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## Ohio Braced for Supreme Court's Decision in Ohio Grocers CAT Case

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As previously reported in GBO's SALT Watch, in September an Ohio appellate court ruled in Ohio Grocers Assn v. Wilkins, App. No. 07AP-813, 2008-OH-4420, the Ohio Commercial Activity Tax (CAT) is unconstitutional as applied to wholesalers and retailers of food items for human consumption off premises. A stay of proceeding was issued immediately, allowing business as usual for the CAT - wholesalers and retailers in the food industry continued to file and pay CAT as usual. The stay also provided, however, time for the Tax Commissioner to file an appeal to the Ohio Supreme Court, which it did in October. And as many predicted, the Ohio Supreme Court has decided to hear the appeal. Ohio now finds itself braced for the outcome in the Ohio Grocers case as the decision stands to have a powerful impact on the future of CAT and the sanctity of tax reform.

The crux of the Ohio Grocers claim that CAT is unconstitutional lies in the Ohio Constitution, which restricts the state from imposing a sale or excise tax on food sold by wholesalers and retailers including grocery stores for consumption away from the premises. Based on the nature of the CAT, the appellate court ruled the CAT acts as a prohibited excise tax and thus should not apply to such sales of food. For now Ohio businesses are playing a wait and see game to know whether the Ohio Supreme Court agrees with this reasoning.

There are several critical aspects to the Ohio Grocers appeal. First, if the Supreme Court affirms the case then significant refund opportunities will be available for wholesalers and retailers of food items sold for consumption off premises. The magnitude of such refunds cannot be precisely quantified but would likely have a damaging effect on general revenue funds for the state of Ohio. Second, a win at the Supreme Court level could be extended to others within the food industry not directly involved in the Ohio Grocers case, such as food packagers and food manufacturers and processors. Thus the CAT may be determined unconstitutional as applied to virtually all companies doing business within the food industry and the magnitude of CAT refund claims could be even greater than originally predicted. Third, the sanctity of tax reform stands in the fray of the Ohio Grocers case as the state of Ohio stands to lose multimillion dollars of future CAT collections if the Ohio Supreme Court agrees the CAT is unconstitutional. Finally, a taxpayer loss at the Supreme Court will negatively impact the economic nexus standard currently applied to out-of-state companies for CAT and may reduce the number of such companies subject to the tax.