

## OHIO STATE BAR ASSOCIATION TAXATION COMMITTEE

### Sales/Use Tax Subcommittee Report

January 19, 2017

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## I. EXEMPTIONS

### A. Direct Use In Farming

*Kaufman v. Testa*, Ohio BTA Case No. 2015-2369 (September 26, 2016). All-terrain vehicle was taxable since no evidence of direct use in farming (and the record did not even address whether taxpayer was engaged in farming business).

### B. Highway Transportation for Hire

*SE Enterprises, LLC v. Testa*, Ohio BTA Case No. 2016-240 (November 10, 2016). Four-door automobile was taxable since no evidence to support nature of taxpayer's business or that vehicle was used to transport tangible personal property belonging to others for consideration.

*Dombrowski Bordonaro Enterprise v. Testa*, Ohio BTA Case No. 2016-226 (November 10, 2016). Although the taxpayer was accepted as being registered with the Public Utilities Commission of Ohio, truck was taxable since there was no evidence it was used to transport tangible personal property belonging to others (other than unsworn statements accompanying the notice of appeal). There was no evidentiary hearing. For same result/analysis, *see also*, *24-Seven Transportation v. Testa*, BTA Case No. 2016-285 (November 29, 2016).

## II. TAXABLE SERVICES

### Automatic Data Processing

*Ankle & Foot Care Centers, LLP v. Testa*, Ohio BTA Case No. 2016-208 (January 10, 2017). Consistent with earlier decisions, medical transcription services were not nontaxable personal/professional services but were taxable automatic data processing. The transcriptionists did not study, alter, analyze, interpret or adjust the dictation (but merely reduced the physician's oral statements to writing). They had no specialized training, no licensing or certification process, and were not subject to a regulatory authority. Accordingly, the Board noted, consistent with most recent precedent, such services may be nontaxable if the relevant contract specified that each transcriptionist must hold a certificate from an approved college program and was to utilize specific professional skills acquired from such program to complete his/her tasks. *See Dayton Physicians, LLC v. Testa*, 2<sup>nd</sup> Dist. Montgomery No. CA 26881, 2016-Ohio-5348.

### III. PROCEDURE

#### A. Penalty and Interest Abatement

*J&T Washes, Inc. v. Testa*, Ohio BTA Case Nos. 2015-2389; 2016-594; 2016-612; 2016-636 (October 3, 2016). Consistent with the Board's recent, prior decision, the Tax Commissioner did not abuse his discretion by not remitting the entire penalty (and the BTA has no statutory authority to address interest abatement). For same result/analysis, *see also, Alan Rehbein*, Ohio BTA Case No. 2016-372 (December 8, 2016) and *Porter v. Testa*, Ohio BTA Case No. 2016-484 (January 6, 2017) (taxpayer asserted that it was forced to close business in absence of relief).

#### B. Price

*Pitsul v. Testa*, Ohio BTA Case No. 2016-158 (October 31, 2016). Tax Commissioner's independent determination of value of motorcycle acquired via trade, through research and further supported by former owner, was affirmed in the absence of contrary evidence.

#### C. Statute of Limitations (Refund Claim)

*Energy Fit Living, Inc. v. Testa*, Ohio BTA Case No. 2015-219 (November 9, 2016). Partial denial of taxpayer's use tax refund claim filed on the basis of internal employee fraud affirmed as untimely (i.e., beyond four-year statute of limitations). The taxpayer asserted an equitable right to file the claim because the relevant fraud was not confirmed until after the four-year refund period expired. However, there is no precedent for applying equity to the statute of limitations; moreover, the Board lacks authority to grant equitable relief.

#### D. Mark-up Audit

*The Dukester, LLC v. Testa*, Ohio BTA Case No. 2016-2168 (December 6, 2016). Mark-up audit of small bar was affirmed due to evidence that insufficient tax was collected and the absence of primary records. The taxpayer did not provide alternative methodologies to determine taxable sales. For same analysis/result, *see also, Cantax, Inc. v. Testa*, Ohio BTA Case No. 2016-217 (December 7, 2016) (convenience store audited consistent with Memorandum of Agreement signed by the taxpayer).

#### E. Proof of Payment / Refund Claim

*Ridg-U-Rak, Inc. v. Testa*, Ohio BTA Case No. 2016-249 (December 8, 2016). Partial denial of refund claim affirmed since taxpayer could not prove it paid relevant invoices. There was no Board evidentiary hearing.

### IV. LEGISLATION

#### A. Sub S.B. 235

R.C. 5739.03(B)(1)(a) amended to provide that a vendor must obtain an exemption certificate if the consumer claims exemption under R.C. 5739.01(JJ)(1) to (5) (applicable to employment services).

Gov. Kasich used line item veto to delete provisions related to: (1) expansion of exemption for property used “directly in producing tangible personal property for sale by production of crude oil and natural gas”; and (2) exemption for digital products transferred electronically through a device accepting direct payments (e.g., juke boxes, music machines and arcade games).

## **V. OHIO ADMINISTRATIVE CODE**

- A. O.A.C. § 5703-9-14 (Sales and use tax; construction contracts; exemption certificates) – Specifically incorporates Construction Contract Exemption Certificate (Form STEC CC) and Contractor’s Exemption Certificate (Form STEC CO).
- B. O.A.C. § 5703-9-25 (Watercraft, outboard motors, and personal watercraft; tax payment or exemption claim required for certificate of title; remittance of tax by clerk of courts) – Updated to change title of exemption certificate form.
- C. O.A.C. § 5703-9-47 (Cash register adjustment reimbursement) – Rescinded
- D. No changes to O.A.C. §§ 5703-9-16, 5703-9-17, 5703-9-18, 5703-9-20, or 5703-9-24. Citations updated in O.A.C. §§ 5703-9-27 and 5703-9-29.
- E. PROPOSED O.A.C. § 5703-9-13 (Sales and use tax; reporting periods) – Revisions made to update and simplify sales / use tax return requirements.
- F. PROPOSED O.A.C. § 5703-9-15 (Sales and use tax; coupons, coupon books, and gift cards) - Updates definition of “gift card” and provides several additional examples for discounted goods and loyalty programs.

## **VI. DEPARTMENT OF TAXATION GUIDANCE**

Info Release ST 1999-04 (Updated Sept. 2016)

H.B. 131 excludes “digital advertising services” from electronic information services definition. In response, the Department cautions that mixed transactions including aspects of both digital advertising services and electronic information services will continue to be taxable if the electronic information services are a significant aspect of the service.