



Common Sense Initiative

Mike DeWine, Governor
Jon Husted, Lt. Governor

Carrie Kuruc, Director

MEMORANDUM

TO: Kerrie Ryan, Ohio Department of Taxation

FROM: Ethan Wittkorn, Regulatory Policy Advocate

DATE: October 27, 2020

RE: CSI Review – Commercial Activity Tax (CAT) Five-Year Rule Review (OAC 5703-29-02 and 5703-29-19)

On behalf of Lt. Governor Jon Husted, and pursuant to the authority granted to the Common Sense Initiative (CSI) Office under Ohio Revised Code (ORC) section 107.54, the CSI Office has reviewed the abovementioned administrative rule package and associated Business Impact Analysis (BIA). This memo represents the CSI Office's comments to the Agency as provided for in ORC 107.54.

Analysis

This Ohio Department of Taxation (Department) rule package consists of two amended rules submitted as part of the statutory five-year rule review requirement. It was submitted to the CSI Office on June 1, 2020, and the public comment period was open through June 22, 2020. Unless otherwise noted below, this recommendation reflects the version of the proposed rules filed with the CSI Office on June 1, 2020.

The proposed rules in this package establish how common ownership for Commercial Activity Tax (CAT) purposes is determined, requirements of common owners and joint ventures, and ownership changes. Proposed amendments to the rules include clarifying language, standards used by the tax commissioner when evaluating if a taxpayer is eligible for a retroactive consolidated election, allowing taxpayers to notify the commissioner of ownership changes through the Ohio Business Gateway, and removing outdated references.

During the period of early stakeholder outreach, the Department sent out a notification to stakeholders via email through the Tax Alert notification system and posted the rules on its website.

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The Department received two comments during the early stakeholder outreach period. One comment suggested that the Department seek legislative changes to the CAT, to which the Department responded that rules can be amended due to legislative changes in the future but current rules must administer current law, and that the amendments are intended to provide clarity. The Department states that the rule has successfully served to provide guidance on the composition of group taxpayers and reporting gross receipts of their members since 2006. The Department also disagrees with the commenter on the interpretation of statute and believes that a drastic change to the statute would lead to confusion on the impact and administration of the CAT for existing taxpayer groups.

The second comment on OAC 5703-29-02 expressed concern that the initial changes to the rule overturned the Board of Tax Appeals (BTA) 2019 decision in case No. 2016-1076. However, the Department states that the BTA decision was partially based on the fact that the rule for consolidated elections did not contain a standard or requirement for granting such elections. The Department's proposed amendments intend to create such a standard for granting a retroactive consolidated election consistent with Department policy and the BTA's decision that taxpayers should be able to fix mistakes in registration. As a result of the concerns raised during the period of early stakeholder outreach, the Department made changes to the initial version of the proposed rule that allow for a registration mistake to be corrected when taxpayers are under an audit, compliance, or a criminal investigation program. Changes to the rule also expand availability of the retroactive election for taxpayers that come forward under a voluntary disclosure agreement.

Two comments were received in response to the CSI public comment period. One commenter suggested that the rules should include a tax amnesty program, which the Department is unable to do because tax amnesty programs are established by the legislature. A second commenter, Zaino Hall & Farrin LLC (ZHF), shared their concerns regarding potential registration errors for groups of companies filing the CAT that could lead to a higher tax rate, as well as concerns with the consolidated elected taxpayer (CET) retroactive election. The CET retroactive election concerns were addressed during early stakeholder outreach based on comments submitted by other parties, and the Department believes that the other hypothetical errors that ZHF raised would not amount to a simple registration error. No further updates were made to the proposed rules as a result of these comments.

Impacted communities include anyone subject to the CAT. Potential adverse impacts of the rule include time and costs necessary to report required information, such as taxable gross receipts for group members during times that they met common ownership requirements to qualify as a group member, and notification to the commissioner when a group acquires a new member or changes its structure. The Department states that the rules are necessary to provide guidance on applications of certain CAT requirements, and to provide clarity to avoid confusion, uncertainty, and increased

appeals or litigation.

Recommendations

Based on the information above, the CSI Office has no recommendations on this rule package.

Conclusion

The CSI Office concludes that the Department should proceed in filing the proposed rules with the Joint Committee on Agency Rule Review.