enjoined from enforcing the tax against it.

Excise and Motor Fuel

In *Information Release XT 2009-02*, "Severance Tax Increase on Coal for Certain Permit Holders—December 2009," the Department announced a severance tax increase on coal for permit holders that have not posted a full-cost bond for the acreage on which the mining operation is being conducted. R.C. 5749.02(A)(8) charges the chief of the Division of Mineral Resources Management to monitor the Reclamation Forfeiture Fund for the extraction of coal and provides for adjustments to the tax rate based on the ending balance of the fund.

In *Ceccarelli v. Levin*, BTA No. 2007-V-391, 2009 Ohio Tax LEXIS 1677 (November 10, 2009), the BTA affirmed an assessment for motor fuel tax against a corporate officer. The officer failed to contest whether he was within the class of individuals subject to assessment under R.C. 5735.12 and the BTA rejected the argument that the assessment against the officer was subject to the four-year statute of limitations that governed assessments against motor fuel dealers as taxpayers.

Miscellaneous

In *Information Release G2009-01*, "Ohio Business Gateway Enhancements and Disclosure Reminder—Issued March 2009," the Department advised taxpayers and their representatives of the upcoming enhancements to the Ohio Business Gateway and to remind such persons of the strict disclosure guidelines that employees of the Department must follow before providing information to individuals in order to protect confidential taxpayer information.

In *Commerce Energy, Inc. v. Levin*, 554 F.3d 1094 (6th Cir. 2009), the Sixth Circuit reversed the district court's decision to dismiss for lack of subject matter jurisdiction. Plaintiff retail natural gas suppliers alleged that Ohio's tax scheme was discriminatory and thus unconstitutional under either the Commerce Clause or Equal Protection. The district court cited general principles of comity and federalism as bases for dismissal of the matter, but the Sixth Circuit held that an application of broad principles to narrow issues was incorrect. The Sixth Circuit remanded for further proceedings.

In *Benesch, Friedlander, Coplan & Aranoff, LLP v. Ohio Dept. of Job and Family Servs*., BTA No. 2007-V-479, 2009 Ohio Tax LEXIS 1395 (September 15, 2009), the BTA ruled that an employer who applied for and was awarded an Ohio Training Tax Credit, but who had failed to submit the fourth part of an application listing the final amounts claimed, was entitled to notice of the deficiency and 30 days in which to remedy the problem. These provisions were contained in R.C. 5733.42(D) and O.A.C. 5101:10-1-02. Since the ODJFS failed to provide notice of the deficiency, it was without authority to rescind the credit.

In *Liberty Waste Transportation, LLC v. Levin*, Ohio BTA No. 2007-B-236, 2009 Ohio Tax LEXIS 1495 (September 22, 2009), the BTA affirmed the Tax Commissioner's finding that a waste transportation company did not qualify for an exempt pollution control facility certificate under R.C. 5709.21(B). The facility transported mostly non-industrial waste and, thus, did not meet the requirement that the facility transport industrial waste. The BTA also affirmed the Tax Commissioner's finding that the waste containers were not specifically designed, constructed or installed to collect or conduct industrial waste. Further, the facility was not property installed pursuant to approval of the EPA. Thus, the BTA found that the Tax Commissioner properly denied the exemption application for water pollution control facility.