

Supreme Court Rejects Ohio CAT Assessment Challenge

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The U.S. Supreme Court declined to review a Kentucky Supreme Court decision that sovereign immunity barred claims filed in the state challenging the validity of an Ohio commercial activity tax (CAT) assessment.

The Court October 5 denied the [July 10 certiorari petition](#) by a Kentucky-based company contending that sovereign immunity did not prohibit its claims against Ohio and former Ohio Tax Commissioner Joseph Testa in Kentucky courts because it was not seeking monetary damages from the state, letting stand the state supreme court's ruling in [Great Lakes Minerals LLC v. Ohio](#).

Thomas Bullock of Bullock & Coffman LLP, who represented Great Lakes Minerals, told *Tax Notes* October 5 that it was unfortunate that the Court didn't accept certiorari on such an important issue, saying that a basic tenet of the Constitution is the right to defend yourself in your own state.

"A citizen should be able to defend themselves in their own state from the predatory actions of another state," Bullock said. He added that the decision substantially extends the time before Great Lakes Minerals can assert its counterclaims — including that the company does not have the minimum contacts with Ohio to be subject to the tax.

Mark Loyd of Dentons Bingham Greenebaum told *Tax Notes* it was "an interesting case that unfortunately did not attract the Court's attention."

Loyd said the most interesting question raised is "whether a taxpayer should be permitted to defend itself in its home state rather than being forced to defend itself in the state seeking to subject the out-of-state taxpayer to the state's taxing jurisdiction, particularly when the taxpayer asserts that it has no contacts with the taxing state. It seems like a chicken-egg scenario.

"This defensive access to home state courts is in contrast to what Great Lakes Minerals characterized as the offensive use of home state courts in [[Franchise Tax Board of California v. Hyatt](#)]," Loyd said, adding that "if this issue is raised again, the Court may be interested."

The U.S. Supreme Court held in the May 2019 *Hyatt* decision that states are immune from private suits brought in another state's court, overruling its 1979 decision in *Nevada v. Hall* that the federal Constitution does not bar suits brought against a state by an individual in the courts of another state.

The Ohio Department of Taxation issued Great Lakes Minerals a \$325,000 CAT assessment, determining that it had sold over \$104 million in minerals to Ohio customers between 2009 and 2016. The company paid a portion of the assessment but challenged its validity, petitioning for reassessment.

'Allowing a Kentucky court to determine whether Great Lakes has minimum contacts or a substantial nexus with the State of Ohio is the equitable, expedient ruling,' the company said.

Great Lakes sued the state and Testa in a Kentucky circuit court, seeking a declaration that it was not subject to the CAT on the grounds that it lacked sufficient contacts with Ohio and that requiring it to defend an action in a foreign state would be inequitable. The company also asked for monetary relief under 42 U.S.C. section 1983 for the forced collection of taxes not owed.

Ohio filed a motion to dismiss the complaint on several grounds, including sovereign immunity, and the circuit court denied it. Ohio appealed the circuit court's order denying the motion, which the state supreme court abated pending the Supreme Court's decision in *Hyatt*.

In a December 2019 opinion, the Kentucky Supreme Court concluded that the U.S. Supreme Court unequivocally held in *Hyatt* that states [retain their sovereign immunity](#) from private suits in other states under the U.S. Constitution.

The court held that the claims against Ohio and Testa, in his official capacity as state tax commissioner, were required to be dismissed because they were protected by sovereign immunity. The court concluded that the immunity determination regarding the section 1983 claim against Testa in his individual capacity would require the court to interpret Ohio tax law, and that "any declaration from this Court about the lawfulness of Testa's application of Ohio law would be intrusive and could disrupt Ohio's state tax administration."

The court added that "Ohio's state courts are better suited to efficiently evaluate and apply Ohio law to this issue" and, if the case progresses further, "would also be better suited to evaluate the facts."

The company argued in its certiorari petition that "the entirety of Great Lakes' business transactions begin and end within the borders of the Commonwealth of Kentucky," stating that individuals and businesses wishing to purchase minerals from the company must physically travel to its plant in Kentucky and take full physical possession of the product there. Great Lakes Minerals argued that Ohio had unconstitutionally assessed the tax against it, adding that the federal due process clause requires some minimum connection between the taxing state and what it seeks to tax.

"Ohio's unique taxing scheme that unduly taxes businesses outside of Ohio creates an unfair economic advantage for businesses within the state and for the state itself," the company argued in its petition.

Great Lakes claimed that "Ohio does not permit an out-of-state business to promptly assert its constitutional rights or challenges regarding minimum contacts nor present a nexus argument under the United States Constitution until after it endures several years of administrative litigation with the tax and penalties accruing throughout the process."

The company urged the Court to review the case and determine whether *Hyatt* extends sovereign immunity to bar actions of declaratory and other equitable relief and claims against an individual acting in his individual capacity.

It noted that federal law, as well as Kentucky and Ohio law, "maintain that sovereign immunity does not apply to declaratory and injunctive relief."

“Allowing a Kentucky court to determine whether Great Lakes has minimum contacts or a substantial nexus with the State of Ohio is the equitable, expedient ruling,” the company continued.

“Unfortunately, given the historically low cert grant numbers, in particular on matters of [state and local tax], and the relatively recent *Hyatt* decision by SCOTUS, denial of cert herein does not come as a shock to me,” Mark Sommer of Frost Brown Todd LLC told *Tax Notes*.

Sommer added that given the Ohio Supreme Court’s recent decision on the CAT in [Defender Security Co. v. McClain](#), “it will be interesting to see how the underlying merits dispute in the *Great Lakes Minerals* case plays out, should it get to the Ohio Board of Tax Appeals.”

“While *Defender Security* was focused on intangibles issues and the CAT, perhaps the decision is a precursor or an indicator as to how the Court thinks the CAT needs to be administered, rather than how it has been administered life to date,” Sommer continued.

In *Defender Security*, the Ohio Supreme Court held that the gross receipts that an authorized dealer of security systems receives from ADT Security Services Inc. for the sale of security monitoring services contracts are situated to the location where ADT realized the benefit derived from purchasing the intangible contract rights, which was outside the state, and that such receipts [were not subject to the CAT](#).

The taxpayer in *Great Lakes Minerals LLC v. Ohio* (No. 20-24) was represented by attorneys from Bullock & Coffman.