IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

OHIO GROCERS ASSOCIATION, ET AL,	:	
Plaintiffs,	:	Case No. 06CVH02-2278
vs.	:	JUDGE BESSEY
WILLIAM WILKINS, IN HIS OFFICIAL CAPACITY AS OHIO TAX COMMISSIONER,	:	
Defendant.	:	

DECISION DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED SEPTEMBER 15, 2006 AND DECISION GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, FILED DECEMBER 15, 2006

These matters are before the Court upon the Motion for Summary Judgment, filed by Plaintiffs, Ohio Grocers Association, Carfagna's Incorporated, dba Carfagna's Specialty Foods, CFZ Supermarkets, Inc., dba Union Square Sparkle, Reading Food Services Inc., dba Reading IGA, and The Sanson Company (hereinafter "Plaintiffs"), on September 15, 2006. On December 15, 2006, Defendant, William Wilkins, in his official capacity as Ohio Tax Commissioner (hereinafter "Defendant"), filed a Memorandum Contra Plaintiff's Motion for Summary Judgment, as well as a Cross-Motion for Summary Judgment. On January 5, 2007, Plaintiffs filed their Combined Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment and Memorandum in Opposition to Defendant's Motion for Summary Judgment. On January 31, 2007, Defendant filed its Reply Memorandum to Plaintiffs' Memorandum Opposing Defendant's Motion for Summary Judgment.

I. Background

This case concerns whether the Commercial Activity Tax (hereinafter "CAT") is constitutionally valid. Plaintiffs contend that this Court should declare as a matter of law that the provisions of the CAT, that impose a percent tax on annual gross receipts greater than $1 million violates the Ohio Constitution when applied to gross receipts derived from the wholesale sale of food and from the retail sale of food for human consumption off the premises where sold. However, Defendant contends that because neither Section 3(C), Article XII of the Constitution, nor Section 13, Article XII of the Constitution, expressly or by implication prohibit the imposition of a tax on the privilege of doing business in Ohio, the Court should hold that the CAT is constitutionally valid.

Section 3, Article XII of the Constitution, as reenacted, states in pertinent part, as follows:

> Laws may be passed providing for:
> * * *
> (C) Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

In addition, Section 13, Article XII of the Constitution, states in pertinent part as follows:

> No sales or other excise taxes shall be levied or collected (1) upon any wholesale sale or wholesale purchase of food for human consumption, its ingredients or its packaging; (2) upon any sale or purchase of such items sold to or purchased by a manufacturer, processor, packager, distributor or reseller of food for human consumption, or its ingredients, for use in its trade or business; or (3) in any retail transaction, on any packaging that contains food for human consumption on or off the premises where sold.

The CAT imposes a tax on each person with annual "taxable gross receipts" in excess of $150,000. R.C. 5751.02, R.C. 5751.03, R.C. 5751.333 and R.C. 5751.01(E)(1). "Taxable gross receipts" are defined as "gross receipts" sitused in Ohio, which includes gross receipts from sales of tangible personal property (e.g. goods) received in this state by a purchaser. R.C. 5751.01(G) and R.C. 5751.033(E). "Gross receipts" means "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contribute to the production of income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration." R.C. 5751.01(F). The CAT is imposed at a flat rate of $150 for the first $1 million of annual "taxable gross receipts" plus, when fully phased in, at the rate of two and sixth mills (0.26 percent) per dollar of taxable gross receipts above $1 million. In short, the CAT imposes a gross receipts tax on annual gross receipts greater than $1 million on a percent basis. As Plaintiffs contend, it is this aspect of the CAT, when applied to receipts from the sale of food, which is at issue in this case.

II. Standard of Review

When deciding the parties' Motions for Summary Judgment, the Court must first examine the standard under which summary judgments are properly granted.

A motion for summary judgment is properly granted in favor of the moving party, if the court, upon viewing the evidence in a light most favorable to the party against whom the motion is made, determines that: 1) there are no genuine issues as to any material fact; 2) the movant is entitled to a judgment as a matter of law; and, 3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party. See Civ.R. 56(C); *State ex. rel. Howard v.*

Ferreri (1994), 70 Ohio St.3d 587, 589; *Miller v. Bike Athletic Co.* (1998), 80 Ohio St.3d 607, 617.

A party seeking summary judgment, on the grounds that the nonmoving party cannot prove its case, bears the initial burden of: 1) informing the trial court of the basis for the motion; and, 2) identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims. See *Vahila v. Hall* (1997), 77 Ohio St.3d 421, 429, citing, *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293, 662 N.E.2d 264; *Mitseff v. Wheeler* (1988), 38 Ohio St.3d 112, 115. "The moving party cannot discharge its initial burden under Civ.R. 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case. Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ.R. 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims." *Dresher*, at 288-289. If the moving party fails to satisfy this initial burden, the motion for summary judgment must be denied. See *Kulch v. Structural Fibers, Inc.* (1997), 78 Ohio St.3d 134, 147; *Dresher*.

If the moving party satisfies its initial burden, "the nonmoving party then has a reciprocal burden outlined in Civ.R. 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party." *Dresher*, at 288-289; followed by *Conway v. Calbert* (C.A.10 1997), 119 Ohio App.3d 288, 291, 695 N.E.2d 271, 272-273. Thus, "[a] motion for summary judgment forces the non-moving party to produce evidence on issues for which that party bears the burden of production at trial."

Wade-Hairston v. Franklin Cty. Bd. of Mental Retardation and Developmental Disabilities (Dec. 17, 1998), Franklin App. No. 98AP-456, unreported, citing, W*ing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St.3d 108, 111; see, also, *Dresher*, at 288-289; *Carter v. Consol. Rail Corp.* (C.A.10 1998), 126 Ohio App.3d 177, 181, citing, *Stewart v. B.F. Goodrich Co.* (1993), 89 Ohio App.3d 35, 623 N.E.2d 591; *Cullen v. Ohio Dept. of Rehab. & Corr.* (C.A.10 1998), 125 Ohio App.3d 758, 764, citing, *Stewart*. "The non-movant must also present specific facts and may not merely rely upon the pleadings or on unsupported allegations." *Wade-Hairston*, citing, *Shaw v. J. Pollock & Co.* (1992), 82 Ohio App.3d 656, 612 N.E.2d 1295. Moreover, "[w]hen a party moves for summary judgment supported by evidentiary material of a type and character set forth in Civ.R. 56[(C)], the opposing party has a duty to submit materials permitted by Civ.R. 56(C) to show that there is a genuine issue for trial." *Wade-Hairston*, citing, *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 375 N.E.2d 46.

III. Discussion

A. Is the CAT an excise tax or franchise tax?

Plaintiffs argue that the CAT is an excise tax. "An excise is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege." *Saviers v. Smith* (1920), 101 Ohio St. 132, syllabus at ¶4. Ohio Revised Code 5751.02(A) specifically states that "there is hereby levied a commercial activity tax on each person with taxable gross receipts *for the privilege of doing business in this state*." [Emphasis provided]. As such, Plaintiffs contend that by its own terms, the CAT purports to be a tax on a privilege, and therefore must be an excise tax. The Court agrees.

In contrast, Defendant contends that because the CAT is imposed on the privilege of conducting business in the State of Ohio, it is a franchise tax, *not* an excise tax. However, the Court finds that Ohio Supreme Court has repeatedly recognized that a franchise tax is a form of an excise tax. As Plaintiffs argue, the Ohio Supreme Court has long held that "[a]n excise tax is a tax assessed for some special privilege or immunity granted to some artificial or natural person, based upon the grant of such privilege or immunity. In the case of a corporation it is sometimes spoken of as a franchise tax." *Cincinnati, Milford & Loveland Traction Co. v. State* (1916), 94 Ohio St. 24, 27. See also, *Litton Industrial Products, Inc. v. Limbach* (1991), 58 Ohio St. 3d 169, 170 ("The franchise tax, an excise tax, taxes corporations for the privilege of doing business in Ohio in corporate form."); *Hoover Universal, Inc. v. Limbach* (1991), 61 Ohio St. 3d 563, 568 ("The franchise tax, an excise tax, can be measured on net income received in a taxable year."); *Keycorp v. Tracy* (1999), 87 Ohio St. 3d 238, 240 ("Franchise tax is an excise tax paid by domestic and foreign for profit corporations for the privilege of doing business within the state."); *Wesnovtek Corp. v. Wilkins*, 105 Ohio St. 3d 312, 313, 2005-Ohio-1826, ¶ 2 ("The Ohio franchise tax is an excise tax levied upon corporations for the privilege of doing business in the state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance authorizing it to do business in this state.")

Therefore, based on the foregoing, the Court finds that the CAT is a franchise tax, which is a type of excise tax, which is imposed on the privilege of doing businesses in Ohio. However, even though the Court finds that the CAT is both a franchise tax and an excise tax, the Court further finds that the constitutional exceptions asserted by Plaintiffs

are not applicable. More specifically, the Court finds as stated above, that the CAT is an excise tax on the privilege of doing business in the state of Ohio, and is *not* an excise tax that is "levied or collected upon the sale or purchase of food." Although the CAT is measured by the taxpayer's taxable gross receipts, the Court finds that this does not convert the CAT into a transactional tax on the privilege of purchasing or selling food. As Defendant argues, in *Mutual Holding Co. v. Limbach* (1994), 71 Ohio St. 3d 59, the Court defined a franchise tax, and held that the method of measuring the amount of the tax does not establish the nature of the tax. The Court specifically stated:

> A franchise tax, such as that imposed by R.C. 5725.18, is a tax on the privilege of doing business in Ohio. (Emphasis supplied) It is not a tax on the property of the paying entity. *Bank One, Dayton, N.A. f. Limbach* (1990), 50 Ohio St.3d 163, 553 N.E.2d 624; *Celina, supra*. For the privilege of operating a domestic insurance company, Ohio imposes a tax that may be measured either in terms of net worth or premium value. R.C. 5725.18. Measuring tax liability in terms of net worth does not convert a franchise tax into a property tax. Emphasis supplied)See *Internatl. Harvester Co. v. Evatt* (1945), 146 Ohio St. 58, 31 O.O. 546, 64 N.E.2d 53. R.C. 5725.18 is a franchise tax measured by net worth, not a tax on net worth. [Emphasis provided.]

Mutual Holding Co., 71 Ohio St. 3d at 60.

Moreover, and again as Defendant argues, the Ohio Supreme Court has determined that an excise imposed on the privilege of doing business is *not* a tax imposed on an underlying component of such business. In *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, the Ohio Supreme Court specifically held:

> [T]his court has previously discussed the nature and operation of the Ohio corporate franchise tax, stating as follows:
>
> "Similarly, the annual franchise tax levied on corporations is also a tax on the privilege of doing business in this state. R.C. 5733.01(A); *Woodland Gardens Apartments v. Porterfield*

> (1968), 16 Ohio St.2d 56. Both the excise tax on public utilities and the franchise tax on corporations are levied on the exercise of a privilege and not on income, sales or receipts. Further, both taxes are based upon the results of an entire year of doing business and tax liability is not fixed until the end of that annual period * * *." *East Ohio Gas Co. v. Limbach* (1986), 26 Ohio St.3d 63, 67, 26 OBR 54, 57, 498 N.E.2d 453, 456.

Bank One Dayton, N.A., 50 Ohio St.3d at 167.

In addition, the Court in *Bank One Dayton, N.A.*, went on to approvingly cite to the United States Supreme Court decision in *Werner Machine Co. v. Dir. Of Div. of Taxation* (1956), 350 U.S. 492, when it stated:

> In *Werner Machine Co. v. Dir. Of Div. of Taxation* (1956), 350 U.S. 492, the Supreme Court approved a tax scheme which included the value of federal bonds in a corporation's net worth to determine New Jersey's franchise tax. Therein, the high court accepted the state supreme court's conclusion that the tax was not imposed directly on property, but was indeed a bona fide franchise tax. Furthermore, the United States Supreme Court stated that it had "* * * consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property. * * *" (Emphasis supplied) *Id.* at 494.

Bank One Dayton, N.A., 50 Ohio St.3d at 167.

Similarly, in the case at hand, the Court finds that although the CAT is measured by a yardstick which includes taxable gross receipts from the sale or purchase of food for human consumption, and the CAT may be said to indirectly bear an economic impact on the retail and wholesale sale of food for human consumption, this does not cause the CAT to violate the Constitution. Stated another way, the Court finds that although the CAT is measured by a taxpayer's taxable gross receipts for the calendar quarter or year, which may include receipts from purchases or sales of food for human consumption, it is not a transactional tax on the purchase or sale of tangible personal property, including food for

human consumption, and therefore does not violate the above cited sections of the Constitution.

B. Is the CAT any different from a traditional sales tax?

Plaintiffs contend that expert testimony establishes that under well-established economic analysis, the CAT is no different from, and will have the same economic effect as a traditional sales tax. More specifically, Plaintiffs contend that the economic incidence for the CAT, which refers to the analysis of who actually bears the burden of the tax, regardless of who is legally responsible for paying the tax, is no different from a traditional sales tax simply because it is collected from the seller and the latter is collected from the consumer. As such, Plaintiffs contend that by operation and effect, the CAT is no different from a sales tax, and when applied to the gross receipts received from the sales of food violates the Constitution.

However, the Court finds, as Defendant argues, that the authority to impose a tax is not limited by the possibility that the cost of the tax may be shifted to others, particularly customers. In *Columbus & Southern Ohio Electric Co. v. Porterfield* (1974), 41 Ohio App. 2d 191, the Tenth District Court of Appeals discussed the issue of the "incidence" of a public utility tax, and stated:

> Clearly, the Ohio sales tax is a tax on a consumer of goods. * * * Interestingly, the amount of sales tax is clearly identified in any transaction because the invoice covering a sale of goods shows a cost of those goods to the consumer to which is added, separately noted, and calculated a sales tax at the basic rate of 4%. It is a tax which the consumer pays; there is the "incidence."
>
> An examination of the stipulations in this case reveals no recital as to a method of billing. It must be assumed that the invoice sent to the City by the Company shows an amount of energy consumed multiplied by a rate, arrived at by contract, or established with approval of the Public Utilities Commission of

> Ohio, or both. There is no distinguishable tax imposed upon, or added to that amount. The excise tax device provides as a base upon which the tax is calculated "the gross receipts of such company on its intrastate business." (R.C. 5727.38) In contrast to the sales tax, the tax does not relate to any single consumer of electrical energy. It is an excise tax upon a particular corporation for the privilege of carrying on that business.
>
> * * * The facts as stipulated, as well as the operational requirement of the excise tax here imposed, require the conclusion that the "incidence" of the tax rests upon the Company and the City does not "pay" the tax.

Columbus & Southern Ohio Electric Co., 41 Ohio App. 2d at 198.

Similarly, in the case at hand, the Court finds that in contrast to the sales tax, the CAT is calculated on the gross receipts of the business and does not relate to any single consumer or purchaser of food. The Court further finds that the CAT is imposed directly on the business for the privilege of doing business in Ohio, and therefore the "incidence" of the tax rests upon the business not the consumer. While the tax may ultimately be passed on to the consumers in the form of higher prices, it cannot be directly billed to and paid by the purchaser. As such, the Court finds that the CAT is significantly different from a sales tax. If the Court were to hold otherwise, the legislature would be unable to impose an excise tax on any aspect of a business that was in the supply chain for any food. This would further be in conflict with the decisions cited by Defendant, which hold that the indirect effect of an excise tax on the privilege of doing business in Ohio does not invalidate the tax. See, *Southern Gum v. Laylin* (1902), 66 Ohio St. 578; *Zielonka v. Carrel* (1919), 99 Ohio St. 220; and *Savier v. Smith* (1920), 101 Ohio St.132.

In addition, the Court finds that unlike a sales tax, the very terms of the CAT tie the obligation to pay the CAT to a time or date, not a specific transaction or sale. As Defendant argues, it is not possible for a business to compute the tax it owes under the

CAT until the applicable time period, either a quarter or a year, expires and the gross receipts for that time period are totaled. Furthermore, gross receipts are much broader than sales receipts, because a business' gross receipts may include other sources of revenue from the sale of services or goods other than food. As such, the Court agrees that the CAT is simply not tied to a transaction, and therefore distinctly different from a sales tax.

Therefore, based on the foregoing, the Court agrees that there are both theoretical and practical differences between a tax on sales and a gross receipts tax, which are economically significant, and which cause the CAT to be substantively different from a traditional sales tax.

IV. Conclusion

Based on the foregoing, the Court finds that the CAT is an excise tax on the privilege of doing business in the state of Ohio, and is *not* an excise tax that is "levied or collected upon the sale or purchase of food." Although the CAT is measured by the taxpayer's taxable gross receipts, which includes gross receipts derived from the wholesale sale of food and from the retail sale of food for human consumption off the premises where sold, the Court finds that the CAT is still substantively different from a transactional or sales tax, and thus is not expressly or impliedly prohibited by either Section 3(C), Article XII of the Constitution, or Section 13, Article XII of the Constitution. Therefore, the Court finds the CAT to be constitutionally valid, and accordingly hereby **DENIES** Plaintiffs' Motion for Summary Judgment, and **GRANTS** Defendant's Motion for Summary Judgment.

Counsel for Defendant shall submit the appropriate Judgment Entry pursuant to Loc.Rs. 25.01 and 25.02.

IT IS SO ORDERED.

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JOHN P. BESSEY, JUDGE

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