Opinion of the Tax Commissioner

Date Issued: July 31, 2006

Opinion No: 06-0005

Tax: Commercial Activity

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Subject: Common Owner

This request for an Opinion of the Tax Commissioner was received on February 10, 2006. The request concerns whether an income beneficiary may be considered the owner of the businesses of an irrevocable trust, allowing that person to be a common owner and to make an election to be part of a consolidated elected taxpayer group under R.C. 5751.011 for purposes of the commercial activity tax (CAT).

TAXPAYER STATEMENT OF FACTS

The persons involved in this request are as follows: PROPRIETOR (hereinafter "Proprietor"), a sole proprietor and lessor of real estate; SSSS an S-corporation, which is wholly owned by Proprietor; YYYY, which is wholly owned by the TRUST (hereinafter "Trust"); and ZZZZ, which is also wholly owned by Trust. Proprietor is the lifetime beneficiary of the income of Trust.

SSSS owns the property that is used in business and rented by YYYY such that all of SSSS's receipts come from YYYY. Proprietor owns the real estate that is used in business and rented by ZZZZ such that all of the receipts from her activities as lessor come from ZZZZ. In addition, Proprietor files as a sole proprietor for consulting services performed for SSSS.

Ohio Adm. Code 5703-29-02 identifies "common owners" for purposes of the CAT, and specifically identifies Internal Revenue Code (IRC) sections 677 and 678 as governing the ownership of certain revocable trusts. Proprietor is not considered the owner of Trust under either section, but instead seeks to be considered the common owner of all persons listed above, pursuant to the catch-all provision of that rule. The rule does not address an owner of an irrevocable trust.

QUESTION PRESENTED BY TAXPAYER

May Proprietor be considered the owner of YYYY and ZZZZ through Trust so that a consolidated election may be made for purposes of the CAT pursuant to paragraph (C)(2) of Ohio Adm. Code 5703-29-02?

ANALYSIS

A group of persons may elect to be a consolidated elected taxpayer group if the persons are owned and controlled by common owners. The term "common owners" is not defined in R.C. Chapter 5751. Therefore, Ohio Adm. Code 5703-29-02 was promulgated to clarify that term. In general, the rule focuses on voting rights to control the affairs of the business regardless of the type of business structure. From the facts presented pursuant to this request, Trust was originally a revocable trust governed by IRC sections 677 and 678. Trust, however, became irrevocable upon the death of the grantor. Therefore, the ownership rules for irrevocable trusts govern.

While the administrative rule does not specifically address an irrevocable trust, the trustee is the person to whom legal title to property is transferred by the settlor and who is responsible for administering the property in accordance with the terms established by the settlor. Proprietor, as a mere lifetime income beneficiary, does not own and control the trust's businesses. In this case, Trust has co-trustees, neither of which are Proprietor. Under these facts, Proprietor cannot be deemed the owner of Trust. Proprietor is thereby prevented from making an election to include Trust's businesses as part of a consolidated elected taxpayer group.

ANSWER

For purposes of the CAT, absent unique circumstances, the "common owner" of an irrevocable trust is the trustee. In this case, Proprietor is not the trustee of Trust and has not demonstrated a unique organizational structure. Therefore, Proprietor is not deemed to be the owner of Trust and Proprietor cannot make an election to consolidate with YYYY and ZZZZ.

CLOSING

This opinion applies only to Taxpayer. It may not be transferred or assigned. In addition, the tax consequences stated in this Opinion are subject to change for any of the reasons provided for in R.C. 5703.53(C). It is the duty of Taxpayer to be aware of such changes pursuant to R.C. 5703.53(E).

William W. Wilkins
Tax Commissioner