

## U.S. Supreme Court Refuses to Hear CAT Appeal from Missouri

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On June 12, 2017, the United States Supreme Court refused to entertain an appeal from the United States Court of Appeals for the Eighth Circuit that upheld the dismissal of an action by Diversified Ingredients, Inc. in U.S. District Court in Missouri seeking declaratory and injunctive relief against the imposition of the commercial activity tax (“CAT”). The District Court dismissed the action on jurisdictional grounds, which decision was upheld by the Court of Appeals. As a result of the refusal of the Supreme Court to accept the case, the taxpayer will have to avail itself of the statutory appeal process should it be assessed CAT and wish to contest the assessment.<sup>1</sup>

Diversified Ingredients manufactures and sells commodities typically used to manufacturer and produce pet food products. Diversified has no business locations in Ohio and does not employ individuals to enter Ohio to make sales on its behalf. All customer orders are solicited and received outside Ohio, and all goods are shipped at the direction of the customer via common carrier. Some of those goods are shipped to locations inside Ohio.

Diversified sought injunctive relief prohibiting the Tax Commissioner from assessing CAT against it for the sales of goods shipped into Ohio. It claimed that declaratory relief was justified because it did not have an adequate remedy at law. It further claimed that the Interstate Income Act, 15 U.S.C. §381, also known as Public Law 86-272, protected it from taxation by Ohio. The Tax Commissioner moved to dismiss on the basis that the federal tax anti-injunction act, 28 U.S.C. §1341 (“TIA”), and considerations of comity, precluded federal intervention with state tax matters. The District Court held that the Ohio appeal scheme provided Diversified with an adequate remedy at law, such that declaratory relief was not appropriate. In addition, it held that the TIA and considerations of comity, absent the involvement of a fundamental right or irreparable harm, precluded its action in the case.<sup>2</sup>

On appeal, the Court of Appeals agreed with the District Court in all regards.<sup>3</sup> It rejected the argument that federal courts had exclusive jurisdiction to consider the immunity afforded by Public Law 86-272. It agreed that the Ohio process for contesting tax assessments was plain, speedy and efficient remedy that the TIA barred involvement by the federal courts in the matter. Because it relied upon the TIA, it refused to rule on the question of whether comity also barred the action. Diversified sought review by the Supreme Court of the United States, and that review was denied on June 12.

The decision does not reach the merits of whether the CAT may be imposed upon a taxpayer who does not have a physical presence in Ohio.<sup>4</sup> However, it is noteworthy for some other reasons. First, the trial and appellate courts both recognized that Ohio

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<sup>1</sup> *Diversified Ingredients, Inc. v. Testa*, Sup. Ct. No. 16-1266 (June 12, 2017).

<sup>2</sup> *Diversified Ingredients, Inc. v. Testa*, Dist. Ct. No. 4:15-CV-1935 RLW (E.D. Mo., May 19, 2016).

<sup>3</sup> *Diversified Ingredients, Inc. v. Testa*, App. Ct. No. 16-2791 (8<sup>th</sup> Cir., January 23, 2017).

<sup>4</sup> See *Crutchfield Corp. v. Testa*, \_\_\_ Ohio St. 3d \_\_\_, 2016-Ohio-7760 (2016).

provides a plain, speedy and efficient remedy with respect to assessments of CAT. Thus, challenges to assessments of CAT should be brought before and decided by Ohio Courts. Second, and in some respect more important, it reflects the willingness of federal courts to refrain from interfering with state tax matters. Whether couched in terms of the TIA or comity, the considerations are similar: A respect for states and their statutory tax schemes. Third, it represents yet another failed attempt to bring the question of economic nexus in the realm of state taxation before the Supreme Court.