



Volume 14 Number 8

August 2007

State Tax Return

Beware of the UNWRITTEN Rule: OHIO PROPERTY TAXES

Kasey T. Ingram
Columbus
(614) 281-3922

Just when you think you know the rules for receiving a waiver of a late-filing penalty for Ohio personal property tax, an unwritten internal policy rears its ugly head! A recent Ohio case emphasizes the importance of knowing the lore as well as the law on state tax matters.

In *J.M. Smucker, L.L.C. v. Levin*,¹ the Ohio Supreme Court affirmed the Tax Commissioner's application of an unwritten internal policy of the Ohio Department of Taxation ("Department") as the support for the Commissioner's refusal to waive late-filing penalties assessed against J.M. Smucker, L.L.C ("Smucker LLC"). Though this decision appears to ignore the due process reasons behind having written policies, it does emphasize the need to maintain good relations with the Department to gain access to those unwritten rules.

Asset Transfers Led to Late Property Tax Returns

In October 2001, J.M. Smucker Company ("Smucker Co.") and Procter & Gamble ("P&G") negotiated an agreement whereby Smucker Co. would purchase certain assets owned by P&G. As a result of that purchase, Smucker Co. formed Smucker LLC in May 2002. All of Smucker Co.'s manufacturing assets were transferred to Smucker LLC. The P&G deal closed on June 1, 2002, and Smucker Co. transferred all of its newly-acquired P&G assets to Smucker LLC in December 2002.

As a newly-formed entity, Smucker LLC was required to file its initial personal property tax return within 90 days after it began business by July 30, 2002 for the 2002 tax year. Smucker LLC did not file its 2002 return until October 7, 2003. As for its 2003 return, Smucker LLC received an extension until June 15, 2003 to file, but did not file until September 2003. Smucker Co. also filed its 2003 returns about 3 months late, but did file its 2002 returns on time.

The reason for the delay, according to Smucker LLC, centered on "its obligation to wait for an allocation of the purchase price to all the assets – property, plant and equipment – pursuant to Financial Accounting Standard 141."² That fair value determination took almost one year to complete and was exacerbated by the fact that two separate transfers of property occurred. Smucker Co. filed its 2003 return late for the same reasons.

The Tax Commissioner's Refusal to Waive Late-Filing Penalties

The Tax Commissioner assessed both Smucker LLC and Smucker Co. with late-filing penalties. Both Smucker Co. and Smucker LLC requested waiver of their respective penalties pursuant to section 5711.27 of the Ohio Revised Code. That section allows waiver if "it is shown that such failure is due to reasonable cause." The Tax Commissioner granted Smucker Co.'s request but denied Smucker LLC's request even though the underlying cause for the delay was identical.

The Tax Commissioner based his decision to deny Smucker LLC's request for waiver on an unwritten internal policy that "required denial of [waiver] when there was more than one delinquent filing within a five-year look-back period."³ Because Smucker LLC filed late returns for both 2002 and 2003, as compared to Smucker Co., which only filed 2003 late, the Department's policy required denial of Smucker LLC's request. Considering that both delays were the result of the same transaction, the Tax Commissioner's application of the unwritten policy seems arbitrary.

The Supreme Court Affirms—Finding Taxpayer Could File With "Best Available Information."

Smucker LLC appealed the Tax Commissioner's decision and lost at both the Ohio Board of Tax Appeals and the Ohio Supreme Court. Both the Board and the Court held that the Tax Commissioner's decision was not an abuse of discretion. Smucker LLC based part of its argument on the fact that it would have either had to file an incorrect return or a late return, neither of which was a good option. The Ohio Supreme Court, however, relying solely on the testimony of a Department witness, determined that Smucker LLC could have filed its return "based on 'the best available information' and correct[ed] the returns later."⁴ Of course, the return does not include such an option. Apparently, that is another unwritten internal policy that the Court relied on in affirming the Tax Commissioner.

Practical Implications

In the end, the Ohio Supreme Court tacitly approved the use of unwritten internal policies by the Department. As a result, this ruling makes it even harder for companies to comply with the already complicated tax rules by adding unknown hurdles to the process.

It is important that companies ensure that they are meeting their statutory requirements. If not, it is essential that the Department be consulted early and often so that the taxpayer can become aware of any unwritten rules that may come back to haunt them. ■

¹ 133 Ohio St. 3d 337, 2007-Ohio-2073.

² *J.M. Smucker, L.L.C. v. Levin*, 133 Ohio St. 3d 337, 2007-Ohio-2073 at ¶ 7.

³ *Id.* at ¶ 8.

⁴ *Id.* at ¶ 9.



This article is reprinted from the *State Tax Return*, a Jones Day monthly newsletter reporting on recent developments in state and local tax. Requests for a subscription to the *State Tax Return* or permission to reproduce this publication, in whole or in part, or comments and suggestions should be sent to Gail Whelan (214/969-4831 or gfwwhelan@jonesday.com) in Jones Day's Dallas Office, 2727 N. Harwood, Dallas, Texas 75201.

©Jones Day 2007. All Rights Reserved. No portion of the article may be reproduced or used without express permission. Because of its generality, the information contained herein should not be construed as legal advice on any specific facts and circumstances. The contents are intended for general information purposes only.