
Opinion of the Tax Commissioner

Date Issued: November 10, 2005

Opinion No: 05-0007

Tax: Commercial Activity

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Subject: Elected Consolidated Group

This request for an Opinion of the Tax Commissioner was received on November 1, 2005. The request concerns issues associated with the commercial activity tax (“CAT”) levied under Ohio Revised Code (R.C.) Chapter 5751. Specifically, COMPANY and its affiliates request an Opinion related to issues associated with the consolidated elected taxpayer provisions of the CAT.

With respect to the CAT, COMPANY intends to file with its qualifying affiliates as a consolidated elected taxpayer (CET) and to select the “50% or more” ownership threshold permitted under R.C. 5751.011(A)(1). Because of the size and complexity of its ownership structure, as well as the frequency with which it adds, forms, or disposes of affiliates, the possibility exists that COMPANY may omit persons that it was required to include in the CET group. This Opinion addresses these omissions.

QUESTIONS FOR WHICH OPINION IS REQUESTED

1. If a person is omitted from the CET group, may the omitted person nonetheless be included in the CET group upon the discovery of such omission? Will the omitted person pay tax as a single taxpayer?
2. If a person is omitted from the CET group, will COMPANY’s CET election be respected? In addition, will the inter-company receipts exemption provided under R.C. 5751.011(C)(1) apply with respect to the following: (a) receipts among the members that were reported as part of the CET group; (b) receipts among the CET group members and the omitted person; and (c) receipts among two or more persons that were omitted but have subsequently been added to the CET group upon discovery of the omissions?
3. If a person is omitted from the CET group election and/or return filing, and the person is subsequently included in the CET group upon its discovery, will the Tax Commissioner impose any penalty with respect to such omission?

4. If a person is omitted from the CET group election and/or return filing, and the subsequent inclusion of the person in the CET group upon the discovery of the omission results in an increased CAT liability, how shall the consolidated elected taxpayer remit the additional tax that is owed?
5. If a person is omitted from the CET group and/or return filing, and the person is subsequently included in the group upon its discovery, will the Tax Commissioner impose any interest charge with respect to such omission?

TAXPAYER'S STATEMENT OF FACTS

COMPANY is a multinational organization that operates through a large number of affiliated entities. In fact, the number of entities is constantly changing due to acquisitions, the creation of new affiliates, as well as the disposition or sale of existing affiliates. Accordingly, the opportunity exists for omissions to occur with respect to certain filings. COMPANY anticipates it will make an election under R.C. 5751.011 to file and to pay the CAT as a CET. R.C. 5751.011 generally requires a CET to include either all persons having at least 50% or all person having at least 80% of the value of their ownership interests owned or controlled by common owners, and requires the CET to include the common owners. COMPANY anticipates that it will file as a CET and make the "50% or more" election.

Consistent with the CET provisions, COMPANY intends to include all non-foreign persons that meet R.C. 5751.011's "50% or more" threshold. However, the possibility exists when (a) making the initial and any subsequent CET election, (b) filing the CAT registration statement and updates, and (c) filing the tax returns associated with the CAT, COMPANY may omit one or more persons that meet the "50% or more" threshold.

ANALYSIS

Under R.C. 5751.011, when a CET "50% or more" election is made, the group must include all persons meeting that ownership or control requirement except for foreign corporations, for which an all or none choice for inclusion is allowed. Other than that choice with regard to foreign corporations, the group composition is automatic. Any omitted persons are automatically included in the CET group by operation of R.C. 5751.011. The effective date of such inclusion is the date such person or persons met the ownership or control threshold.

The exclusion of receipts between members is also automatic by operation of R.C. 5751.011 and applies to all members of the group. The omission of a person from the group's registration and/or filing does not effect that person's status as a member of the group if the person is required by R.C. 5751.011 to be a member.

ANSWERS

1. Any person required to be a member of the CET group is automatically included in that group as of the date such person met the applicable ownership or control threshold selected by the group, in this case, the “50% or more” threshold without foreign corporations. The omitted person will not pay tax as a single taxpayer. However, its taxable gross receipts must be included in the CET’s taxable gross receipts on either an original or amended return for the applicable tax period(s).
2. The omission of a required person does not nullify the CET election. The CET group automatically consists of all persons required to be included as members for the applicable tax period, and the exclusion of receipts between members applies to all members whether or not they were omitted from the group’s registration and/or filing. The group must pay tax on a consolidated basis as if all members were a single taxpayer, and all taxable gross receipts of all members for the tax period must be reported, subject to the applicable exclusion of receipts between members.
3. The decision on whether penalty will be waived on any underpayment of tax is based on a reasonable cause standard. With regard to the omission of a required member, the question is whether such omission was inadvertent. The Tax Commissioner will take into account the complexity of COMPANY’s affiliated group and COMPANY’s compliance with paragraph 4 below in deciding whether the omission of one or more required members was inadvertent.
4. The increased CAT liability resulting from the inclusion of an omitted person shall be reported and paid as soon as practical after discovery of the omission, on an amended return for the tax period to which the omission applies or as otherwise permitted by the Commissioner pursuant to R.C. 5751.05(C).
5. The statutorily authorized interest charge applies to any underpayment or late payment of CAT resulting from the omission of a person required to be included in the CET group.

This Opinion applies to COMPANY and its CET group only. It may not be transferred or assigned.

In addition, the tax consequences stated in this Opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of COMPANY and the members of its CET group to be aware of such changes pursuant to R.C. 5703.53(E).

William W. Wilkins
Tax Commissioner