OHIO SALES/USE TAX: RECENT TRENDS, DEVELOPMENTS AND PLANNING OPPORTUNITIES

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I. BACKGROUND

A. Taxable Transactions and Services.

R.C. 5739.03 provides that all vendors making taxable sales are required to collect, and all consumers are required to pay, sales tax. Generally, taxable sales include the following transactions for consideration:

1. Transactions by which title to, or possession of, tangible personal property is transferred; and
2. The provision of certain services, such as:

a. repairs or installation of tangible personal property except property the purchase of which is exempt from tax;

b. cleaning, waxing, polishing or painting a motor vehicle;

c. laundry and dry cleaning services;

d. automatic data processing, computer services or electronic information services;

e. telecommunications services;

f. printing or lithographic services;

g. production or fabrication services;

h. landscaping or lawn care services (annual sales > $5,000);

i. private investigation or security services;

j. building maintenance and janitorial services;

k. employment placement services (annual sales > $5,000 and only through 9/30/21);

l. exterminating services;

m. physical fitness facility services;

n. recreation and sports club services;

o. employment services (through 9/30/21);

p. producing written or graphic matter;

q. warranty, maintenance or service contracts pertaining to tangible personal property;

r. lodging furnished by a hotel to transient guests (less than 30 days);

s. snow removal (annual sales > $5,000);

t. vehicle towing;

u. information services or tangible personal property ordered through "900" telephone calls;

v. personal care services;

w. satellite broadcasting services;

x. intrastate transportation of persons by motor vehicle or aircraft;

y. electronic publishing services; and

z. storage of tangible personal property.

3. Miscellaneous Transactions:

a. Sales of closely held stock or interests in pass-through entities not engaged in business and holding boats, planes, motor vehicles or other tangible personal property for the use and enjoyment of the owners.

b. The provision of guaranteed auto protection.

c. Certain Medicaid service transactions.

d. The provision of specified digital products.

4. Consideration must exist for "sale": ***Dunagan v. Testa*** *(*October 31, 2013), BTA Case No. 2011-1466. Transfer of vehicle from limited liability company to sole member was nontaxable due to the absence of consideration.

B. Ohio Use Tax.

The Ohio use tax is complementary to the sales tax and is imposed upon the use, storage, or consumption of tangible personal property in Ohio or the receipt of the benefit of taxable services to the extent sales tax has not been paid. *See* RC Chapter 5741.

DaimlerChrysler Corp. v. Levin, Ohio Supreme Court, Slip Opinion No. 2008-Ohio-259, January 30, 2008. An automobile manufacturer was not the consumer of repair services and parts used by its dealers in "goodwill" repairs provided after the warranty period expired, the cost of which was reimbursed by the manufacturer and at no charge to the consumer in an effort to maintain loyalty. Customers had no contractual right to free repairs. Since such repairs did not relate to a charge separable from the automobile's price (such as a warranty payment), a portion of the car's sale price related to the anticipated cost of the goodwill repairs, thereby making the automobile owner the consumer of the repair parts and services.

The manufacturer was the consumer only when the parts were used to fulfill a separately acquired warranty (i.e., a separate contract right), not when they were provided as part of the price of the automobile. The Court's holding in ***Gen. Motors Corp. v. Wilkins*** 102 Ohio St. 3d 33, 204-Ohio-869 was distinguishable because such earlier case involved contracted for payments for parts and services under a warranty, thereby making GM the consumer of such parts and services used to fulfill its warranty obligations. In reaching its holding, the Court noted the unique relationship between automobile manufacturers and dealers and the obligations of dealers to service the vehicles they sell.

Three justices dissented. The dissenting opinions believed Gen. Motors governed since it addressed "special-policy repairs", also provided at no charge to the customers. Justice Moyer noted "the payment made to purchase a car is considered for the purchase of the car, not for the purchase of repairs performed long after the purchase of the car."

Ameritech Publishing, Inc. v. Wilkins (March 2, 2007), Ohio BTA No. 2005-M-238. A telecommunications company was liable for use tax on telephone directories acquired from an Illinois printer and distributed to Ohio customers at no charge through independent transportation companies on behalf of the company. The directories were under the company's direction and control thereby constituting a use within Ohio. Since the company consumed the directories (not paper and printing services), the exemption for materials consumed in the production of printed materials for market and sale was not applicable. *See* R.C. 5739.01(D)(4) (also deeming the company to be the consumer of printed matter distributed to the public without charge).

Doepke v. Testa (April 8, 2014), BTA Case No. 2013-5989. The taxpayer's purchase of a motor home in Texas which had been used outside Ohio then brought into Ohio to be stored for a year while waiting to be sold was subject to use tax. When the motor home was stored in Ohio, the taxpayer exercised ownership and control over it thereby subjecting it to Ohio use tax.

Berry v. McClain, Ohio BTA Case No. 2020-1222 (January 3, 2022). Vehicles owned by a Montana company but stored, used and consumed in Ohio were subject to use tax. The vehicles consisted of a motor home, truck, motorcycles and van. The individual owner of the Montana LLC was an Ohio resident and could not establish that the vehicles were not present in Ohio.

Transient-Use Exemption:

Gallenstein v. Testa, 138 Ohio St. 3d 240, 2014-Ohio-98. R.C. 5741.02(C)(4) provides a use tax exemption for the following: "Transient use of tangible personal property in this state by a nonresident tourist or vacationer, or a nonbusiness use within this state by a nonresident of this state, if the property so used was purchased outside this state for use outside the state and is not required to be registered or licensed under the laws of this state." (Underline added). The taxpayers (Kentucky residents) qualified for this transient use exemption for their use of a boat that was primarily operated in non-Ohio waters although it was registered in Ohio.

The boat was purchased from an Indiana resident, and no sales/use tax was paid in either Kentucky or Indiana, nor was the boat registered in either of those states. It was primarily used in Kentucky and Indiana waters, passing through Ohio less than a dozen times during a three-year period. Nonetheless, the taxpayers voluntarily applied for an Ohio watercraft registration after having been stopped by Cincinnati police while boating.

The Court concluded that merely voluntarily registering in Ohio did not disqualify the taxpayers for the transient use exemption. The boat was registered in Ohio only for purposes of minimizing future contact with Ohio police and was not "required to be registered". Further, the taxpayers could have easily registered the boat in Indiana or Kentucky, which is contrary to any conclusion that registration in Ohio was "required" (and boats documented by the United States Coast Guard as temporarily transiting are exempt from registration).

Guile v. Testa, Ohio BTA Case No. 2017-2115 (September 5, 2018). Transient use exemption (R.C. 5741.02(C)(4)) not available for Ohio resident's purchase of vehicle driven by him from Ohio dealer to Montana residence. Only non-residents are entitled to exemption.

C. Exemptions.

Exemptions from tax are available with respect to a number of transactions, operations or items, including the following:

1. resale;

2. manufacturing, processing, assembling, mining, refining and reclamation;

3. rendition of public utility services;

4. packaging materials and equipment;

5. food preparation;
6. carry-out food;
7. casual sales;
8. farming, agriculture, horticulture or floriculture;
9. commercial fishing;
10. production of magazines distributed as controlled circulation publications;
11. graphic matter production;
12. highway transportation for hire;
13. medical supplies and equipment;
14. egg preparation;
15. sales to Ohio or its political subdivisions;
16. sales to U.S. government and its agencies;
17. sales to churches and certain nonprofit organizations;
18. research and development equipment;
19. equipment used in certain warehouse or distribution centers;
20. certain advertising materials used in making retail sales;
21. property used to fulfill a warranty, maintenance or service contract;
22. computers and related equipment purchased by Ohio elementary and secondary school teachers;
23. motor racing vehicles, related repair parts and services purchased by Ohio professional racing teams;
24. property used in generating, transmitting, or distributing electricity for use by others;
25. rental vehicles provided by warrantor;
26. investment bullion and coins;
27. feminine hygiene products; and
28. baby products.

D. Collection of Tax.

The vendor has duty to collect the tax, and the consumer has corresponding duty to pay the tax. If the vendor is assessed for failure to collect, it may seek reimbursement from consumer. R.C. 5739.13. *See also*, ***Erb Lumber Co. v. L & J. Hardwood Flooring, Inc.*** (1997), 118 Ohio App. 3rd 421. Lumber supplier entitled to reimbursement from purchaser for assessment of unpaid sales tax on lumber purchases. *See* R.C. 5739.13. However, purchaser was still entitled to assert common law defenses concerning breach of contract, promissory estoppel, and fraud.

II. TAXABLE SERVICES

A. Recreation and Sports Club Service.

Findlay Country Club. v. Tracy, Ohio TA Case No. 94-H-1307 (Feb. 23, 1996). A one-time fee paid by members of a country club was not taxable. The statute contemplates taxing only on-going, continuing obligations of a member paid to maintain a membership, not a one-time charge for a physical improvement. Furthermore, the Board stated: "the assessment was unarguably imposed not for membership but for the improvement."

Akron Mgt. Corp v. Zaino (2002), 94 Ohio St. 3d 101. R.C. § 5739.01(NN) defines a taxable recreation and sports club service as "all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a recreation and sports club, which entitles the member to use the facilities of the organization." The Court held that since the payments at issue (loans and equity contributions) were required as a condition to membership, and thereby served the same purpose as initiation fees, they were taxable.

The Court factually distinguished the Board's earlier decision in ***Findlay Country Club v. Tracy*** BTA Case No. 94-H-1307 (February 23, 1997), yet did not state whether it was correctly decided. Presumably, if the *Findlay* facts were before the Court, it would hold that such payments are taxable if they were required to maintain the membership, serving the same purpose as renewal fees.

B. Employment Services (through 9/30/21).

Taxable employment services involve providing personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when such personnel receive their wages, salary or other compensation from the service provider (or, effective April 1, 2007, from a third party that provided the personnel to the provider). Exclusions from this definition include:

- the provision of medical and health care services;
- arrangements with contractors or subcontractors where the service personnel are not under the direct control of the purchaser;
- supplying personnel to a purchaser pursuant to a contract of at least one year where the contract specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis;
- transactions between members of an affiliated group as defined in R.C. 5739.01(B)(3)(e); and

- transactions where the personnel so provided by a provider to a purchaser of an employment service are then provided or supplied by that purchaser to a third party as an employment service, except "employment service" does include the transaction between the purchaser and the third party (effective 1/1/07).

R.C. 5739.01(JJ).

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).

1. Resale/Manufacturing Exceptions.

Bellemar Parts Industries, Inc. v. Tracy (2000), 88 Ohio St. 3d 351. The Court held that neither the resale nor manufacturing exception applied to the services provided to a manufacturer by leased employees. The Court reversed the Board of Tax Appeals' decision which held that the benefit of the services rendered by a manufacturer's leased employees was resold in the manufactured product. Having found the resale exception available, the Board did not address the manufacturing exception. Specifically, the Supreme Court held that the benefit of leased employee services was "a flexible, less costly, and more efficient work force," not the product being manufactured by the work force. Since this benefit was not resold (but was consumed) by Bellemar Parts, the resale exception was not available.

The manufacturing exception was not available since employment services are not within the list of taxable services specifically enumerated within the statutory definition of "things," a necessary characteristic for the manufacturing exception. "Things" are limited to the following specific services:

computer	repairs
electronic information	installation
automatic data processing	

Corporate Staffing Resources, Inc. v. Tracy (October 27, 2000), BTA Case No. 97-M-538. Taxable employment services found to exist with respect to trained personnel leased to a repair company (Sarcom, Inc.) engaged in repairing computer equipment for other businesses (which was a taxable service itself). The Board held:

- Leased employees were under the supervision and control of the repair company, receiving their assignments therefrom.
- Although the employees were skilled, the taxpayer (lessor) was not acting as a subcontractor since it was not responsible for completion of specific tasks or projects.
- Applying ***Bellemar Parts Industries, Inc., supra***, the resale exception was not available since the benefit provided by the taxpayer, which was not resold, was the "labor of the employees" (and not the product of services performed by the workers).
- For the same reasons, the services could not be considered exempt repair services purchased to meet the repair company's warranty obligations (they were not "things" for purposes of the exception available for purchases made to fulfill obligations under a warranty).

The Supreme Court affirmed on appeal. *See* ***Corporate Staffing Resources, Inc. v. Zaino*** (2002), 95 Ohio St. 3d 1. *Quoting* ***Bellemar Parts Industries, Inc., supra***, the Court stated

that a company's benefit in receiving temporary employees is "their contribution of temporary, flexible, and less costly labor to its work force." Other benefits include screening candidates for future employment and controlling benefits costs. The benefit Sarcom received was not the product of the workers' labor (computer repair) but a temporary and flexible work force having expertise. The screening and employee benefits were also received. Sarcom's customers did not receive these benefits but received the actual repair/maintenance services, the product of the labor.

Crew 4 You, Inc. v. Wilkins (2005), 105 Ohio St. 3d 356. The taxpayer provided crewing service personnel to trucking companies who were then used to operate trucking company equipment under the control of the broadcasting entities for sporting events. Reversing the Board of Tax Appeals, the Court held that the trucking companies who purchased the services and then conveyed them, along with their equipment, to the broadcasting entities were not entitled to the resale exception "[because the trucking companies did not sell a taxable 'employment service' to the broadcasting entities – because the provider of 'employment services' under R.C. 5739.01 (JJ) must pay the 'wages, salary or other compensation' of the workers, and Crew 4 You (rather than the trucking companies) paid the workers' wages – the trucking companies cannot be deemed to have resold the employment services that they purchased from Crew 4 You". In other words, an employment service is not resold unless the subsequent resale is an employment service. The Court also noted that the services were not conveyed in the same form since the trucking companies purchased employment services from the taxpayer yet conveyed the underlying technicians, along with equipment they were operating, to the broadcasting entities.The Court also held that the contractor/subcontractor exception for otherwise taxable employment services was not available to the taxpayer since it was not hired to reach a final result.

COMMENT: Under the language quoted above, the resale exemption is never available for employment services since the provider's customer can never provide an employment service to its customer because it does not pay their wages, salary or other compensation. The only available exemptions would appear to be those based upon the status of the user (e.g., charitable, IRC Section 501(c)(3), the state and political subdivisions thereof). However, effective January 1, 2007, sales to other employment service providers are not taxable. See Sub. H.B. 298.

2. Providing Personnel.

Moore Personnel Serv., Inc. v. Zaino, 2003-Ohio-1089. The taxpayer was found to be a Provider of personnel even though clients determined persons it hired.

Sub S.B. No. 139 (effective 3/22/13).

Although there are no changes to sales/use tax provisions, R.C. 4125.042(B) states:

> Shared employees whose services are subject to sales tax shall be considered employees of the client employer for purposes of collecting and levying sales tax on the services performed by the shared employee. Nothing contained in this chapter shall relieve a client employer or professional employer organization of any sales tax liability with respect to its goods or services.

What does this accomplish? Presumably, amounts paid to a PEO continue to be subject to sales tax, consistent with ***Moore Personnel Serv., Inc. v. Zaino***, 2003-Ohio-1089, unless the one-year exemption is met.

3. Supervision or Control.

E.T.S., Inc. v. Tracy, Ohio BTA Case No. 97-S-1613 (April 14, 2000). Taxpayer providing consulting, engineering and design services to manufacturers at their site was not providing an employment service. The taxpayer received specific projects from the manufacturers, selected the appropriate engineers from its staff to perform the work and retained control over such assigned employees.

Sunbelt Transportation Service, Inc. v. Zaino, Ohio BTA Case No. 01-V-997 (October 30, 2002). The provision of truck drivers to make deliveries was a taxable employment service because the taxpayer's customers controlled the mode, manner and timing of the driver's day-to-day assignments and activities. This included: when the deliveries were made, where the deliveries were made, the sequencing of the deliveries and the amount of time the drivers were on the road.

The Board also addressed whether the one year/permanent assignment exception was available. Although the contracts were for one year, they did not specify each employee was permanently assigned. Following the Board's earlier decision in ***Advantage Services v. Zaino,*** BTA Case No. 95-T-1391 (October 30, 1998), the Board would not allow parole evidence to add terms (i.e., a permanent assignment provision) or intentions not already expressed in the written contract.

For essentially the same facts, see also, ***TLI, Inc. v. Zaino***, Ohio BTA Case No. 01-V-1006 (October 30, 2002).

Reed Elsevier v. Zaino (June 30, 2004), Ohio BTA Case No. 2003-J-1083. The taxpayer engaged a company to provide personnel to assist its own employees in completing the development of application software pertaining to its computerized information services (Lexis-Nexis) offered to subscribers. The taxpayer's project manager was found to have supervised the work performed by both its employees and the outside personnel, thereby making the services taxable "employment services" which did not qualify for the exception for "acting as a contractor or subcontractor".

There were a number of unfavorable facts which appear to have facilitated an expansive Board discussion of the scope of taxable employment services. These included the following:

- The personnel did not appear to clearly furnish special expertise unavailable from its own employees (although there was reference to using the personnel when the taxpayer's regular employees were not sufficiently "skilled").
- The personnel augmented the taxpayer's existing employment force performing the same or similar services.
- The provided personnel were used "to fill in gaps caused by occasional workload increases".
- The provided personnel "took direction" from the taxpayer's "project manager".

The Board also worked with the premise that in resolving disputes as to whether a relationship merits employment service characterization, it must be determined who supervised or controlled the work: the provider or the taxpayer. Nonetheless, presumably, there are nontaxable circumstances when neither party supervises or controls the personnel.

Helpful factors for avoiding employment service characterization include:

- The personnel provide services involving an expertise not readily available to the taxpayer; they bring some level of expertise/specialization the taxpayer did not already have.
- The services are clearly task oriented. The personnel are on site to merely complete an assigned objective, and there is essentially no/little interaction with the taxpayer other than communicating the assigned task.
- The services are provided off the taxpayer's premises (preferably at the provider's premises); and
- The provider of the personnel is clearly supervising and controlling the personnel.

To the extent a fixed fee and a flexible work relationship (i.e., the personnel can work at their own pace) can be incorporated into the above arrangements, that would also be helpful.

Strategic HR Partners, Inc. v. Wilkins (May 5, 2006), BTA Case No. 2005-V-100. A taxpayer's computer staffing service was taxable since the provided personnel were under the control of the client. The resale exception was not available because the clients did not resell employment services.

Seaton Corp. v. Testa, 2018-Ohio-4812. The Ohio Supreme Court affirmed the BTA's decision that services provided by a staffing agency (Seaton) to a manufacturer were not taxable employment services. The issue was whether the personnel were performing work under the "*supervision or control*" of the manufacturer when the staffing agency provided on-site management of the workers. The Court found that in the context of this case supervision and control must be "*specific to* the *work or labor performed by the provided personnel—not an overall production process.*" The Taxpayer maintained control over training, scheduling, workplace assignments, and work tasks performed <u>at the job site</u>. Conversely, the manufacturer had no work related interactions with Seaton workers on the job floor.

The Tax Commissioner asserted that the manufacturer's general control over its own production process and manufacturing lines equated to supervision or control over the Seaton-supplied personnel who worked in those areas. However, the Court agreed with the BTA's finding that Seaton's control over on-site recruitment, employees' hiring, scheduling, job assignments, work production, safety, and communicating new procedures reflected clear control over the employees. Not only did Seaton perform these functions, but the contracts specifically granted it the exclusive right to control its employees and prohibited each party from directing each other's employees.

4. <u>Affiliated Group Exception</u>.

Karvo Paving Co. v. Testa, Ohio Ct App., 9th Dist., C.A. No. 28930 (September 30, 2019). The Court upheld the BTA's finding that leased employees provided to Karvo by a related company were exempt under the affiliated group exemption of R.C. 5739.01(JJ)(4). The Tax Commissioner contended that the companies were not affiliated because Mr. Karvounides owned 100% of Karvo and his wife owned a majority (55%) of the other company, K&H Excavating. Although there was no "common" ownership, they were still affiliated because the statutory definition of affiliated group includes companies owned ***or controlled*** by the same person. Mr. Karvounides controlled both companies.

5. <u>One-Year Contract / Permanent Assignment</u>.

Excel Temporaries, Inc. v. Tracy, Ohio BTA Case No. 97-T-257 (October 30, 1998). The Board held that an oral contract may satisfy the one-year exception. Excel established that the parties to the leasing arrangement clearly understood and expected that all personnel provided were assigned on a permanent basis (even though there may have been high turnover on the jobs because either the employee or employer/lessee was not satisfied).

Factors supporting this finding included evidence that:

a. the customer needed positions filled permanently to gain the benefits of a substantial learning curve;

b. leased employees were not reassigned to other customers;

c. the arrangement was to be long-term; and

d. a substantial number of leased employees were eventually hired by the customer.

Moreover, the parties specified that the personnel provided were assigned on a permanent basis. However, the Board found that the oral contract was not for at least one year. Either party to the contract had the authority to terminate the relationship at any time for any reason.

Advantage Services, Inc. v. Tracy, Ohio BTA Case No. 95-T-1391 (October 30, 1998). Oral contracts terminable within a year and performance under a subsequent written contract established that the employees were not permanently assigned. The Board noted that performance must "affirmatively demonstrate that such ongoing positions did exist and that they were filled with the expectation the employee would be placed there permanently." The large fluctuations in leased employees supported a finding that the positions were not intended to be staffed permanently.

Labor Pool of Cincinnati, Inc. v. Tracy, Ohio BTA Case Nos. 98-A-491 and 98-A-761 (April 14, 2000). Leased industrial workers and office employees provided under oral contracts to customers were not permanently assigned under one-year contracts. There was no evidence that the oral contracts were to last for at least one year.

Success Employment Services, Inc. v. Tracy, Ohio BTA Case No. 98-A-489 (April 14, 2000). Leased production employees were exempt from tax, having been found to be permanently assigned under written contracts of at least one year in duration. Contrary to the Tax Commissioner's assertion, the names or positions of the permanently assigned leased employees were not required to be stated. Permanent assignment was established by the contract (specifying permanent assignment of "permanent core personnel") and the parties' course of dealing.

B. J. Alan Company v. Tracy, Ohio BTA Case No. 99-N-196 (March 1, 2002), appealed to the Ohio Supreme Court, Case No. 02-0500; then it was dismissed. The Board addressed whether a contract having an initial term of one year and month to month extensions (and a clause allowing termination upon fourteen days' notice) qualified for the one-year exception. The Board held that the contract was excepted for the first year since it was still in place after one year; the termination clause had no effect. However, the contract did not qualify for the exception after the first year since it had only monthly terms.

H.R. Options, Inc. v. Zaino (2004), 100 Ohio St. 3d 373. Following its decision in ***Moore Personnel Serv., Inc. v. Zaino*** (2003), 98 Ohio St. 3d, the Court concluded that an employment service includes a company's activity of serving as employer of record for

employees sent to it by its clients. The Court also reversed the Board as to the scope of the exception for otherwise taxable employment services for transactions involving "supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis". R.C. 5739.01(JJ). The parties agreed that the word "permanent" need not appear in the contract.

The Court reviewed the underlying contracts and performance thereunder. The Court stated, "[w]hen the Tax Commissioner's agents examine an employment contract, they must be able to determine at that time whether an employee has been assigned on a permanent basis. The contract, along with the facts and circumstances of the assignment, should permit the Tax Commissioner's agent to determine permanency. The actual length of the employee's assignment is only one of the factors to be used. Where the assignment is of a seasonal nature or serves to meet short-term workload conditions, these factors are also relevant."

After noting that an employee assigned on a permanent basis need not be assigned to an employer forever, the Court stated ". . . assigning an employee on a permanent basis means assigning an employee to a position for an indefinite period, i.e., the employee's contract does not specify an ending date and the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonable or short-term workload conditions." Even though the Court noted that these are "factors" and the contracts and facts and circumstances of the assignments must be considered in determining whether there is permanency, it proceeded to hold as being taxable those relationships involving "employee contracts" that specified an ending date or were clearly seasonal. The Court allowed an exception from taxation for employee service contracts between the provider and its customers even though the particular contracts had a set term, considering only the actual contract between the provider and its employees (i.e., the "employee contracts") in determining whether the assignments had an "ending date".

The Premium Glass Company, Inc. v. Zaino (August 5, 2005), Ohio BTA Case No. 2003-T-1475. The taxpayer did not qualify for the one-year, permanent assignment exception. The case highlights the following:

- As a practical matter, it is very difficult, if not impossible, to establish that an oral contract meets the one-year, permanent assignment exception (since it is very difficult to support a one-year term).
- The BTA is not very receptive to respecting temporary to hire arrangements as being consistent with permanent assignment.

J.Z.E. Electric, Inc. v. Wilkins (May 19, 2009), BTA Case No. 2006-A-2218. The Board affirmed a sales tax assessment on an electrical contractor's leased employees. The relationship did not meet the one-year/permanent assignment exception. Since the contracts met the one-year requirement, the only issue was whether the personnel were permanently assigned to the contractor/lessee even though the contracts stated the workers were provided for "an indefinite basis as opposed to a short-term basis". Particularly important was the contractor's acknowledgement that some of the workers were in fact intended to be used for a temporary/limited duration, while the remaining ones were to be used indefinitely, consistent with such contract language.

In addressing whether the personnel were permanently assigned the Board, citing the Supreme Court's holding in *H.R. Options*, focused on whether a worker's permanence or

temporary nature could be determined based upon all available evidence. Emphasis was placed on the contractor's/lessee's initial records indicating the intent for the employee's permanent or temporary assignment. The Board stated: "There is nothing in the contracts or *J.Z.E.'s* work records to definitively indicate whether a worker hired under such contracts was intended to work as a long term/permanent worker or a temporary worker and, ultimately, we are unable to accept an ambiguity in the record that fails to corroborate for us the precise nature of each employee's assignment." Since the contractor/lessee could not provide support for the permanent assignment of the individuals in question the contracts were taxable.

COMMENT: If some of the personnel provided under a contract are not intended to be permanently assigned, the lessee/taxpayer has the burden of specifically identifying those persons permanently assigned, as determined at the outset of the relationship (and reiterated through actual performance consistent with permanent assignment). At least the work records identifying the individual's tenure would appear necessary to support such permanent assignment. When all personnel are intended to be provided on a permanent basis from the outset of the contract and there is no inconsistent documentation, then presumably only performance under the contract must be reviewed to confirm consistency with permanent assignment.

Bay Mechanical & Electrical Corp. v. Testa (2012), 2012-Ohio 4312. As anticipated, the Court found against Bay Mechanical simply because it did not provide sufficient evidence of permanent assignment of the individuals at issue. The Court integrated prior decisions in clarifying exemption requirements. This included the following:

a. Per *H.R. Options*, *supra*, assignment on a permanent basis means "that an employee is 'assign[ed] to a position for an indefinite period', which in turn means that (1) the assignment has no specified ending date and (2) the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions".

b. The R.C. 5739.01(JJ)(3) permanent assignment exception to "employment service" classification represents an exception/exemption to taxation. Thus, it must be strictly construed, with the taxpayer having the burden to prove entitlement to exemption.

c. The permanent assignment exemption is not conditioned upon the existence of contracts between the provider and its personnel/employees.

d. With respect to "permanent" assignment language, the mere presence of such language in the written contract does not automatically make the transaction exempt. The Court stated: "...we viewed the language of the contracts as one element that, along with the facts and circumstances of the individual assignments, established whether the provider was truly 'supplying personnel' in an exempt manner." Yet, this "one element" seems necessary in light of the statutory language that the "contract...specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis". Nonetheless, although "permanent assignment" language, or its equivalent, should always be included in the relevant contract when possible, the following portions of the Court's decision support that such language may arguably not be required if the personnel were in fact permanently assigned and the contract language was not conflicting:

- "*H.R. Options* is additionally significant because we construed the exemption as turning on the facts of each employee's assignment rather than on the presence of 'magic words' in the employment-service agreements themselves".
- Footnote 4: "As Bay points out, the *H.R. Options* contracts contained no such language themselves. The contract language in that case was significant to the extent that it provided a contract term of at least one year and that it did not otherwise conflict with the conclusion that the personnel were assigned on a permanent basis".
- "Indeed, instead of requiring the commissioner to focus on contract language in *H.R. Options*, we directed that official to look at two types of evidence when auditing a claim of exemption: (1) the employment-services contract itself, to see whether it is consistent with the requirements set forth in (JJ)(3), and (2) the facts and circumstances of the assignment, in order to ascertain whether in actual practice the assignment of the particular employees was 'indefinite' in character, or whether the assignments were seasonal, substitutional, or designed to meet short-term workload conditions.". (underlined added).
- "In *H.R. Options*..., the claim for exemption was potentially viable even though the contracts did not contain the magic words. That was so because *H.R. Options* viewed contract language as merely one important element of establishing entitlement to the exemption".
- "Despite R.C. 5739.01(JJ) (3)'s explicit reference to contract language, the statute justifies the focus on 'what actually is being done' by requiring that the provider actually 'supply [ ] personnel' on a permanent-assignment basis...that the employees are actually provided to work for an indefinite period--i.e., that they are not serving as seasonal workers, as substitutes for regular employees on leave, or as labor needed to meet a short-term workload".

The above arguably supports that, regardless of whether explicit contractual language exists, an assignment will be respected as an exempt permanent assignment arrangement as long as:

(i) The contract has at least a one-year term and language consistent with permanent assignment, without the need to use specific wording (while any wording cannot be inconsistent with permanent assignment).

(ii) The personnel are actually assigned indefinitely, rather than serving as seasonal workers, substitutes for regular employees on leave, or labor to meet a short-term workload.

***A.M. Castle and Company v. Testa*, Ohio BTA Case No. 2013-5851 (March 9, 2015)**. The taxpayer leased employees (truck drivers) "*as required to operate its vehicles.*" The Tax Commissioner asserted this contract language was insufficient to support their permanent assignment since it did not specifically state the number of provided personnel. However, consistent with most recent Supreme Court precedent, the BTA found that the personnel were provided on a permanent basis in the absence of "*magic*" permanent assignment language. This was based upon the following:

(iii) The "*course of action under the contract*" supported the personnel were intended to be permanently assigned and were not seasonal, temporary, or short-term; and

(iv) The individuals were not provided to other clients of the provider.

The BTA noted the number of permanently assigned employees need not "*be a static, specific number, which cannot be varied or adjusted based upon extrinsic factors, such as changes in business/operating conditions or employee performance; such specificity would require a level of certainty, as to the provider's and recipient's future business requirements, that clearly would be difficult, if not impossible, to predict*."

COMMENT: This decision highlights the ability to support permanent assignment through the parties' course of dealings reflective of such intent that the personnel are provided for an indefinite period. In addition, the provided number of personnel need not be fixed.

Accel, Inc. v. Testa, Slip Opinion No. 2017-Ohio-8798. The Court found the leased employees provided by Resource Staffing were nontaxable, qualifying for the one-year permanent assignment exception of R.C. 5739.01(JJ)(3) even though the number of provided personnel fluctuated significantly throughout the year and was greatest during the fall, as the holidays approached.

Consistent with its prior precedent, the Court stated that both the contract and facts and circumstances must be reviewed to determine if exception is warranted.

- Contract: Although the contract in the record did not have explicit wording specifying permanent assignment, contract wording is not critical. To support assignment for an indefinite period, the contract simply cannot specify an ending date. So, the focus is on an open ended contract (i.e., no language limiting the assignment).

- Purpose: The employee must not be provided as a substitute for a current employee who is on leave or to meet seasonal or short-term work load needs. In meeting this standard, the Court focused on the continuity of the workforce as supported by: (a) utilization of the same workers with only their hours being adjusted; and (b) the employees not being used for brief spikes associated with a busy season. The Court stated: "*Ultimately, the distinction between seasonal or short-term-work load employment and more regular employment is one of degree not of kind. In every enterprise, the workload may experience periods of ebb and flow.*"

Accordingly, the following facts should be present to support qualification for the one-year permanent assignment exception: 1) along with reciting a one-year term, the contract cannot include language supporting an ending date for any assignment; 2) the same employees should be supplied to the extent possible (i.e., while working for the provider and satisfactory to the client); and 3) the employees cannot be provided for work load spikes/busy season needs or as a substitute for a current employee on leave.

COMMENT: This decision highlights that the number of hours to be worked by permanently assigned employees need not be fixed.

Career Staffing, LLC v. Testa, Ohio BTA Case No. 2016-2617 (August 2, 2018). Employees provided to a meat processor/packager involving a physically demanding employment environment including severe cold and wet conditions were permanently

assigned despite fluctuation in the number of leased personnel provided. The fluctuation in leased employees was not due to seasonality or short term workload needs, but rather unique circumstances of employment. The intent was to provide permanent employees despite the frequent turnover. Moreover, the difficult employment environment causing such turnover was further supported by the fact that the particular lessee/customer used three separate employment agencies to fill its positions, but still could never satisfy its staffing needs.

6. Alternative Positions.

a. Tax base: only tax fee for service of providing or supplying the personnel?

b. Sale to exempt entity or holder of direct pay permit.

7. Summary.

a. Neither the manufacturing nor resale exemptions are available for the purchase of an employment service. However, effective January 1, 2007 sales to other employment service providers are not taxable.

b. When drafting contracts, be cognizant of supporting lack of supervision and control.

c. To qualify for the permanent assignment exception:

(i) there should be a written contract (although the exception could theoretically be met with an oral contract, as a practical matter, rarely would there be sufficient support; the taxpayer should be able to support that a breach of the oral contract with the provider would have occurred if the provider did not comply with the relevant one-year, permanent assignment terms – a very difficult task);

(ii) the contract should specify permanent assignment of the employees, using such language or similar language (and if it does not, any wording cannot be inconsistent with the intent to have personnel permanently assigned);

(iii) all relevant documentation must be consistent with permanent assignment, and there must be performance consistent with permanent assignment of the employees, which should include the following:

- Leased employees will not be rotated amongst different clients, meaning the provider cannot arbitrarily pull an assigned employee to provide such employee to another client (e.g., more profitable engagement).
- Provided employees are just as permanently assigned as client employees.
- The leased employee must not be provided as a substitute for a current employee who is on leave or to meet seasonal or short-term workload needs.
- When a client's use of leased employee decreases for a short duration, the leased employee is not reassigned to another client. However, if necessary, a temporary reassignment should not be a problem as long as the decrease was unforeseeable and the employee returns to the original client.

(iv) the contract must have an initial term of at least one year (and, if possible, automatic renewals for at least one year unless either party terminates the contract);

(v) if the service provider has a contract with its employees, it can not specify an ending date.

(vi) the provider's contract with its customer should be for an indefinite duration and not for clearly anticipated short-term assignments/projects or seasonal work; and

(vii) employees that may potentially be considered not permanently assigned should be provided under a separate contract to avoid the Tax Commissioner's "one bad apple" policy.

C. Landscaping and Lawn Care Service.

Maintenance Unlimited, Inc. v. Zaino, Ohio BTA Case No. 2000-N-1861 (August 9, 2002). Although taxable services include land clearing services, taxable services must be for ornamentation purposes and not for a construction / development purpose as in the instant case.

D. Building Maintenance/Janitorial Services.

Cousino Constr. Co. v. Wilkins (2006), 108 Ohio St. 3d 90. A construction company was engaged in making restoration improvements to real property damaged by fires. At issue were charges for specialized cleaning services paid to the company's subcontractors performed on schools damaged by fires before the company commenced the restoration process. The Court found the company to be the consumer of the services and, thus, liable for tax on their purchase. The resale exemption was not available since the benefit of the services was not resold in the same form as had been received but was consumed as part of the construction services.

Two Moms & A Mop, Inc. v. Wilkins (October 27, 2006), Ohio BTA Case No. 2005-T-1070. Taxable services include cleaning residential homes (and are not limited to cleaning commercial buildings).

Dunlop and Johnston, Inc. v. Testa, BTA Case No. 2014-1513 (February 19, 2015). Contractor's purchase of cleaning services on a construction project was taxable even if the real property was owned by a state or political subdivision since the services were not incorporated into such improvement (i.e., not affixed to the permanent structure but were post-construction activities).

Am. Sub. Bill 64 (2015): Building maintenance and janitorial services excludes sanitation services provided to meat slaughtering or processing operations necessary to comply with federal meat safety regulations under 21 U.S.C. 608.

Champion Cleaning Specialists, Inc. v. Testa, Ohio BTA Case No. 2015-788 (April 6, 2016). Taxpayer provided taxable cleaning services pertaining to kitchen exhaust hoods and ventilation equipment (but did not provide tangible personal property used to clean property used in the food service operation, as had been asserted, which would be exempt under R.C. 5739.02(B)(27)(c)).

Great Lakes Bar Control, Inc. v. Testa, 2018-Ohio-5207. The Taxpayer serviced customers draft beer systems by monitoring and inspecting the systems, unclogging lines when necessary (applying cleansing solutions), and other measures to "*ensure that the draft system is operating at its optimum performance*." Since cleaning was only a small/incidental aspect of the regular monitoring/inspection service, which included more than simply clearing the beer lines of clogging deposits, the BTA held that the services

were not taxable building maintenance and janitorial services, as cleaning the lines was ancillary to a nontaxable monitoring/inspection service.

The Ohio Supreme Court affirmed the BTA's decision further expanding upon its rationale based upon the meaning of "*cleaning*" in the context of a "*janitorial service*, rather than applying a "*hyper literal meaning of each word*." An expansive interpretation incorrectly ignores the context in which the term "*cleaning*" is used and is contrary to the law's intent. "*Cleaning*" is to be narrowly defined in the context of "*janitorial service*," leading to the conclusion that the activity of flushing beer lines was not a "*janitorial service*" under a common understanding interpretation.

The Court provided a non-exhaustive list of taxable janitorial services, such as washing floors, removing trash, vacuuming, and dusting. On the other hand, under an expansive interpretation of taxable janitorial services, which the Court refused to adopt, many non-janitorial services involving cleaning property would become taxable simply because the property was located inside a building. Such services would include hard-drive cleaning, data cleansing, dry cleaning, and fish cleaning (e.g., scaling, gutting), as all these services involve cleaning tangible personal property within a building.

The Ohio Tax Commissioner has been broadly applying taxable "*building maintenance and janitorial services*" to many types of non-janitorial type services simply because they involve cleaning tangible personal property in a building. The Court has now clarified that such application based upon a hyper literal meaning of the statutory definition is incorrect.

E. Private Investigation and Security Services.

Beck v. Zaino (August 20, 2004), Ohio BTA Case No. 2003-14-1257. The taxpayer was in the business of selling, installing and maintaining electronic security systems for industrial, commercial and residential customers. It did not actually provide the subsequent monitoring service, but accepted payment for the service which, presumably, was remitted to the monitoring company. At issue was the taxability of the monitoring service fees collected by the taxpayer - whether the taxpayer was providing a "private investigation and security service." The Board held that since the taxpayer accepted payment for the monitoring services, it was the "vendor" of such services, thereby requiring it to collect tax.

F. Electronic Information Services.

An "*electronic information service*" is defined as: "*providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following: (i) examining or acquiring data stored in or accessible to the computer equipment; (ii) placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.*" R.C. 5739.01(Y)(1)(c)

Marc Glassman, Inc. v. Levin, Ohio Supreme Court, Slip Opinion No. 2008-Ohio-3819 (August 5, 2008). A pharmacy's purchase of a service involving the electronic transmission of customers' medical insurance claim information from the relevant insurance companies was nontaxable and not an "electronic information service". To be taxable, the pharmacy must have access to computer equipment to receive data. The Court adopted the rationale of the Ohio Board of Tax Appeals in ***PNC Bank, Inc. v. Tracy*** (1995), BTA No. 93-T-1316 involving the mere transmission of credit card authorization information which was found to be a nontaxable service. The Court concluded that the pharmacy did not receive data, but merely the insurance companies' conclusions as to

coverage. Moreover, the pharmacy did not have access to the insurance companies' computers.

COMMENT: The Tax Commissioner was prepared to extend a taxpayer loss to many other transactions such as credit card authorization transactions.

H.B. 466 (2016).

"*Digital advertising*" services are now expressly excluded from an otherwise taxable electronic information services. R.C. 5739.01(Y)(2)(k). This is defined as: "*providing access, by means of telecommunications equipment, to computer equipment that is used to enter, upload, download, review, manipulate, store, add, or delete data for the purpose of electronically displaying, delivering, placing, or transferring promotional advertisements to potential customers about products or services or about industry or business brands.*" R.C. 5739.01(RRR).

The statute now clearly exempts inventory advertising services and portions of mass email-services that had been determined to be taxable by the Tax Commissioner (Information Release ST 1999-04 - On-Line Services and Internet Access Revised Dec. 2015). Exemption applies on a prospective basis.

America's Pizza Co., LLC v. Testa, BTA Case No. 2016-1551 (September 5, 2017). A vendor (pizza restaurant) was taxed on services involving an Internet-based food ordering system. The system was used to receive, price and transmit orders placed by customers originating from a web browser filled by businesses that provided carryout food or delivery services. The food vendor (taxpayer) placed all of its information (i.e., menu, price specials, coupon and delivery time information) into its own computer equipment for purposes of being acquired by the service provider for its use in creating, updating or changing the taxpayer's order site. The services were taxable electronic information services because the service provider received food order data from customers via computer equipment and such data was accessible to the taxpayer's computer equipment. A hearing before the BTA was not held.

G. Computer Services.

Global Knowledge Training, L.L.C. v. Levin, 2010-Ohio-4411 (September 23, 2010). At issue was the scope of taxable computer services. The taxpayer provided training courses with respect to the use of routers and switches, as well as training for beginning computers users (as opposed to experienced programmers). The Supreme Court held:

1. The taxpayer's Constitutional objections (violation of First Amendment/freedom of speech and Equal Protection) could not be considered due to the Court's lack of jurisdiction from the failure to specify the objection before the BTA. The objections could not be raised for the first time before the Court as being a "facially unconstitutional" content based violation because the statutory language making computer services taxable did not distinguish between application and system software. Only the Ohio Administrative Code made such a distinction, and per Supreme Court precedent only the text of the statute may be considered when evaluating "facial" challenges.

2. The claim that the terms "computer equipment" and "computer systems" were unconstitutionally vague could not be considered since it was not specified in the notice of appeal filed with the Court.

3. "Computer systems" include routers and switches so that training with respect to the same was taxable.

4. Two computer training courses pertained to application software and not system software, thereby making them nontaxable.

5. Taxable computer training is not limited to training core computer personnel (e.g., IS / IT type personnel). Training of any employees with respect to the operation of a computer is taxable. This effectively reverses the BTA's decision in *Mentor* ***Technologies Ltd. Partnership v. Tracy*** (August 25, 1995), BTA No. 94-A-1058.

H. Automated Data Processing Services.

Tax Commissioner Opinion 14-0001 (February 4, 2014). The wholesale of software applications via access to the taxpayer's computer hardware to support the customer's telecommunications equipment is taxable as an automatic data processing service. The core purpose for such cloud-computing services was allowing customers to access computer hardware equipment to process their data. This includes the separate charges for software hosting services. The service is situsedto Ohio for customers accessing it within Ohio (and thereby benefiting in Ohio). However, the taxpayer need not collect tax upon receipt of a multiple points of use exemption certificate (so that the customer must pay tax on Ohio use).

The taxpayer's software and hardware used to provide the cloud based services was not subject to Ohio tax due to its location outside Ohio.

Tax Commissioner Opinion **14-0002** (February 4, 2014). Collection services consisting of performing billing and collection activity for healthcare providers were nontaxable. However, the preparation of reports and entering data was taxable as an automatic data processing service, while the separate statement fees for printing and mailing statements (including return envelopes) was deemed to be the taxable sale of tangible personal property. The Tax Commissioner suggested that the price for the taxable items be separately stated to avoid the entire fee being taxable.

Columbus Oncology Associates, Inc. v. Testa, Ohio BTA Case No. 2014-3984 (September 28, 2015); ***Dayton Physicians, LLC v. Testa***, Ohio BTA Case No. 2014-3986 (September 28, 2015). Medical transcription services were taxable automatic data processing services (not personal/professional services). The transcriptionist merely reduced a physician's recordings to a precise written form and did not alter, analyze, interpret or adjust the physician's dictation (i.e., verbatim transcript of physician's spoken words). The Board further noted the transcriptionists had no specialized training, licensing, certification or overseeing regulatory authority.

Dayton Physicians, LLC v. Testa, Ohio Ct. App., Dkt. No. 26881 (August 12, 2016). Affirming the BTA, the Court of Appeals found medical transcription services to be taxable ADP. The purchaser's sole objective was to create a verbatim record of the physician's dictation, while the transcriptionist did not apply any cognitive skills or analytical thought to study, alter, analyze, interpret or adjust the data so as to become personal or professional services.

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***, 2nd Dist. Montgomery No. CA 26881, 2016-Ohio-5348.

Cincinnati Federal Savings & Loan Co. v. McClain, Slip Opinion No. 2022-Ohio-725 (March 15, 2022). The Court addressed whether "*account processing services*" purchased by Cincinnati Federal were taxable. The services involved software used to automate maintenance of the bank's accounting and financial records on an ongoing real-time basis. The record reflected that the service provider made modifications to prewritten software based on Cincinnati Federal's specific needs, while also including some ADP and EIS aspects. The Tax Commissioner asserted that the charges at issue were for taxable ADP and EIS requiring the use of the software, but were not direct purchases of the software itself. The Court found that the services included nontaxable custom software but the BTA failed to examine the true object of the service.

When there is a "mixed transaction" that involves the purchase of taxable (ADP and EIS) and nontaxable items (e.g., custom software), the "true object" test must be applied to determine the taxability of the components. Therefore, the Court remanded the case to the BTA to determine whether the true object was customized software or ADP/EIS.

Finally, the Court rejected Cincinnati Federal's contention that the automated services constituted nontaxable accounting services.

I. Satellite Television.

DirecTV, Inc. v. Levin, Slip Opinion No. 2010-Ohio-6279 (December 27, 2010), U.S. Supreme Court, Dkt. No. 10-1322, petition for certiorari denied June 25, 2012. The issue was whether the Ohio statute imposing sales tax on satellite broadcasting services violated the Commerce Clause of the United States Constitution since cable broadcasting services are not taxed. The Court held as follows:

1. The Commerce Clause protects interstate commerce, but not particular interstate firms or particular structures or methods of operation in a retail market, by prohibiting measures that provide a direct commercial advantage to in-state economic interests thereby discriminating against out-of-state competitors. However, differential tax treatment of two categories of companies resulting solely from differences between the nature of their business, and not from the location of their activities, does not violate the Commerce Clause.

2. Thus, imposing a sales tax on satellite broadcasting services but not on cable broadcasting services does not violate the Commerce Clause because the tax is based on differences between the nature of those businesses, not the location of their activities. Moreover, it does not favor in-state interests at the expense of out of state interests.

3. Ohio's statute taxing satellite broadcasting services focuses on the technological mode of operation, not the geographic location, and while distinguishing between different types of interstate firms, it does not favor in-state interests by discriminating against out-of-state enterprises. The sale of satellite broadcasting services is subject to tax regardless of whether the provider is an in-state or out-of-state business and without regard to local economic activity or investment in Ohio.

This holding is consistent with all other non-Ohio jurisdictions addressing the issue.

J. Local Transient-Occupancy Taxes.

City of Columbus, et al. v. Hotels.com, et al. (September 10, 2012), U.S. Court of Appeals, 6th Circuit No. 10-4531. Online travel companies (OTCs) were not liable for local transient-occupancy taxes authorized by R.C. 5739.08 since they did not perform functions associated with "owning" or "operating" hotels as required by each of the relevant local ordinances. The cities asserted the OTCs owed tax on the spread between the customer retail charge and their wholesale rate. Moreover, the OTCs did not collect from customers' amounts designated as taxes that should have been remitted to state or local authorities. No evidence was presented that the OTCs advised customers they collected "taxes".

III. EXEMPTIONS

A. Resale.

Property or the benefit of services that are resold in the same form in which received by the vendor are exempt from tax upon their purchase. *See* RC §5739.01(E)(1). In order to have a sale, there must be consideration in support of the transfer of the property or the benefit of the service.

Bank One, Akron v. Limbach, Ohio BTA Case No. 89-N-944 (December 31, 1992). Credit authorization equipment conveyed to retail merchants was resold since the bank received sufficient consideration. Consideration includes an act or forbearance to act. The agreements between the bank and retail merchants contained many required acts and forbearances (i.e., displaying signs notifying public of acceptance of the bank's credit card).

Laurel Transp., Inc. v. Zaino, (2001), 92 Ohio St.3d 220. Exemption was not available for aircraft and related costs provided as part of a charter service even though the taxpayer's employees did not operate the aircraft. The taxpayer contracted with another entity to maintain the aircraft and furnish the fuel and pilots. The taxpayer was deemed to be the "provider" of an operator (thus, remaining in possession and control of the aircraft) even though such operator was not the taxpayer's employee. The Court stated: "Laurel controlled the aircraft by contracting with [the other entity] to fly the aircraft." Different result if customer contracted directly with the separate entity to provide the airline pilot?

A.M. & J.B., Inc. v. Zaino, Ohio BTA Case No. 99-T-1387 (December 14, 2001). Following the Supreme Court's decision in ***Laurel Transp. Inc. v. Zaino*** (2001), 92 Ohio St. 3d 220, the Board held that an airplane was not leased to another entity, which provided the flight crew and other management services used in chartering the airplane. Since A.M. & J.B. retained significant control over the airplane and the management entity was its agent, there was no true sale (via lease) of the airplane.

The Board's decision denying the resale exception for charter aircraft was affirmed. Sufficient control over the aircraft was not relinquished to the "lessee". Cuyahoga County Court of Appeals, Eighth Appellate District, No. 80734 (December 26, 2002).

Standards Testing Laboratories, Inc. v. Zaino (2003), 100 Ohio St 3d 240. The Court affirmed the Board's decision allowing the resale exception for tires and special parts purchased by a tire testing lab on behalf of its customers. When the lab took delivery from its vendors on behalf of its customers, it simultaneously completed performance and delivery to its customers, passing title thereto in exchange for consideration; thus, a resale of the property occurred. The purchase of property was first authorized by the customer and then identified as pertaining to the customer when it was received. The property was also separately invoiced to the customer.

KB Learning Center, Inc. v. Wilkins (November 10, 2005), Ohio BTA Case No. 2004-R-1161. A company providing computer training services was liable for use tax on computer equipment, software and training materials since they were deemed consumed as an inconsequential component of a personal service for which there was no separate charge. Accordingly, the resale exemption was not available for their purchase.

Handl-It Inc. v. Wilkins (March 7, 2008), Ohio BTA Case No. 2006-M-492. A company providing packaging services for businesses did not resell its packaging material because it was not conveyed in the same form in which it had been received. However, the Board noted that this objection could not be considered because it was not preserved by the taxpayer in the administrative appeal before the Tax Commissioner or in its notice of appeal filed with the Board.

COMMENT: The Board recited testimony as to plastic being heated to form molds; its shape and form was changed. This would seem to support exemption for the materials as a component of a manufactured product for sale. *See* ***Express Packaging, Inc. v. Limbach*** (September 18, 1992), Ohio BTA Case No. 89-K-22 (requisite transformation in state or form existed with respect to shrink wrapping and blister packaging operations performed for other companies).

Beckstadt v. Levin (April 20, 2010), BTA Case No. 20007-U-936. The taxpayer's extensive personal use of a boat (650-hour trip) precluded application of the resale exemption. A taxable purpose was also supported by the fact that the boat was financed in the taxpayer's and his wife's names and he insured the boat in his individual name (rather than the name of his business). Further, the boat was sold two years after its purchase.

Tan Pro, Inc. v. Levin (April 8, 2014), Ohio BTA Case No. 2010-A-2425; appeal pending with Ohio Supreme Court (Case 2014-0725). The taxpayer claimed the resale exemption with respect to tanning beds, ultra-violet radiation, tanning lamps, privacy partitions, sanitation chemicals, and disposable wipes. However, this ***property*** was not resold to the taxpayer's customer in the same form as purchased (nor was it permanently transferred to the customers) so as to qualify for the resale exemption. The taxpayer was the consumer of these items rendered in providing its personal care services.

Reflex Traffic Systems, Inc. v. Testa (October 24, 2014), BTA Case No. 2012-2997. Electronic monitoring equipment used in traffic enforcement was not sold to the underlying municipalities under a limited license. It was used by the contractor in providing its monitoring services to the municipalities. Critical to the BTA's finding was that the contractor "*retains exclusive title and possession of the property*". The municipal

customers had no interaction with the property after its placement. They had no meaningful access or control over the underlying equipment.

Dotzauer v. Testa, BTA Case Nos. 2014-2030, 2014-2076 (February 27, 2015). At issue were six cars purchased outside Ohio but brought into Ohio and subsequently shipped back out. The taxpayers asserted they were "brokers/agents" and had no intent to "use" the vehicles in Ohio or to do business in Ohio. The vehicles were simply transported through Ohio on their way to a port for delivery outside the United States. They also asserted exemption from use tax because they were engaged in sales for resale.

The BTA disagreed, noting that although the six vehicles were physically in Ohio at the taxpayers' residence for periods ranging from a few hours to less than one week while waiting to be transported outside Ohio, the taxpayers exercised ownership and control over the vehicles. The BTA also denied the resale exemption since the taxpayers were not licensed motor vehicle dealers, but rather "brokers/agents." Therefore, by not being properly licensed to legally sell motor vehicles, the taxpayers could not "avail themselves of the exemption from the sales / use tax of such sales."

COMMENT: The BTA denied the resale exemption because the taxpayers were not licensed since, presumably, they were not required to be licensed due to the sales not occurring in Ohio. Moreover, there are many situations where vehicles are resold via lease to related entities in the absence of licensing. Nonetheless, the resale exemption is still available.

Pi in the Sky, LLC v. Testa, 2018-Ohio-4812. The Taxpayer, purchased an airplane for lease (via "dry lease") to its sole corporate member, Mitchell's Salon and Day Spa (Mitchell's). The purchase was financed by a personal loan from Mitchell's president, Deborah Schmidt, and guaranteed by the Taxpayer. The Taxpayer then leased the aircraft to Mitchell's. The Court affirmed the BTA's conclusion that the Taxpayer/lessor was not "*engaging in business*," as required by the resale exemption of R.C. 5739.01(E).

A person claiming the resale exemption must show that it purchased and resold the item "*with the object of* gain, *benefit, or advantage.*" *See* R.C. 5739.01(F). In this case, the following factors supported that the Taxpayer was not engaged in business and its lease to Mitchell's lacked substance:

- The lease's rental rate was far under FMV (although Mitchell's was responsible for all operating, maintenance, and storage costs related to the aircraft).
- Mitchell's lacked a business purpose for the airplane, as its hair salons and spas were located in Cincinnati.
- Deborah Schmidt executed the lease on behalf of both lessor and lessee.
- The airplane was not advertised, marketed, or leased to any other lessees.
- The airplane was financed through a personal loan obtained by the owner / corporate officer (Deborah Schmidt).
- Flight logs indicated a lack of business-related destinations or passengers – in fact, many flights appeared to be to or from Ms. Schmidt's lake house in northern Michigan.

While the Court focused on whether the Taxpayer was "*engaged in business*" (i.e., operating with the purpose of earning a profit or gain), the Tax Commissioner had invoked the rarely used sham transaction doctrine to disregard the airplane lease. R.C. 5703.56(A)(1).

Although this case presented particularly unfavorable facts, compounded by the Taxpayer waiving its right to present evidence to refute these facts at the BTA evidentiary hearing, it serves as a caution that the form of transactions may be disregarded when lacking any substantive business purpose.

Domokur Aviation Services, LLC v. McClain, Ohio BTA Case No. 2019-694 (September 15, 2020). Applying the Supreme Court's decision in ***Pi in the Sky, LLC v. Testa***, 155 Ohio State 113, 2018-4812, which involved parallel facts, the BTA denied the resale exemption for a $2.9 million aircraft purchase. The BTA cited the following factors to support its finding that the taxpayer was not engaged in a for-profit business operation to support the resale exemption:

- The aircraft was not openly marketed to others (outside the related party lessee).
- The rental rate was not established to be commercially reasonable.
- The taxpayer entity was not separable from the owner/lessee.

The BTA concluded there was no legitimate business purpose because the taxpayer did not have the intent to operate an actual leasing business. Of course, the taxpayer's hurdle was compounded because there was not a requested evidentiary hearing, the taxpayer was represented by an Indiana attorney not admitted in Ohio, and the taxpayer's brief was not accepted.

Cincinnati Reds, LLC v. *Testa,* 2018-Ohio-4469. In reversing the BTA, the Court held that the Reds were exempt from tax on its purchase of bobbleheads and other promotional items. The promotional items were resold, i.e., conveyed to the attendees for consideration, since their cost was included in the ticket price and induced the ticket purchase. *"[F]ans did not receive the promotional items unexpectedly or by chance. Instead, the unique promotional items were an explicit part of the bargain, along with the right to attend the game, that the fans obtained in exchange for paying the ticket fee."*

The Reds advertised the promotional items before the games, and fans purchased tickets "*with the expectation they will receive a promotional item.*" Moreover, the Reds attempted to purchase enough items so that all attendees received one and tried to remedy the situation for fans who do not receive them. Therefore, the Reds received "*consideration*" since the promotional items were part of the bargain of the fans' ticket purchase and attending the game. The Court distinguished these promotional items, which the Reds were obligated to provide, from other items fans have no expectation of receiving, such as t-shirts tossed into the stands or a foul ball.

Karvo Paving Co. v. Testa, Ohio Ct App., 9th Dist., C.A. No. 28930 (September 30, 2019). The Court upheld the BTA's finding that Karvo leased traffic maintenance property, such as barrier walls, traffic signs, etc., to ODOT during road paving contracts. ODOT possessed this property while Karvo performed its contracts because ODOT specified the type, quantity, and placement of the equipment, while Karvo had no interaction with the property after it was installed. Further, this property was used by ODOT to fulfill its public duty to safely maintain traffic on Ohio's highways. Accordingly, the traffic maintenance property was entitled to the resale exemption upon Karvo's purchase.

COMMENT: This decision was codified in H.B. 33 (effective 10/1/23).

The Auto Place, LLC v. McClain, Ohio BTA Case No. 2015-474 (July 25, 2022). Collectible cars "*that may increase in value over time*" were found to be an extension of a "hobby and passion" of the individual owner and, therefore, did not qualify for the resale

exemption. This purpose, even though with an ultimate profit motive, did not constitute "*engaging in business*" (i.e., not purchased as a dealer to use as a commodity to generate a profit or gain even though there was a dealer's license). Although the owner was a businessman, he was not a businessman in the business of buying and selling collectible cars. The cars were not sold frequently or consistently reported as inventory on the relevant Federal income tax returns.

Haverty et al. v. Harris, Ohio BTA Case No. 2020-1125 (August 24, 2023); **Kim v. Harris**, Ohio BTA Case No. 2020-1124 (July 25, 2023). Cars that had been purchased and then modified in Ohio did not qualify for the resale exemption because their form had changed after purchase. The BTA also noted that the resale exemption was not available because the taxpayer did not have a dealer's license.

COMMENT: Query whether there is definitive authority requiring a dealer's license to claim the resale exemption with respect to automobiles such as via captive lease arrangements. Also, the manufacturing exemption would appear to be available in these cases.

B. Manufacturing.

Exemption is available for property primarily used in a manufacturing operation to produce tangible personal property for sale. RC §§RC 5739.02(B)(42)(g) and 5739.011.

1. Status.

Accel, Inc. v. Testa, Ohio Supreme Court, Slip Opinion No. 2017-Ohio-8798. The taxpayer assembled gift sets, consisting primarily of health and beauty products (i.e., shampoos, lotions, shower gels, etc.), for major retailers such as Bath and Body Works and Victoria's Secret. There was a three stage process – a design phase, a planning phase, and an assembly phase. The gift sets were found to be a discrete consumer good, not packaging. Although the operation to produce a gift set was not typical manufacturing involving a change in state / form, the taxpayer was found to be engaged in "*assembly*" – putting together various parts to make an operative whole. Assembling is included within the definition of a "manufacturing operation" under R.C. 5739.01(S) – a new functional (or in this case, aesthetic) whole. Any packaging aspect was incidental to the assembly which created a new product.

2. Use In Manufacturing Tangible Personal Property For Sale.

Stein, Inc. v. Tracy, Ohio (1999), 84 Ohio St. 3d. Taxpayer was engaged in the business of slag/scrap reclamation activities on property owned by various steel manufacturers. Equipment provided to the steel manufacturers with operators was not considered leased thereto since the operators were employees of the taxpayer. Therefore, the resale exemption was not available. However, the Court held that since the equipment was used directly in the production of steel exemption was available even though the taxpayer did not sell the steel being manufactured.

3. Beginning of Manufacturing Operation.

The manufacturing operation begins when the raw materials are committed to the manufacturing process. OAC Rule 5703-9-21(B)(1). Raw materials are committed upon the earlier of:

a. the cessation of material handling from initial storage (or place of receipt if no initial storage); or

b. the point at which the materials are mixed, measured, blended, heated, cleaned or otherwise treated or prepared for the manufacturing process. Id.

To evidence commitment, the materials should be used shortly after the point of commitment under the above rules. Id.

Sims Brothers, Inc. v. Tracy (1998), 83 Ohio St. 3d 162. Scrap metal recycling company was not entitled to exemption for crane and related items. The cranes were used before and after production (and did not participate in any transformation). For example, some of the cranes were found to merely load the crusher (scrap segregating activity was pre manufacturing and did not involve a commitment of such raw materials). Most disturbing about the decision is the Court's statement that materials are not "committed" until they are "changed in such a manner that their original form is altered, such as when a liquid and solid are mixed to create a solution." This is contrary to OAC Rule 5703-9-21(B)(1).

CWM Resource Recovery, Inc. v. Tracy, Ohio BTA Case No. 97-L-811 (June 30, 2000). The taxpayer's activity of reclaiming and recycling industrial solvents and other materials for sale was a manufacturing operation, even though the volume of generated waste product exceeded the saleable product. Accordingly, exemption was available for various items used primarily in the manufacture operation. This included:

a. supplies used in equipment that automatically records test results (apparently distinguishable from the taxable computer in Example 19 of OAC Rule 5703-9-21 since it records the test results automatically); and

b. tanks, coolers and a nitrogen chiller system necessary to safely maintain nitrogen used in manufacturing.

In determining whether material in drums was committed to the manufacturing process, thus marking commencement of production, the Board applied the Supreme Court's test set forth in ***Simms Bros., Inc. v. Tracy*** (1998), 83 Ohio St.3d 162, which focuses upon when a change in state or form of the material occurs. Again, this is contrary to OAC Rule 5703-9-21(B)(1). Accordingly, exemption was not available for a hydraulic lift used to lift and load drums (which had previously been transported from initial storage by a forklift) into a nitrogen evacuation chamber of the drum dispersion unit. The manufacturing process commenced in the drum dispersion unit.

Safety-Kleen Corp. v. Tracy, Ohio BTA Case No. 95-L-1092 (December 11, 1998). Cone-bottom tanks used in the taxpayer's solvent recycling business to separate materials in solvents were exempt from tax. The taxpayer established that the manufacturing process began in the tanks where heavy metals and particulates separate out of the solvent to the bottom of the tank through gravity. High level alarms utilized to warn when tank levels were high were not exempt from tax (not exempt safety property since they warned all persons in the facility not just production workers).

Harsco Corporation Heckett Multiserv Division v. Tracy, Ohio BTA Case No. 97-P-1560 (April 14, 2000). Manufacture of slag began when unprocessed molten slag was poured into Harsco's slag pots. The unprocessed slag was a byproduct of the steel-making process that contained entrained metals. Harsco separated and removed the metals which were then sold to the steel-maker. The conical shape of Harsco's slag pots promoted a gravity separation process causing metallic elements to settle to the bottom of the slag as part of

Harsco's first stage of separating the entrained metals. Exemption for the slag pots was available since the change in state or form of the slag occurred when the slag was in the pots, which were designed to effect the desired change. The slag pots were primarily used for that purpose (and not to facilitate transportation).

Slag pot carriers were also exempt from tax since they participated in the various processes conducted to separate the metal.

Aeroquip Corporation v. Tracy, Ohio BTA Case No. 97-T-1612 (December 15, 2000). Manufacturing process commenced upon application of a stencil to bar stock. The Board exempted a furnace chart monitor attached to the company's brazing furnace and used to track the internal temperature of the furnace. In addition, the following property was exempt:

- bridge cranes (in process transportation); quantified primary use established through a time study (primary use could also have been established by other means, such as amount processed).
- bar carts (holding committed materials).
- mist collection system as well as coolant/chip processing system (recycling materials back into the manufacturing process).
- repairs to an oscilloscope used for testing.
- software that programmed production equipment

A CADCAM system was found to be taxable as being used for producing drawings to be used for programming equipment rather than used for producing construction sets that program machines. Also taxable were environmental control systems (not totally enclosed or sealed area) and software used to simulate manufacturing processes.

Haessly Hardwood Lumber Co. v. Zaino, Ohio BTA Case No. 00-J-1623 (September 20, 2002). A manufacturer of hardwood lumber was entitled to exemption for saw sharpening equipment since the equipment actually re-manufactured dull saw blades which were an integral part of manufacturing equipment used to saw wood (i.e., use on use exemption). The equipment was also exempt as being necessary for the functioning of production machinery and equipment and the continuation of the manufacturing operation. The Tax Commissioner had contended the property was taxable repair equipment.

Aeroquip Corporation v. Zaino, Ohio BTA Case No. 00-161 (November 15, 2002). The Board exempted a conveyor transporting raw material to a saw connected to the conveyor. Even though the material was not converted or transformed, it was committed to the manufacturing process, having been placed onto the conveyor by a crane which removed the material from storage.

Ellwood Engineered Castings Co. v. Zaino (January 23, 2004), Ohio BTA Case No. 2000-M-391 on remand from the Ohio Supreme Court, 98 Ohio St. 3d 424. Recognizing an independent contractor's activities of transforming Ellwood's raw material inventory (ingot molds) was a separate manufacturing process within Ellwood's manufacturing facility, the Board held that Ellwood's boom crane which subsequently handled such ingot molds was taxable because the molds were not "committed" raw materials for purposes of marking the commencement of Ellwood's manufacturing operation since Ellwood did not participate in their prior transformation in state or form. The Board relied upon the Supreme Court's decision in ***Simms Bros., Inc. v. Tracy*** (1998), 85 Ohio St. 3d 162. The

Board's decision appears to be inconsistent with the manufacturing rule (OAC. Rule 5703-9-21) which specifically provides that raw materials are "committed" to the manufacturing process when either material handling from initial storage has ceased or there has been some affirmative action, such as their mixing, measuring, blending, heating, cleaning, treating or preparation (and not necessarily whether they have been transformed in state or form). Although only one of these events need be proven to mark commencement of the manufacturing process, both occurred prior to the handling of the broken molds by Ellwood's boom crane at issue. Nonetheless, the Board held that the molds were not committed. It was not clear that either event occurred in ***Simms***.

Note: My understanding is that as part of obtaining consensus on the major changes made in the manufacturing exemption in 1990, there was to be an acceleration of the deemed beginning point of the manufacturing process, consistent with the current manufacturing rule. The parties who negotiated the legislation agreed that there need not be a transformation of raw materials to commence the manufacturing process.

Lafarge North America, Inc. v. Testa, 2018-Ohio-2047. The taxpayer used bull-dozers, loaders, and dump trucks to break up and transport slag from a slag mountain where it had been stored as a by-product from molten ore during steel making. The bull-dozers ripped slag from the slag mountain, crushing it to form a pile. Then, front-end loaders transferred the crushed slag to dump trucks to be transported to a screening plant on the premises, where it was sorted by size and used in manufacturing steel. The taxpayer asserted this equipment was entitled to the manufacturing exemption since it changed the form of the slag (not for purposes of facilitating transportation from initial storage) and transported it as work-in-process.

The issue was when the manufacturing operation commenced – when the slag was broken up from the mountain or not until it had been transported to the screening plant? A manufacturing operation begins when raw materials are committed to the manufacturing process. Ohio Admin. Code 5703-09-21(B)(1). As relevant to these facts, raw materials are committed when some affirmative action is taken in furtherance of manufacturing, such as mixing, measuring, heating, or otherwise treating or preparing the materials for manufacturing.

The Supreme Court found that the slag, a raw material in steel production, was committed to manufacturing when it was broken up and cut from the slag mountain. At this point, the slag was transformed into smaller, marketable pieces to be transported to the screening plant and used in manufacturing steel. Therefore, the equipment at issue, including its fuel and repair parts, was exempt from Ohio use tax.

Marion Ethanol, LLC v. McClain, Ohio BTA Case No. 2017-337; 2017-338 (May 16, 2019). The BTA held that the Taxpayer's manufacturing / refining operation for corn-based products commenced when the corn passed a magnet, rather than at a subsequent point at the "scalper." Taxpayer delivered corn by truck and emptied it into hoppers which then funneled the corn onto a conveyor transporting the corn past a strong magnet designed to remove any metal contaminates. After passing the magnet, the corn is emptied into bins and then proceeds into a scalper where more debris is removed.

The corn was committed to the manufacturing process, thereby making the commencement thereof, at the magnet because the magnet "refined" the corn by removing metal contaminants and readying the corn for manufacturing. The BTA further explained that, as required for exemption, the corn was committed at the magnet due to

the continuous, integrated manufacturing operation where the corn, after passing by the magnet, could not be removed from the manufacturing operation without proceeding through the remainder of the manufacturing process.

Additionally, the Taxpayer sought a refund for hydrogen peroxide used during the manufacturing operation, despite signing an agreement with the Tax Commissioner that 95% of the hydrogen peroxide used by Taxpayer was for taxable cleaning uses. The agreement contained a provision that the agreement did not constitute an admission of liability or prevent the Taxpayer from appealing. However, the BTA held that the agreement was still valid, precluding the Taxpayer from challenging that less than 95% of its hydrogen peroxide was used for cleaning.

4. End of Manufacturing Operation.

The manufacturing operation ends when the product is complete. The product is complete when it is in the form and condition as it will be sold by the manufacturer. An item is complete when all processes that change or alter its state or form or enhance its value are finished, even though the item will subsequently be tested to ensure its quality or be packaged for storage or shipment. ORC §5739.011(A)(5). *See*, OAC Rule 5703-9-21, Example 64 (ice cream is not complete until it leaves the hardening room; processes that change its state or form are not complete until then).

Anheuser-Busch, Inc. v. Tracy (1999), 85 Ohio St. 3d 514. A beer manufacturer's production process ended after the beer was pasteurized in its capped, unlabeled bottles. Pasteurization promoted its shelf life by killing bacteria. Therefore, property pertaining to the placement of labels on the bottles was not exempt production equipment. This consisted of bottle dryers, a video jet coding machine and glue rollers. The Court stated: "they play no role in changing, converting, or transforming ingredients into beer."

This property was not exempt under the packaging exemption either. The Court stated "because codes and labels are not essential in restraining movement, the equipment that prepares the bottle for labeling and coding, applies glue to labels, or codes the bottle does not qualify as packages or packaging material under R.C. 5739.02(B)(15)." Moreover, the equipment at issue was not an integral part of machinery or equipment used to place the product in a package. It was "not used to place the beer into packages."

The Iams Co. v. Zaino (June 30, 2005), Ohio BTA Case No. 2003-B-1254. Property used in screening produced pet food before being packaged was exempt from tax. The screener's vibrating motion removed small burrs to change the form and smooth the rough edges into its final saleable state (enhancing its value).

5. Material Handling Equipment.

Navistar International Transportation Corporation v. Tracy, BTA Case No. 93-H-1000 (October 20, 1995). Equipment at issue (automatic skid retrieval system) qualified for the pre and post July 1, 1990 exemption available for transportation equipment used in intraplant or interplant transfers of work in process, even though it merely stored and selected skids upon which the product was subsequently processed. The product was not being processed while the retrieval system was in operation. A scissors lift, which assisted in the return of the empty skids to storage, was also exempt material handling equipment.

The Board interpreted the Supreme Court's decision in ***AT&T Technologies, Inc. v. Limbach*** (1994), 71 Ohio St. 3d 11, to expand what constitutes being "in the process of

production" (even though such case involved equipment that actually transferred work in process).

6. Used During and Necessary for Production.

Wyandot, Inc. v. Tracy, Ohio BTA Case No. 95-J-1338 (October 3, 1997). A snack food manufacturer was not entitled to exemption for a mezzanine and stairs that provided access to kettles used during the cooking process. They were found to be used to merely monitor the manufacturing process and did not play a direct role.

Landmark Plastic Corp. v. Lawrence, Ohio BTA Case No. 99-K-499 (March 31, 2000). The taxpayer manufactured plastic products for horticulture packaging. Overhead cranes used to install tooling into the taxpayer's thermo-forming machines and to load injection molds into its injection molding machines were exempt under RC 5739.011 (B)(4) as being necessary for the functioning of production machinery and the continuation of its manufacturing operation. The Board did not address OAC Rule 5703-9-21(C)(5) and (D)(9) which appear to clearly make the cranes taxable. See also, Ex 18, 55, 56, and 58.

The taxpayer's cranes used in its maintenance and tool room to "build and modify equipment, molds and tools" were taxable. Should exemption have been available under the "use on use" exemption.

Q3 Stamped Metal, Inc. v. Zaino (2001), 92 Ohio St.3d 493. Reversing the Ohio Board of Tax Appeals, the Supreme Court found that a forklift used to remove and replace dies in a stamping press did not qualify for exemption. The dies were changed whenever the product changed. The forklifts were not used "during" the manufacturing operation. Moreover, the press functioned, and production continued, without the forklifts.

L-S II Electro Galvanizing Co. v. Zaino, BTA Case Nos. 98-G-412 and 99-G-244 (June 29, 2001). A steel producer's grindstone system used in the production of galvanized steel was exempt from tax since it prevented imperfections from appearing on conductor rolls transferred to steel strips. The grindstones were necessary to make galvanized steel saleable; any cleaning purpose was ancillary.

McCarthy Industrial Contractors, Inc. v. Zaino, Ohio BTA Case No. 2002-N-1197 (May 30, 2003). Equipment used to remove metal shavings that fell into a grinding machine from its grinding wheel was exempt from tax. The equipment removed the shavings similar to a vacuum cleaner. It was exempt under R.C. 5739.011(B)(4) since it was necessary for the functioning of production equipment, which was impaired and would eventually cease if the shavings were not removed.

Perren v. Testa (August 29, 2014), Ohio BTA Case No. 2013-614. The Board denied exemption for the taxpayer's purchase of a "caustic" solution applied to a die after a manufacturing cycle as part of the die's prep for the next production run. The caustic solution was used to remove aluminum residue that collects in a die from a current manufacturing run. It was taxable because it was used to maintain/repair the dies for use in manufacturing and not necessary for the continuation of the manufacturing operation, being used only when manufacturing had ceased. The Board relied upon the Supreme Court's decision in ***Q3 Stamped Metal, Inc. v. Zaino*** (2001), 92 Ohio St. 3d 493 which found to be taxable a forklift used to remove dies from a press before/post manufacturing.

The Granger Plastic Company v. Testa, BTA Case no. 2014-2884 (July 16,2015). A platform used to hold underground tornado shelters while they were being manufactured

was exempt. Parts were welded and bolted onto the shelters while they were on the platform.

7. Testing Property.

USS/Kolbe Steel Company v. Tracy, Ohio BTA Case No. 98-J-731 (January 14, 2000). Steelmaker's moisture analyzer that tested the moisture content of coke and coal to ensure the quality of the finished product was exempt as testing equipment used as part of a continuous manufacturing operation; the testing was physically and functionally integrated between steps on the production line. (Apparently, such a finding was necessary since the coal and coke served as a raw material and a fuel.)

8. Handling Scrap For Re-Use.

Landmark Plastic Corp. v. Lawrence, Ohio BTA Case No. 99-K-499 (March 31, 2000). The taxpayer manufactured plastic products for horticulture packaging. A dust collection system was exempt under R.C. 5739.011 (B)(7) since it handled and temporarily stored scrap resin materials intended to be reused in the manufacturing process.

9. Environmental Control Property.

Hamilton Fixture Co. v. Tracy, Ohio BTA Case No. 93-K-870 (June 9, 1995). Equipment collecting dust generated from the Taxpayer's woodworking operation did not qualify for exemption since, as explicitly required by ORC §5739.011(C)(5), it failed to "totally regulate(s) the environment in a special and limited area of the manufacturing facility where the regulation is essential for production to occur." Exemption was not available since the equipment:

a. was used throughout the facility; and

b. collected only 80-85% of the dust (not "total" regulation).

The Dannon Company Co., Inc. v. Tracy, Ohio BTA Case No. 97-M-233 (September 11, 1998). A clean-in-place ("CIP") sanitation system used in processing by a yogurt manufacturer qualified for the manufacturing exemption (even though ORC §5739.011(C)(9) deems to be taxable equipment used to "clean, repair or maintain real or personal property in the manufacturing facility"). The system cleaned production lines and equipment after in-process yogurt passed through them. The system's primary purpose was to totally regulate the environment within the equipment holding in-process product which was essential for production to occur. See ORC §5739.011(C)(5). Yogurt cultures added to the milk needed the contaminant free environment to allow them to grow and transform the milk into yogurt.

For blended yogurt, the production process ended at the surge tanks (prior to the fillers) since the milk had become yogurt at such point. However, "traditional yogurt" was not complete until after the filling process since yogurt cultures were added when the yogurt was placed in the cup. Therefore, the corresponding portions of the CIP system through such points were exempt from tax.

Sub H.B. No. 149, Exemption for Property Used to Clean Dairy Processing Equipment, Effective April 2, 2007. Exemption is available for equipment and supplies used to clean processing equipment that is part of a continuous manufacturing operation to produce milk, ice cream, yogurt, cheese, and similar dairy products for human consumption.

Appleton Papers, Inc. v. Tracy, Ohio BTA Case No. 98-T-1444 (October 5, 2001). Manufacturer could not establish that air conditioning systems within drive rooms were

exempt environmental control property that totally regulated the environment in a special limited area of the manufacturing facility which was essential for production to occur. The manufacturer did not establish that the drive rooms were completely isolated from the rest of the facility. Moreover, the extent of regulation through the air conditioners was not established or that such property was even necessary.

Aeroquip Corporation v. Zaino, Ohio BTA Case No. 00-161 (November 15, 2002). Exemption was available for cleaning room ventilation.

Mfg. Corp. v. Testa, 2018-Ohio-2923. A manufacturer of custom aluminum trucks asserted exemption for natural gas used to maintain portions of multiple buildings to a temperature of at least 50°F. Regulating the temperature was necessary to enable extensive welding throughout each trailer. Welding in this environment eliminated condensation on the aluminum and ensured a good welding bond. Although the areas in which welding occurred were not fully enclosed, the manufacturer asserted they were still special/limited areas of each building whose environments must be totally regulated for production.

Consistent with R.C. 5739.011(C)(5), the Court held that temperature regulation of an entire plant necessary for production is not exempt even if the focus is on a particular area of the plant, akin to Example 48 (candy cane manufacturer) in Rule 5703-9-21. Temperature regulation is only exempt if it is restricted to a special/limited area of the plant (presumably meaning the area must be fully enclosed) and such total regulation in the confined environment must be essential for production to occur (i.e., all three requirements of the environmental control exemption are met). Since the heating constituted "*temperature regulation*" of entire buildings and not limited areas, any property used for such heating was excluded from the definition of "*thing transferred*" for use in manufacturing. Thus, exemption was not available as items necessary for production or gas used in production under R.C. 5734.011(B)(4) and (8). The Court Stated: "*R.C. 5739.011(C)(5) is a more specific provision that excludes from exempt status those items that are used for temperature control, even if those items would otherwise fall under the more general exempting language of R.C. 5739.011(B).*"

10. Safety Property.

Q3 Stamped Metal, Inc. v. Zaino (2001), 92 Ohio St.3d 493. The Court affirmed the Board's determination that welding equipment (i.e., helmets, glasses and lenses) was exempt because its primary purpose was to enable the welder to view the welding being done as part of the taxpayer's manufacturing process.

11. Miscellaneous.

Appleton Papers, Inc. v. Tracy, Ohio BTA Case No. 98-T-1444 (October 5, 2001). A fly ash system installed on the manufacturer's coal-fired boilers to collect airborne particles released during the burning of coal was taxable since the manufacturer did not establish that the system was a component part of the exempt boilers (boilers being exempt since they produce steam for the manufacturing process).

USS/Kolbe Steel Company v. Tracy, Ohio BTA Case No. 98-J-731 (January 14, 2000). Steelmaker's coke and coal bins were exempt from tax due to their use in transporting the coke and similar materials utilized in the manufacturing operation from the point of generation to the actual manufacturing operation. They were not used for storage.

Miller v. Zaino (July 15, 2005), Ohio BTA Case No. 2003-V-373. Exemption was available for components of a water sprinkling system utilized in a mulch and boiler fuel

production business. The water supplied by the sprinkling system was essential to their production, being added to raw, composting bark. R.C.5739.011(B)(a) expressly exempts "water, … used in the manufacturing operation; machinery and equipment used for, … producing or extracting those substances; machinery, equipment, and other tangible personal property used to treat, filter, pump, or otherwise make the substance suitable for use in the manufacturing operation; … .".

C. Packaging Materials and Equipment.

1. Requisite Status.

a. Exemption is available for persons engaged in the following activities:

- making retail sales
- manufacturing
- assembling
- processing
- refining
- mining
- rendering a public utility service

b. Those who contract out manufacturing in accordance with their specific designs are also entitled to exemption.

c. Special provision for food packages (Ohio Constitution Article XII, Section 13): Exemption for packaging for food (or its ingredients) for human consumption.

2. Packaging Material.

a. The essential characteristic of a package is that it restrains movement of the enclosed contents in more than one plane of direction.

b. Exemption is not limited to packaging in which the merchandise is delivered to the retail customer. *See*, ***Newfield Publications, Inc. v. Tracy*** (1999), 87 Ohio St. 3d 150. Bulk boxes used to transport packaged products to the post office were packages since they restrained movement of the products in more than one plane of direction and their purpose was to facilitate shipping and handling of the products. Therefore, the predominate purpose of the bulk boxes was to function as a package. A tilt-tray conveyor used to place the packaged products into the boxes was exempt since it was part of a continuous operation which was an integral and essential part of the equipment used in placing the product in the package (see discussion below concerning packaging equipment).

See also, ***Limited Stores, Inc. v. Tracy***, Ohio BTA Case No. 91-K-1287 (March 18, 1994) (packaging exemption available for cardboard cartons, etc. used in packaging clothing items for delivery from distribution center to retail store). However, *see*, ***International Paper Co. v. Zaino***, Ohio BTA Case No. 2003-B-713 (March 11, 2005) (no exemption for baler line equipment since the paper being packaged was not for sale but merely being transferred between divisions of the same company).

c. ***Moulton Gas Serv., Inc. v. Zaino*** (2002), 97 Ohio St. 3d 48. A liquid propane delivery truck's bobtail tanks did not constitute packages exempt from tax. Even though the items restricted movement in more than one plane of direction, they were taxable since they were not specified in R.C. 5739.02(B)(15) or similar to items specified. The Court cited ***Southwestern Portland Cement Co. v. Lindley (1981)***, 67 Ohio St. 2d 417, which denied exemption for trucks and railroad cars since they were not similar to property listed on R.C. 5739.02(B)(15). Accordingly,

the tanks and charges for related property were taxable, which included bulk tanks used to store liquid propane transferred from truck tanks.

3. Packaging Equipment.

a. ORC §5739.02(B)(15) provides that "'packaging' means placing therein." Nonetheless, exemption is not limited to property that actually places the product in the package. Exemption is available for property that is an "integral part of" machinery or equipment used in placing the product in packages. See, ***Kroger Co. v. Limbach*** (1990), 53 Ohio St. 3d 245; and ***Hawthorn Mellody, Inc. v. Lindley*** (1981), 65 Ohio St. 2d 47.

b. ***Anheuser-Busch, Inc. v. Tracy***, Ohio BTA Case Nos. 95-T-922 and 95-T-923 (October 24, 1997). Beer manufacturer's vision system (ensuring all kegs were properly sealed), foreign liquid detectors and empty can rinser qualified for the packaging exemption. They were an integral and essential part of a continuous packaging operation.

c. ***International Paper Co. v. Zaino*** (March 11, 2005), BTA Case No. 2003-B-713. A jogger-aerator which only shuffled and jogged paper into position (and did not place the paper into any packaging) before the paper being packaged actually reached the packaging line was not exempt as being used in packaging or as an integral part of packaging.

4. Expansion of Packaging Exemption (H.B. 640, effective September 14, 2000).

Exemption for packaging materials and equipment extended to labels and property used to: 1) make labels or packages; 2) prepare packages or products for labeling; or 3) label packages or products.

5. Restriction of Packaging Exemption (Effective October 21, 2003).

a. Packaging exemption not available for persons engaged in highway transportation for hire (deemed consumer status).

b. "Package" does not include motor vehicles, bulk tanks, trailers or similar devices attached to motor vehicles.

D. Transportation for Hire.

Exemption is available for property used in the transportation of property belonging to others for consideration as long as the carrier has a permit from Ohio or the federal government authorizing such transportation over public roads. R.C. 5739.01(Z).

Case Leasing & Rental, Inc. v. Tracy, Ohio BTA Case No. 96-T-956 (June 30, 1998). Truck lessor was entitled to claim exemption even though it did not use the trucks for highway transportation for hire. Moreover, supplies used for cleaning and sanitizing the trailers were exempt due to their maintenance purpose.

Triad Transport, Inc. v. Tracy, Ohio BTA Case No. 97-K-164 (September 18, 1998). Contract carrier certified by the PUCO was entitled to exemption for vehicles used to transport waste materials since the materials constituted tangible personal property belonging to another.

Associated Paper Stock, Inc. v. Tracy, Ohio BTA Case No. 98-A-390 (December 10, 1999). The Taxpayer was engaged in transporting its customers' corrugated paper to paper mills for recycling. It received payment from the mill and remitted the same to its

customers after deducting its transportation fee. The Taxpayer was entitled to the highway transportation for hire exemption since it did not own the paper being transported. The Board exempted the Taxpayer's trucks, trailers and forklifts used to load the trucks.

Rumpke Container Serv., Inc. v. Zaino (2002), 94 Ohio St. 3d 304. Waste hauler's trucks did not qualify for exemption for both of the following reasons:

1. It did not hold a permit or certificate from a federal or state agency to transport property belonging to others. A permit from a county general health district to collect and haul garbage did not qualify since it did not regulate the business of motor transportation of personal property belonging to others for consideration on public thoroughfares (and only extended to local, versus statewide, activity).

Likewise, a U.S. Department of Transportation identification number for its trucks was merely an administrative number and not the required permit or certificate authorizing the holder to engage in the transportation of personal property belonging to others for consideration.

2. The Company was not transporting property "belonging to others" because the customers relinquished control of the waste to be transported to the landfill. Moreover, citing nontax cases and administrative code provisions, the Court held that waste was not even classified as property.

Findlay Truck Lines v. Tracy, BTA Case No. 97-M-1167 (November 24, 2000). Truck and trailer washings qualify for exemption, being necessary for maintenance of motor vehicles used in highway transportation for hire. Pallets were not exempt since they were not attached to the vehicles. Likewise, the packaging exemption was not available for the pallets since the taxpayer was not engaged in the requisite activity (i.e., manufacturing, making retail sales, etc.). Although the exemption for "the transportation of persons or property" includes packaging materials used and consumed in the transportation of property, exemption was not available for the pallets since they were consumed by Findlay's customers and not Findlay.

R.K.E. Trucking, Inc. v. Zaino (2003), 98 Ohio St 3d 292. Exemption is available only if the property being transported belongs to another.

Yellow Transportation, Inc. v. Wilkins (May 26, 2006), BTA Case No. 2004-V-1113. Yard tractors used to move and re-arrange loaded and unloaded trailers qualified for exemption even though they never left the trucking company's terminal. They moved property of others which need not occur on a public roadway.

Pallet World, Inc. v. Levin (June 22, 2010), Ohio BTA Case No. 2007-M-116. Exemption was not available because the taxpayer failed to establish that the property being transported (pallets) belonged to others.

Refuse Transfer Systems, Inc. v. Levin (October 2, 2013), BTA Case No. 2009-1710. A solid waste contract hauler used "tippers" to unload waste material at a landfill. The tippers remained at the site, not being attached to the trailers until they were at the site, and played no role in transporting the waste from origin to such destination. Since the tippers were used after transportation ceased, exemption was not available.

Cisco Transport, LLC v. Testa (April 8, 2014), Ohio BTA Case No. 2013-4603. Exemption was not available for a truck since the taxpayer failed to use it primarily to transport property belonging to others. The truck was used to transport construction

materials to job sites, as well as construction waste to landfills. However, the Ohio Supreme Court has held that relinquished waste does not qualify as property belonging to others.

Arcaro v. Testa (October 22, 2014), BTA Case No. 2014-432. Exemption was not available due to insufficient evidence taxpayer used its trucks primarily to transport property belonging to others. The transportation involved hauling waste, including construction debris, which does not qualify as property belonging to others per existing Ohio Supreme Court precedent.

Vance Property Management v. Testa BTA Case No. 2014-3427 (May 27, 2105). Exemption was not available for the taxpayer's purchase of a jeep used to transport customer documents, including invoices, bills of lading, driver logs, and fuel reports that resulted from its transportation of customers' commodities using separate trucks that were not at issue. The taxpayer was not hired for this document transportation purpose (and there was no evidence that the jeep was primarily used for this purpose).

Boyco Trucking, LLC v. Testa, Ohio BTA Case No. 2014-4951 (November 17, 2015). Taxpayer provided insufficient evidence (i.e., non-descriptive invoices) to support vehicle was used primarily to transport tangible personal property belonging to others.

Dumpsters, Inc. v. Testa, Ohio BTA Case No. 2015-1279 (May 27, 2016). Affirmed assessment due to failure to support or provide proof that truck was used for transportation of property of others for consideration. For same result, *see,* ***Two Star Leasing, LLC v. Testa***, Ohio BTA Case No. 2015-1358 (June 6, 2016).

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).

The R.L. Best Company v. Testa, Ohio BTA Case No. 2015-2237 (December 4, 2017), appeal pending in the Seventh District Court of Appeals. The BTA found that the Taxpayer was not entitled to exemption for its transportation property (i.e., trucks / trailers) for two independent reasons. First, the Taxpayer did not separately charge for the transportation of customer property to or from its facility where it had been repaired, although the BTA acknowledged that costs associated with the transportation were included in the Taxpayer's cost recovery for the overall charge to repair the customer's property. Accordingly, although the BTA acknowledged that the Company built the transportation charge into its repair costs, exemption was not available since it did not separately charge for such transportation, being found to be provided as a courtesy (even though the customer only received transportation if it made the repair purchase).

As the second basis for exemption denial, the BTA determined that "dead mileage" occurring when the truck was empty either en route to pick up property to be repaired or to deliver property that had been repaired must be ignored in the numerator for purposes of determining whether the 50% test was met (i.e., use of trucks/trailers more than 50% of the

time to transport other person's property), even though the only purpose for the trucks/trailers' movement while empty was to accomplish the customer property transportation. Only "loaded" trips are to be considered in determining primary use of the trucks/trailers.

For the appeal, *see* ***The R.L. Best Co. v. Testa***, Ohio Ct. App., Dkt. No. 18 MA0001 (Dec. 28, 2018). The Seventh District Court of Appeals affirmed the BTA's decision that the Taxpayer was not entitled to the transportation for hire exemption for its property (i.e., trucks/trailers) since no "*consideration*" was received for the transportation service. The Taxpayer did not separately charge for the transportation of customer property to or from the Taxpayer's facility where it had been repaired. Although the Taxpayer built the transportation cost into its repair price, exemption was not available since it did not separately charge for such transportation, which was found to be provided as a courtesy (even though its cost was substantial and only provided in conjunction with the repair service contract).

In affirming the BTA, the Court of Appeals noted that, although the Taxpayer asserted it was implicitly obvious, there was nothing in the record to establish that the Taxpayer's customers knew they were contracting for transportation services. Rather, the Court agreed that the transportation was an integral part of the repair business.

N.A.T. Transportation, Inc. v. McClain, Slip Opinion No. 2021-Ohio-1374. A transporter of waste (residential and commercial) to landfills possessed PUCO certificate as a "*for-hire*" carrier, receiving payment for the transportation. The sole issue was whether the waste was property "*belonging to others*".

The Court first considered its prior decision in *Rumpke Container Serv., Inc. v. Zaino*, 94 Ohio St.3d 304, 762 N.E.2d 995 (2002) where exemption was denied because the waste was determined to not be property belonging to others. Here, the Court distinguished *Rumpke* because it owned the landfill and the customer did not dictate the destination of the waste. *Rumpke* was characterized as providing a waste disposal service (not "*for-hire*" carriage).

The Court then held that N.A.T. was entitled to exemption, but only with respect to commercial waste since the customer controlled its disposition/destination. Due to this fact, commercial waste customers (versus residential customers) continued to exercise "*powers of ownership*" over the waste, making it their property. Accordingly, exemption was available for Peterbilt trucks that primarily carried commercial waste.

Planning:

1. Confirm contract language supports customer control over disposition/destination of property being transported; and
2. If any taxable carriage, must support primary portion used in an exempt manner.

Battle Axe Construction v. McClain, Ohio BTA Case No. 2022-559 (October 11, 2022). Exemption denied for truck not used primarily to transport property belonging to others. The BTA focused on a questionnaire response referencing transportation of waste, which is generally not considered to be property of another since it had been discarded. No BTA evidentiary hearing occurred. *See* ***N.A.T. Transp., Inc. v. McClain*** for when waste can qualify for "belonging to others" (i.e., where they control its disposition).

E. Property Used Directly in the Rendition of a Public Utility Service.

USAir, Inc. v. Tracy (1997), 80 Ohio St.3d 411. Permissive use tax was properly assessed on complimentary soft drinks given to passengers by airline service. The soft drinks were not used in rendering a public utility service (essential in rendering the transportation service), but were provided merely as a convenience. As to liquor purchases, the case was remanded to the Board of Tax Appeals to determine whether the resale exemption applies and the purchase price of the liquor if such exemption is not available.

Continental Cablevision of Ohio, Inc. v. Tracy, Ohio BTA Case No. 96-K-6 (July 10, 1998). Cable television company's purchases of automatic data processing services involving the use of a subscriber management system were excepted from tax because they were used directly in the rendition of its public utility service. The system enabled the company to better coordinate and monitor the delivery, maintenance, repair and termination of its cable services and to respond to its customers' inquiries and changing needs. Moreover, the system ensured prompt and accurate billing. For these reasons, the subscriber management system made the company more efficient for the benefit of the public.

Suchy v. Zaino, Ohio BTA Case No. 2000-R-82 (March 14, 2003). Limousines were not used in rendering a public utility service. Although the taxpayer was issued a license to operate by the City of Toledo and must meet certain insurance requirements, it was not sufficiently regulated by the City (in comparison to taxi cabs) so as to be considered a public utility. Moreover, the service was not devoted to a public use, operating instead pursuant to private contracts for the transportation of persons.

Castle Aviation, Inc. v. Wilkins (2006), 109 Ohio St. 3d 290. An on-demand air freight carrier, licensed as a common carrier under FAA regulations (Part 135), did not provide a public utility service since it was not subject to special regulation and control by a governmental regulatory agency (other than with respect to safety and regulations applicable to most businesses). There was no governmental control over the carrier's customer relationships. The Court suggested that carriers holding a certificate of public convenience and necessity were sufficiently regulated to constitute public utilities.

Epic Aviation, LLC v. Testa, Ohio Supreme Court, No. 2016-Ohio-3392 (June 15, 2016). The taxpayer sold jet fuel to a consumer who used it in a multiple transportation services, including package delivery at published times and schedules. The Court reversed the BTA, finding the consumer to be a common carrier with respect to this portion of its business because it transported at pre-published times/places and at reasonable/non-discriminatory prices (i.e., not operating as a contract carrier). The consumer's separate contract carrier/charter operations did not qualify for exemption. The case was remanded to the Tax Commissioner to determine the portion of fuel purchases used for the exempt package delivery purposes as a common carrier.

Contrary to the BTA / Tax Commissioner's determinations, the taxpayer was sufficiently regulated to qualify as a public utility even though it did not have a "*Certificate of Public Convenience and Necessity*". The relevant statutory provisions allowing exemption for property used in rendering a public utility service (R.C. 5739.02(B)(42)(a) and 5739.01(P)) did not preclude exemption simply because the provider lacked a Certificate, but rather automatically allowed exemption for taxpayers having such a Certificate.

Time Warner Operations, Inc. v. Wilkins (2006), 111 Ohio St.3d 559, 2006-Ohio-6210. Converter box sales to cable customers were taxable. The public utility exemption only extends to property consumed by the utility (and not property it sells).

Childers v. Wilkins (May 18, 2007), Ohio BTA No. 2004-R-1326. A transportation company providing limousine services was not sufficiently regulated to qualify for exemption. Its regulation was substantially less than a taxi cab service.

H.B. 699 (2007).

Exemption amended to clarify that a "public utility" includes a citizen of the United States holding, as required, a certificate of public convenience and necessity issued under federal law that authorizes the holder to provide air transportation.

F. Providers of Electronic Information Services.

Key Serv. Corp. v. Zaino (2002), 95 Ohio St. 3d 11. The refund provision of R.C. 5739.071, allowing a 25% refund of sales/use tax paid on purchases of computers and related equipment by providers of electronic information services, was available to the taxpayer even though its services were provided to members of an affiliated group. The Tax Commissioner argued that since such services occurring between members of an affiliated group are deemed nontaxable sales, a refund is not available. See R.C. 5739.01(X) defining "providing a service" with reference to "anything described in" R.C. 5739.01(B)(3) (which sets forth the taxable services). The Court found that electronic information services were so described, whether or not they were provided between members of an affiliated group. Moreover, the taxpayer was a provider of "electronic information services" as statutory defined in R.C. § 5739.01(Y)(1)(c). The case was remanded to the Board to determine the extent such services were provided.

Observation: Extending the Court's reasoning makes the partial exemption very broad. Exemption would appear to be available to equipment used in providing a web site (including ancillary equipment and otherwise taxable services) if the primary purpose of the property is to provide electronic information services to business customers. An "electronic information service" is defined as "providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following: (i) examining or acquiring data stored in or accessible to the computer equipment; (ii) placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment." See R.C. §5739.01(Y)(1)I.

International Business Machine Corp. v. Levin (June 23, 2009), BTA 2007-Z-1140; appeal pending with the Ohio Supreme Court (Case No. 09-1296). Interest is not payable on the refund since the statute allowing the refund does not explicitly provide for the payment thereof. The general refund statute (R.C. 5739.07) providing for the payment of interest on refunds of illegal or erroneous payments of sales or use tax did not apply.

G. Advertising Material.

R.C. 5739.02(B)(37) provides an exemption for "*…newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale*".

Doyle v. Tracy, Ohio BTA Case No. 98-V-131 (August 10, 2001). A distributor of direct mail advertising packets was liable for tax on its charges to advertisers for advertisements included in its packets that did not display or describe and price items offered for sale. The Board interpreted the exemption to require all exempt materials to price and describe the

property offered for sale, even though specifically enumerated advertising material, such as coupons and flyers, would appear to be automatically exempt regardless of whether it prices and describes tangible property. Since each advertisement was for a different advertiser, the Board required separate scrutiny of each item and would not apply Highlights for ***Children, Inc. v. Lindley*** (1985), 27 Ohio App. 3d 284, which allowed exemption for a package of advertising materials that were part of one advertiser's distribution even though some of the items did not price and describe. *See also* ***B.J. Alan Company v. Tracy***, Ohio BTA Case No. 99-N-196 (March 1, 2002).

H. Warranty Repair Parts and Services.

Mitsubishi Motor Sales of America, Inc. v. Zaino, Ohio BTA Case No. 01-V-181 (October 11, 2002). The R.C. 5739.01(E)(13) exemption for purchases to fulfill a contractual warranty obligation was available for a manufacturer's warranty reimbursement payment to dealers since the manufacturer was contractually obligated to perform under the warranty even though the claim was made after the warranty period. The contract obligation arose since the abnormality existed during the warranty period.

I. Direct Use in Agriculture.

Blanchard Valley Farmers Cooperative, Inc. v. Zaino, Ohio BTA Case No. 00-P-1341 (March 21, 2003); appeal pending with Ohio Supreme Court. Agricultural cooperative was exempt from tax on costs pertaining to its grain storage terminal and liquid fertilizer plant. They were used directly in the pursuit of agricultural activities.

Dairy Farmers of America v. Wilkins (2004), 101 Ohio St. 3d 100. At issue was clean-in-place ("CIP") chemicals used to clean and disinfect property used in the storage and processing of milk of an agricultural cooperative. The cooperative bought raw milk from its member farmers and processed it into dairy products. R.C. 5739.01(E)(2) exempts property used "directly in producing a product for sale by… agricultural". The exemption is separate from the manufacturing exemption. The Supreme Court noted that R.C. 1.61 states: "agriculture includes… dairy production [and] the processing, drying, storage, and marketing of agricultural products when those activities are conducted in conjunction with, but are secondary to, such husbandry or production." The Court then noted that the dictionary definition of "dairy production" includes "the production of milk, butter, and cheese." Since the cooperative was engaged in milk production, it was engaged in agriculture and was, thus, entitled to exemption for its CIP chemicals since they were used in producing the milk for sale. The Court effectively recognized that the scope of the "direct use in agriculture" exemption was broader than the manufacturing exemption.

The decision would appear to support exemption for all of a commercial dairy's CIP related costs (i.e., chemicals, equipment, repairs, maintenance and installation). There would appear to be no basis for extending the exemption to only cooperative dairies for the benefit of farmers or taxpayers that were actual farmers. See also, Sub H.B. No. 149, Exemption for Property Used to Clean Dairy Processing Equipment, Effective April 2, 2007. Exemption is available for equipment and supplies used to clean processing equipment that is part of a continuous manufacturing operation to produce milk, ice cream, yogurt, cheese, and similar dairy products for human consumption.

Hemmelgarn & Sons, Inc. v. Zaino (April 9, 2004), Ohio BTA Case No. 2002-T-473. The taxpayer raised chickens for their eggs through contract farmers and, then, processed the eggs for sale. The taxpayer was found to be in control of the entire operation even though it used contract farmers. At issue was the taxability of refrigerated trailers used to

transport the eggs to the taxpayer's processing facility from the contract farmers and trucks used to transport feed from its milling facility to the contract farmer. The transportation property was exempt under the agricultural exemption since it carried feed to the contract farmers – an essential part of raising the flock of chickens and ensured that the feed being administered was healthy (and not contaminated). By maintaining the optimum temperature during transportation, the refrigerated trailers were also exempt because they were primarily used to prevent the growth of harmful bacteria in the eggs while the eggs were being transported from the contract farmers back to the taxpayer's processing facilities.

Reichenbach v. Testa (June 28, 2013), BTA Case No. 2011-A-2726. Tractor and back hoe were exempt due to direct use in farming even though no farm income had been earned in first year of use. The taxpayer's activity laid the foundation for the next year's income.

Iron Works Farm, LLC v. Testa, Ohio BTA Case No. 2014-537 (January 26, 2015). A utility terrain vehicle (UTV) was exempt as being used in a start-up hay farm operation that did not produce income until two years later.

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).

Hedman v. Testa, Ohio BTA Case No. 2018-373 (Oct. 12, 2018). Trailer was not exempt as property used directly in farming. It was used only to transport livestock to customers over the road which did not qualify for exemption since such activity played no part in actually raising the livestock.

Bahan Farms, LLC v. McClain, Ohio BTA Case No. 2017-2180 (March 11, 2019). The BTA held that a semi-tractor (a gator) was taxable as being used for transportation purposes, rather than directly in farming. It was used to haul seed, fertilizer and equipment to/from various fields of a 4800-acre farm, as well as haul harvested grain to the main facility for processing/storage.

The BTA held that equipment used primarily for transportation was not exempt under the farming exemption. The BTA noted only "*implements and articles used to cultivate or stimulate the growth of crops or flowers which are to be sold are within the scope of the exemption*." Ohio Admin. Code 5703-9-23. *See also*, **Meyer v. McClain**, Ohio BTA Case No. 2018-1033 (March 4, 2019) no exemption for all-terrain vehicles used to transport materials used in agriculture; similarly, equipment/tools used in performing landscaping services are taxable per R.C. 5739.01(D)(5)).

Quinter v. McClain, Ohio BTA Case No. 2022-431 (October 24, 2022). Although the taxpayer identified multiple farming activities, he did not connect them to use of the utility task vehicle at issue. Furthermore, the taxpayer did not file tax returns reflecting a farming business. Therefore, exemption was denied. No BTA evidentiary hearing occurred.

J. Casual Sales.

Parbro Air, Inc. v. McAndrew (August 26, 2005), Ohio BTA Case No. 2004-M-134. Casual sale exemption was not available because the aircraft was purchased from a broker (i.e., an entity in the business of making retail sales).

Schlegel v. Levin (May 23, 2013), BTA Case No. 2010-A-1757. Taxpayer did not support casual sale exemption for an aircraft purchase. There must be evidence that the aircraft had been used by the seller.

Karvo Paving Co. v. Testa, Ohio Ct App., 9th Dist., C.A. No. 28930 (September 30, 2019). The Court considered Karvo's assignment of error that the BTA incorrectly held that a lease of property could not qualify for the casual sale exemption. K&H leased equipment to Karvo which K&H had previously used in its excavating business, before its operations were wound down. The BTA had ruled the casual sale exemption could not apply to a lease since the lessor (K&H) was solely engaged in the business of leasing the property during the audit period. However, the Court noted that the definition of casual sale only requires that the property had been: (1) acquired for the person's own use, at least initially; and (2) previously subject to any state's taxing jurisdiction. Both conditions were satisfied since K&H previously acquired and actually used the property in its excavation operations, at which time the property was subject to Ohio tax (although an exemption applied). Thus, the Court held that the leased property in this case could qualify for the casual sale exemption. Further, Karvo need not establish that tax had previously been paid on the property. This issue was remanded to the BTA for further proceeding as to availability of the casual sale exemption consistent with the Court's guidance.

Karvo Paving Co. v. McClain, Ohio BTA Case No. 2016-782 (November 3, 2021); on appeal to Ninth District Court of Appeals. Upon remand from the Court of Appeals, the BTA held that the casual sale exemption was not available for property leased solely to a related entity. The leasing activity represented an "*ongoing and recurring*" business for several years. Since the lessor was engaged in systematic leasing, the activity ceased to be occasional, casual or isolated and instead became a significant part of its business, thereby disqualifying for the casual sale exemption.

K. Property Used in Storing, Transporting, Mailing, or Handling Purchased Sales Inventory for Distribution Outside Ohio to Related Retail Stores or by Direct Marketing.

Fruedenberg NOK General Partnership v. Wilkins (April 13, 2010), BTA Case No. 2006-K-1556. "Direct marketing" is defined with reference to sales to consumers who order by U.S. mail, delivery service or telecommunications. Even though most of the vendor's sales were to retailers, the exemption for direct marketers was available since retailers meet the broad definition of "consumer" in R.C. 5741.01(F) (which includes "any person that has purchased tangible personal property").

L. Telecommunications/Call Center.

The 409 Group, Inc. v. Testa (January 28, 2014), BTA Case No. 2010-1531. To qualify for the exemption for sales of telecommunication services used directly/primarily to perform call center functions, the call center must employ at least 50 full-time employees (or FTEs) engaged in call center activities (i.e., placing or receiving a high volume of calls for the purpose of making sales, marketing, customer service, technical support or other specialized business activity). The taxpayer failed to meet this threshold; disqualified positions included personnel involved in marketing, human resources, and real estate activities.

M. Charitable/Non-Profit / 501(c)(3) Status.

Anyana Kai, Inc. v. Testa (October 29, 2014), BTA Case No. 2014-1486. Taxpayer could not support claimed federal tax exempt status. Its apparent status as a Nemenhah Native

American Band is not a federally recognized tribe. Moreover, its application for non-profit status as a church for alternative healing was denied by the IRS, while it was not even located on tribal land (since no such land is located in Ohio).

Central Ohio Numismatic Association v. Testa, Ohio BTA Case No. 2017-2094 (Oct. 1, 2018). A nonprofit organization was not involved in a charitable purpose. In response to the organization's assertion it was exempt due to its primary educational purpose, the BTA held that it did not meet the prerequisites of an exempt educational organization because:

1. It was not an institution of learning;

2. It does not have a static location where education occurs; and

3. It did not disseminate scientific or technical information (but only historical information).

N. Oil and Gas Production.

Keller v. Testa, Ohio BTA Case No. 2015-1749 (July 6, 2016). Case remanded to determine whether taxpayer's off-road vehicle was exempt based upon use in oil and gas production. The taxpayer asserted the truck was used for purposes of carrying: (1) a welder to different well locations for use in repairs; and (2) a generator used in the drilling, grinding and performing other repairs. Since this argument had been preserved but not considered by the Tax Commissioner, the case was remanded for such consideration.

Stingray Pressure Pumping, LLC v. Harris, Slip Opinion No. 2023-Ohio-2598. Reversing the BTA, the Court determined five categories of equipment used in blending water, chemicals, and sand to be pumped deep into the earth for the hydraulic fracking of oil and gas deposits qualified for exemption based upon a 2018 retroactive statutory change in the exemption that specifically enumerates categories of exempt property. The statute contains non-exhaustive lists of property deemed exempt and taxable. The Tax Commissioner had argued that the equipment was taxable because it was used in a preliminary stage prior to any injection of the mixture into a well. In determining whether the property was "*primarily used*" in an exempt manner, the Court applied old precedent that focuses on "*primacy in utility or essentiality, in quality as well as quantity*." ***Ace Steel Bailing, Inc. v. Porterfield*** (1969), 19 Ohio St.2d 137.

Most importantly, the Court rejected the BTA's application of a principle of statutory construction that tax exemptions must be strictly construed against the taxpayer. The Court stated:

> *Our task is not to make tax policy but to provide a fair reading of what the legislature has enacted: one that is based on the plain language of the enactment and not slanted toward one side or the other. "Like any other governmental intrusion on property or personal freedom, a tax statute should be given its fair meaning, and this includes a fair interpretation of any exception it contains." Scalia & Garner, supra, at 362. Tax statutes must be read through a clear lens, not one favoring tax collection. Thus, we make clear today that henceforth we will apply the same rules of construction to tax statutes that we apply to all statutes.*

Accordingly, this decision lays the foundation for application of taxing statutes.

IV. MIXED TRANSACTIONS: PERSONAL AND PROFESSIONAL SERVICES IN CONJUNCTION WITH TRANSFER OF PROPERTY

A. Statute.

RC §5739.01(B)(5) exempts professional, insurance, or personal services transactions if tangible personal property sold in connection therewith is inconsequential and no separate charge is made therefor. Thus, such a service is taxable if it is part of a transaction involving a transfer of tangible personal property as a consequential element and the person performing the service does not make a separate charge for the property.

B. No Consequential Property Conveyed.

WBNS TV, Inc. v. Tracy (1996), 75 Ohio St. 3d 572. Television station's purchase of ratings information from a media market research firm ("Nielsen") was exempt from tax. Nielsen compiled, interpreted and collated survey data which was then conveyed to WBNS on a quarterly basis in the form of a written report. Other customers of Nielsen received the same report.

The fact the Nielsen's reports were not customized was not relevant. The transaction was exempt since:

- Nielsen performed a personal service involving an intellectual and manual act which utilized a recognized skill (identifying the pool and securing their participation, telephone interaction, and the collection and analysis of polling results); and
- The overriding purpose of WBNS was not to receive the reports. "It was the intellectual and manual personal efforts of employees of Nielsen that were sought by WBNS and not the inconsequential tangible personal property which was transferred, for purposes of communication, as an incidental element without separate charge."

McGraw-Hill Co., Inc. et al. v. Tracy, Ohio BTA Case No. 96-A-465 (June 19, 1998). For multiple customers on a customized basis, the taxpayer compiled information concerning various construction projects, expending significant skill and efforts (i.e. personal services) in locating, recording, and disseminating information within a database of approximately 750,000 construction projects. Relying on ***WBNS TV, Inc. v. Tracy*** (1996), 75 Ohio St.3d 572, the Board found the reports to be inconsequential tangible property transferred for the purpose of communication. The Board also held that it could consider the testimony of the taxpayer's employee concerning the motive of its customers.

TV Fanfare Publications, Inc. v. Tracy (1999), 87 Ohio St. 3d 165. An advertising company's separately-charged fees for placing advertising materials in exhibited advertising media, such as shopping carts, sign holders and retail store sign boards, were nontaxable service charges. The fees were separated from the cost of producing the taxable advertising. After July 18, 1990, advertising charges for ads placed in free magazines and cash register tapes were not taxable due to a statutory change; prior to such date, the company placing the ad in such distributed advertising media was deemed to be the taxable consumer of such property.

C. Consequential Property Conveyed.

Diversa, Inc. v. Tracy, Ohio BTA Case No. 96-T-843 (January 9, 1998). Advertising and public relations firm was found liable for uncollected sales tax because the overriding purpose of its customers was to obtain consequential tangible property. The company's

separation of charges for services versus the tangible personal property conveyed (upon which tax was collected) did not have any effect. The Board noted that it has consistently concluded that advertising services are like the services provided by a photographer; the purchaser's overriding interest is to obtain the tangible product (i.e. a piece of advertising). *See also*, ***Watt, Roop and Co. v. Tracy***, Ohio BTA Case No. 95-P-906 (January 30, 1998) (taxation not avoided by merely separately stating services on invoice since the taxpayer's clients sought finished advertising product which included services necessary for completion; however, the following services did not involve the transfer of consequential property: public relations, research, data gathering, creative consulting, and concept presentation).

Satisfaction Charter Services, Inc. v. Levin (March 15, 2011), BTA Nos. 2008-M-940. The true object of marketing services at issue was the receipt of mailing lists, which were taxable tangible personal property.

D. Partial Exemption.

As an alternative to attempting to establish exemption for the entire transaction, the "half-apple" approach might be pursued whereby a separate charge for the property is identified and tax paid thereon, while no tax is paid on any payments that do not pertain to the transfer of property. *See* ***Roxane Laboratories, Inc*. v. Tracy**, Ohio BTA Case No. 91-A-1240 (December 3, 1993) (separately identified charges for shipping and delivery as well as travel expenses, were removed from the assessment). However, this approach will work only where the service is not an integral part of the tangible personal property being sold.

In ***Terry Robie Industrial Advertising, Inc. v. Tracy***, Ohio BTA Case No. 93-S-1301 (July 28, 1995), an advertising firm, conveyed the following property to its clients for use in their advertising campaigns:

- book jackets
- promotional postcards
- report covers
- logos
- open house invitations
- business cards

Such property was found to be "consequential," thereby making the entire fee for the advertising service taxable. The Taxpayer was unsuccessful in contending that charges for the service component ("creative and design" time) separate from the charge for the property were exempt since the creative work was an integral part of the tangible personal property sold; the taxpayer's creative efforts without the finished product would be of no value to its customers. To make this determination, the Board also looked to Tax Commissioner Rule 5703-9-41 ("The full amount charged on the sale or production of tangible personal property is subject to sales tax even though a part of the charge may be billable as 'service charge,' 'fee,' or 'commission'"); ***The Lubrizol Corp. v. Tracy***, BTA Case No. 92-M-1342 (September 9, 1994).

Ameritech Publishing, Inc. v. Wilkins, 111 Ohio St.3d 114, 2006-Ohio-5337. Ameritech paid a production company to produce telephone directories and was charged a "paper management" fee for the production company's cost of efficiently maintaining the proper

paper stock to produce the directories. The fee was taxable since it was not for a separable nontaxable personal service but was paid in conjunction with the purchase of tangible personal property.

V. REAL VERSUS PERSONAL PROPERTY

A. General Rule.

A construction contract pursuant to which tangible personal property is incorporated into a structure or improvement on, or becoming part of, real property is not a sale of such tangible personal property. R.C. 5739.01(B)(5). The construction contractor is deemed to be the consumer of such tangible personal property. *Id.*

Exceptions for:

1. the sale and installation of carpeting, agricultural land tile and portable grain bins; and
2. the provision of landscaping and lawn care services and the transfer of property as part of such service. *Id.*

B. Real Property statutory definition (R.C. 5701.02):

1. Building: a permanent fabrication or construction, attached or affixed to land, consisting of foundations, walls, columns, girders, beams, floors, and a roof, or some combination of these elemental parts, that is intended as a habitation or shelter for people or animals or a shelter for tangible personal property and that has structural integrity independent of the tangible personal property, if any, that it is designed to shelter.
2. Fixture. An item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement and that primarily benefits the realty and not the business, if any, conducted by the occupant on the premises.
3. Improvement: with respect to a building or structure, a permanent addition, enlargement, or alteration that, had it been constructed at the same time as the building or structure, would have been considered a part of the building or structure.
4. Structure: a permanent fabrication or construction, other than a building, that is attached or affixed to land and that increases or enhances utilization or enjoyment of the land. This term includes, but is not limited to, bridges, trestles, dams, storage silos for agricultural products, fences, and walls.

The definition of "personal property" includes a business fixture. R.C. 5701.03(B) defines "business fixture" as an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement and that primarily benefits the business conducted by the occupant on the premises and not the realty.

Specifically included within the definition of a business fixture are: signs; storage bins and tanks; transportation, transmission, and distribution systems; and machinery, equipment, and foundations and supports therefor. Specifically excluded therefrom are general purpose heating, ventilating, and air conditioning systems, potable water lines, tanks and towers, and electrical and communication lines. The usage aspect of the definition of real

property is further expanded by excluding special purpose components of a building or structure from the definition of real property.

C. Interpretation.

1. ***F.P. & E., Inc. v. Tracy*** (March 18, 1999), Ohio BTA Case No. 96-M-806. Canopies installed at gas stations were personal property (business fixtures). They "have more benefit to the business conducted upon the land than to the land itself." They are "related to the service station business and are not common to other businesses that have opened in former service stations." Moreover, they have value independent of the realty.

2. ***Meijer, Inc. v. Tracy*** (February 8, 2001), Ohio BTA Case No. 97-M-1618. A refrigeration system and indoor and outdoor signs were classified as personal property, meeting the definition of "business fixtures." They were permanently attached to the land or building and primarily benefited the business being conducted by the taxpayer.

3. ***Haessly Hardwood Lumber Co. v. Zaino*** (September 20, 2002), Ohio BTA Case No. 00-J-1623. The manufacturer's purchases of stone and gravel used for the mill yard and concrete used for various ramps in the mill floor did not become business fixtures, but were real property since they were not designed specifically for a business purpose but were common to buildings and improvements to the land generally (even though a portion of such items actually supported material handling equipment). Accordingly, the manufacturer had to pay tax on the cost of its materials.

4. ***Funtime, Inc. v. Zaino***, 2004-Ohio-6890. In a four to three decision, the Court held that property associated with an amusement park consisting of a water ride (Grizzly Run), a roller coaster (Mind Eraser) and an enclosed ride that elevated patrons to the top of a "needle" to view the park (Skyscraper), as well as their station houses, were personal property being classified as "business fixtures". Under the Court's two prong test, an item is real property only if it: 1) fits the definition of one of the enumerated categories of real property set forth in the statute; and 2) is not within the definition of "business fixture" because it does not primarily benefit the business conducted by the occupant. Conversely, any property that primarily benefits a business is personal property.

Applying the test, the Court held that special use buildings and structures are personal property. Although the Grizzly Run, Mind Eraser and Skyscraper were structures or buildings, they were personal property because:

a. "There was no evidence that the rides would be of any benefit to a buyer of the land who engaged in a different business."

b. "No use independent of the amusement park business was shown for the Mind Eraser station house."

COMMENT: The scope of the Court's test for determining whether an item is real property is interesting because it potentially results in personal property classification for all buildings and structures peculiar to a specific business. Moreover, applying the Court's test, the statutory definitions added in 1992 for the enumerated categories of real property would appear to serve no purpose since property with primarily a business purpose is personal property even when it meets a real property definition.

The Court's decision would appear to have changed the historic priority given to the definition of real property. Prior to the 1992 statutory amendments which added specific definitions for the various categories of real property, the Court held that an item is real property if it constitutes one of the enumerated categories of real property even though it may otherwise be personal property under common law. In addition, the Court did not provide guidance in determining whether a particular property primarily benefits the business conducted on the land. How specialized must the item of property be before it becomes a business fixture? For example, are the following properties personal property?

a. Shopping mall: only used for retail businesses.

b. Columbus' Crew Stadium: only used for the business of sporting events (particularly soccer).

c. Progressive Field: only used for the business of baseball entertainment.

d. FirstEnergy Stadium: only used for the business of football entertainment.

e. Cleveland's Quicken Loans Arena: only used for the business of entertainment events, actually taking the place of the Richfield Coliseum (which was demolished after its occupant moved to this arena). Since no one could find a use for the Coliseum, it was demolished, even though it was only 25 years old.

f. A bridge between two manufacturing plants or stadiums. Even though bridges are included in the statutory definition of structure, such a bridge is presumably for the benefit of the businesses.

A common characteristic for all of these properties is that their utility to any buyer is the same as the prior owner/occupant. Under the Court's decision, arguably, all of these items are subject to sales/use tax and personal property tax (and not real estate tax). Even land can be modified so as to be in a form that benefits the particular business occupying it (i.e., sand and gravel pit).

5. ***Oregon Ford, Inc. v. Wilkins*** (January 27, 2006), Ohio BTA Case No. 2005-A-111 (property tax case). An automobile dealership's parking lot lighting was personal property. It did not increase or enhance utilization of the land on which it was located (e.g., structure definition), but benefited the business conducted on the land. The lighting would not benefit the land if the particular business conducted on the land ceased.

6. ***Polaris Amphitheater Concerts, Inc. v. Delaware County Board of Revision***, et al (January 26, 2007), Ohio BTA Case No. 2004-V-1294 (property tax case). An outdoor amphitheater was determined to be real property. The following was also considered to be real property:

- Cafeteria and six dressing rooms
- Hospitality building with patio and deck
- Paved parking lots and walkways
- Wood fence around amphitheater
- Dock-height loading bays
- Food concession buildings and restrooms
- Storage buildings
- Covered outdoor bar/lounge area and restrooms

- Ticket sale building
- Concessions booths and sales buildings

All of these items are buildings or structures because they are permanent fabrications or constructions affixed to land that are: 1) intended as habitation for people, animals or shelter for tangible personal property; and 2) increase the utilization or enjoyment of the land.

The Board did not consider whether the items were "business fixtures" that primarily benefit the business conducted on the property, because they were not items of personal property attached to land. The Board stated:

> R.C. 5701.03(B) provides "'[b]usiness fixture' means an item of tangible personal property that has become permanently attached or affixed to the land, ***." The evidence before us concerning the nature of the buildings, improvements and structures fails to demonstrate that any of them are items of personal property that have become permanently attached to the subject property. The buildings, improvements, and structures before us are borne from permanent fabrication and construction upon the property (e.g., brick and mortar construction "consisting of foundations, walls, columns, girders, beams, floors, and a roof"), rather than item(s) of personal property (e.g., "machinery, equipment, signs, storage bins and tanks, ***, broadcasting, transportation, transmission, and distribution systems") that have been otherwise delivered and permanently attached to the land.
>
> It is unnecessary to consider whether or not the buildings, improvements and structures before us "primarily benefit the business conducted" on the property because the brick and mortar buildings, improvements and structures fail to constitute "[an] item of personal property" under R.C. 5701.03(B) in the first instance.
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> • • •
>
> As the Ohio Supreme Court held in Funtime, supra, R.C. 5701.02 and 5701.03 must be interpreted in pari materia. The distinction between real property and personal property does not hinge upon the singular distinction of whether property is used in business or a commercial venture. Rather, only the distinction of whether an item of personal property constitutes a "fixture" under R.C. 5701.02I and is therefore defined as real property, or whether an item of personal property constitutes a "business fixture" under R.C. 5701.03(B) and is therefore defined as personal property does hinge upon the determination of whether the item of personal property is used in business.
>
> The limited inclusion of language by the legislature in the definition of business fixture permits foundations and supports specifically designed for machinery, equipment, and the like to be classified as business fixtures. [FN5] If we were to accept Polaris' argument, the definition of business fixture would necessarily eclipse all the definitions of real property found in R.C. 5701.02 and require that all buildings, structures and improvements (e.g., car washes, office buildings, retail stores, banks, gas stations, indoor and outdoor arenas) be classified as personal property solely because they

are all used for a commercial purpose. We fail to read the statutory enactments and the court's holdings to produce this result.

FN5. All of the examples cited within the definition of business fixture found in R.C. 5701.03(B) support the conclusion that business fixtures are items of personal property that have been brought upon the land and otherwise affixed (i.e., machinery, equipment, signs, storage bins and tanks; broadcasting, transportation, transmission, and distribution systems).

7. ***Opinion of the Tax Commissioner***, No. 07-001, March 29, 2007. The Opinion addresses golf course improvements. Real property includes:

Fixtures:	Paved cart paths	
Buildings:	▪ Restrooms	▪ Canopies on barns and sheds
	▪ Storage sheds	▪ Golf cart storage area
	▪ Maintenance facility	▪ Golf course club house
	▪ Machinery shed	
Structures:	▪ Pole barns	▪ Clubhouse patio
	▪ Pole-constructed shelter	▪ Gazebo
	▪ Parking lots	

For these first three categories of property, the Tax Commissioner concluded the improvements would be of use to a subsequent owner not engaged in the same business.

<u>Land</u>:

- Practice greens
- Driving ranges
- Greens
- Sand traps
- Man-made lakes, streams, other water hazards and an irrigation pond

<u>Personal Property included</u>:

- Underground irrigation system, above-ground attached fixtures and control boxes
- Driving range mats and practice pins
- Water coolers and associated wooden posts
- Waste disposal cans
- Yardage markers, out-of-bounds markers and tee signs
- Scoreboard
- Ball washers

8. ***Inverness Club v. Wilkins***, (May 11, 2007), Ohio BTA Case 2004-R-338. Golf course improvements were determined to be real property and not personal property or taxable landscaping services. The improvements included:

- moving a hill
- changing fifty-seven bunkers
- reconstructing thirty-eight tees
- adding yardage
- tee drainage
- fairway construction
- new irrigation on fifteen holes

In finding the golf course improvements to be real property, the Board limited the scope of taxable landscaping services to transactions that make the property "prettier or more ornamental." As to real property classification, the Board found the improvements to be "land itself". The Board then addressed whether they were business fixtures and cited its decision in ***Polaris***, limiting "business fixtures" to items of personal property (with a physical existence separate and apart from the land) that have become permanently attached but can be removed without causing significant injury to the land, versus permanent fabrication and construction. The Board also cited a July 21, 2006 Portage County Court of Common Pleas decision involving golf course improvements found to be real property, distinguishing ***Funtime*** "because the use of the amusement rides 'was confined exclusively to the business of an amusement park and were not of any practical use to a different business'."

9. ***Goofy Golf II, Inc. v. Levin*** (November 4, 2008), Ohio BTA Case No. 2007-A-199. Following the Ohio Supreme Court's decision in ***Funtime, Inc. v. Wilkins***, 105 Ohio St. 3d, 2004-Ohio-6890, two specialty water park pools, consisting of a "Lazy River" and main activity pool, were classified as personal property (business fixtures) since they primarily benefited the particular business conducted on the land and would be of no benefit to the land if the water park's business was terminated. The Tax Commissioner found that an in-ground pool and adult pool were real property.

COMMENT: Did the Board retreating from its restrictive interpretation of ***Funtime*** set forth in ***Polaris***? Perhaps the Board felt a bit constrained since the pools at issue appear to be similar to Funtime's Grizzly Run water ride found to be personal property (business fixture).

10. ***Funtime, Inc., v. Wilkins*** (May 24, 2011), BTA No. 2006-K-730. ("Funtime II"). Narrowly construing the Supreme Court's decision in ***Funtime, Inc. v. Wilkins***, 105 Ohio St. 3d 74, 2004-Ohio-6890, fencing and railing around an attraction were found to be real property, being a "structure" without unique business characterization. It served a general purpose of protecting, building and restricting pedestrian traffic, as well as separating from view one area from another. Therefore, the fencing/railing was not a business fixture. This is consistent with the BTA's decision in *Polaris*.

11. ***SSN II, LTD v. Warren County Board of Rev.***, 12th District Appellate Court, No. CA2012-04-037 (March 25, 2013). The taxpayer asserted that various golf course improvements were personal property (business fixtures) and not real property for real estate tax purposes. The improvements consisted of teeing grounds, cart paths, sprinkler systems, drainage systems, water hazards such as ponds and streams, fairways, bunkers, roughs putting greens, and holes. The

Court adopted the BTA's rationale in *Polaris* and *Inverness* in holding that all of these improvements (except the sprinkler systems) were real property. In addition, a canopy deck was found to be a fixture since it was common to buildings.

12. ***Hoffman Properties Limited Partnership v. Testa***, Ohio Ct. App. 9th Dist., Dkt. No. 14C0041-M (September 28, 2015). Ohio Supreme Court appeal pending, Case No. 2015-1779. The court affirmed the Board's holding that a golf course irrigation system was a "*business fixture*" and, thus, not real property. It was highly specialized and designed/installed to address the unique needs associated with the golf course operation, primarily benefitting the business and not the land. Moreover, its removal would only cause repairable, temporary damage (and not permanent damage). Although subject to debate, the Court found the Board's decision in ***Inverness Club v. Wilkins***, Ohio BTA Case No. 2004-R-338 (May 11, 2007) to be distinguishable as addressing only whether improvements constituted landscaping or lawn care services; the court stated that the Board found the construction company services to be construction, not landscaping, and did not address the characterization of an irrigation system.

13. ***Pep Boys – Manny, Moe & Jack of Delaware, Inc. v. Testa***, Ohio BTA Case No. 2015-706 (April 4, 2016). Assessment affirmed with respect to burglar/fire alarms, outdoor illuminated sign, electrical wiring and switches, a security surveillance system, store remodeling, and an air compressor. Although the Tax Commissioner acknowledged that some of the items assessed as "*store remodelers*" may be real property, there was insufficient evidence since the taxpayer did not attend the hearing.

14. ***Palace Hotels, LLC v. Testa***, Ohio BTA Case No. 2016-1300 (March 5, 2018). Resort hotel's waterpark improvements/amenities were real property. This included a roof/dome, fiberglass decks, plumbing, electric and concrete foundations. The Tax Commissioner accepted in-ground pools as real property. Relying upon its earlier decisions in ***Polaris Amphitheater*** (2007) and ***Inverness Club*** (2007), the Board noted that an item can have a commercial purpose and still be real property (rather than a business fixture). Moreover, professional engineering services were nontaxable, being a part of the price for the waterpark construction (i.e., real property improvements).

15. ***Nationwide Mutual Insurance Co. v. McClain***, Ohio BTA Case No. 2018-313 (October 22, 2019). Installation of industry-standard communication lines (CAT-5 and CAT-6 cabling) constituted nontaxable real property improvements, rather than taxable business fixtures. Despite a previous ruling (discussed below) that such cabling was a business fixture, the BTA found this type of high-speed computer cabling was not a business fixture because it was no longer unique to specific businesses and is common in any commercial property. The parties stipulated that if Nationwide abandoned the buildings where the cabling was installed, any business could use the cabling for its voice and internet communications. Common building elements, including electrical and communication lines, are excluded from the definition of "*business fixture*." R.C. 5701.03(B).

    Accordingly, certain improvements once taxable as business fixtures may evolve into nontaxable real property improvements. In the 1990s, the BTA held

internet cable installations were taxable business fixtures because they were not common in every building and primarily benefited the specific business occupant instead of the realty. *See Newcome Corp. v. Tracy*, BTA No. 97-M-320 (Dec. 11, 1998). Now, this type of high-speed computer cabling is so commonplace that any subsequent business occupying the property would use the installed cabling for its own benefit. The BTA noted that when *Newcome* was decided the type of high-speed communication cable installations were tailored to the specific customers' business, as the existing cabling was rarely used when systems were upgraded, and similar cabling was not found in every commercial building nor usable by other building occupants. Although the BTA noted there might be some specialized cable installations that constitute business fixtures that was not the case here where only industry standard cabling was installed.

16. **Tax Commissioner Opinion 21-0001 (November 9, 2021): Video Display Systems are "business fixtures" subject to sales / use tax**: Explains that Video Display Systems installed in sports stadiums / arenas and digital billboards and signs that broadcast videos and messages to visitors or passersby are business fixtures. The Displays at issue consisted of one to hundreds of video cabinets either welded or anchored to the building or structure and installed based upon the customer's planned use. The Tax Commissioner explained the Displays are composed of separate pieces of tangible personal property assembled on-site similar to equipment, signs, or broadcasting systems that are specifically identified as business fixtures in R.C. 5701.03(B). Further, the displays are generally intended to benefit the business conducted on the premises. Therefore, the Tax Commissioner concluded that the Video Display Systems were business fixtures.

Conclusions:

a. Per the BTA's interpretation of ***Funtime*** in ***Polaris, Inverness***, ***Funtime II***, ***SSN II, LTD*** and ***Palace Hotels***, business fixture classification is confined to distinct items of tangible personal property that:

(i) do not become part of a permanent fabrication or construction on the property whose removal would cause "significant injury to the land"; and

(ii) have a very specific business purpose.

Special purpose buildings and structures are real property. Where does ***Goofy Golf*** fit in? Is it an aberration, or does it bring us back to a restrictive interpretation of ***Funtime***?

b. Actual components of land are real property.

D. Protecting From Uncertainty as to Property Classification.

If it is unclear whether tangible personal property becomes real property upon installation, the contractor may request certification from the customer as to what will constitute real property and what will retain its classification as tangible personal property after installation. The request must be sent to the customer by certified mail, return receipt requested, before entering into the contract to perform the work. The contractor may rely in good faith on the customer's certification and is protected from erroneous classification as long as it acts consistent with the customer's certification. If the customer does not provide a certification, the contractor can make a good faith determination as to which

property becomes real property after installation and pay sales/use tax accordingly; under such circumstances, the contractor will be excused from liability for tax on materials if the Tax Commissioner determines more of the contract was properly characterized as a real property improvement.

VI. PROCEDURE

A. Penalty Abatement.

Smink Electric, Inc. v. Wilkins (January 19, 2007), Ohio BTA No. 2005-B-1277 (appeal pending with the Ohio Supreme Court). Under the abuse of discretion standard, penalty remission was granted due to the taxpayer's "exceptional good faith demonstrated," which included relying on competent professionals for advise on tax matters. Before the liability arose, the company also contacted the Ohio Department of Taxation for specific instructions concerning tax compliance.

Cottonwood, Inc. v. Levin (April 19, 2011), Ohio BTA No. 2009-K-5. The Tax Commissioner assessed a struggling business deficient sales tax, interest and penalties. The taxpayer appealed requesting a waiver of interest and penalties, but without challenging the tax, based upon the fact that the deficient sales tax had been paid and the business' financial hardship. In affirming the penalty, the BTA noted that the Tax Commissioner has considerable discretion to include interest and penalties in an Ohio sales/use tax assessment pursuant to R.C. 5739.13 to 5739.133. A taxpayer challenging the use of this discretion must show more than an error of law or judgment, but rather that the Tax Commissioner's decision was unreasonable, arbitrary or unconscionable which did not exist in this case.

Smedley Chevrolet Sales, Inc. v. Levin (October 9, 2012) Ohio BTA Case No. 2011-A-760. Normally, a penalty can be challenged only through a timely filed Petition for Reassessment. However, a penalty refund (and interest thereon) is allowed in the absence of a Petition for Reassessment in "egregious circumstances" which, in this case, included employee fraud (theft of company funds) discovered after the period during which a Petition for Reassessment could be filed. It also appeared helpful that the taxpayer had prosecuted the employee and paid all of the outstanding assessments, consistent with a previous record of timely paying all taxes.

S2K, Inc. v. Testa (September 24, 2014), BTA Case No. 2013-2423. 50% penalty affirmed since taxpayer did not meet burden of establishing Tax Commissioner abused his discretion. The seven-year assessment period, the significant time elapsing before discovering and addressing the delinquent filing, and the failure to timely remit taxes for a subsequent period supported the Tax Commissioner's denial of penalty abatement.

Neptune v. Testa, Ohio BTA Case No. 2014-4620 (November 12, 2015). Penalty assessment upheld due to failure to support a Tax Commissioner abuse of discretion. The taxpayers asserted one spouse's long-standing severe health conditions forced them to rely on the other to maintain proper records for the remittance of sales tax. The Tax Commissioner abated a portion of the penalty, and there was no evidence the Tax Commissioner abused his discretion.

J&T Washes, Inc. v. Testa, Ohio BTA Case No. 2015-470 (March 14, 2016). The taxpayer failed to establish that the Tax Commissioner abused his discretion by not remitting the entire penalty. The BTA had no statutory authority to address abatement of interest.

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).

Fiddle Stix Boutique, LLC v. McClain, Ohio BTA Case No. 2018-69 (April 29, 2019). A penalty was affirmed even though the Taxpayer asserted it had paid the sales tax liability at issue and received a confirmation that it had paid. However, the Department of Taxation never took the funds out of the Taxpayer's account. The BTA had to limit its review to determine if the Tax Commissioner had abused his discretion in denying penalty abatement, and determined that he did not.

Karr v. McClain, Ohio S. Ct., Dkt. No. 2021-0457 (February 17, 2022). The taxpayer was penalized for not paying tax on a truck asserted to be used for transportation-for-hire. The BTA had found that the truck was not exempt, but abated the penalty by finding the Tax Commissioner abused his discretion. On appeal, the Court held that there was no basis in the record for finding that the Tax Commissioner abused his discretion, acting arbitrarily or unconscionably in imposing the penalty (i.e., no explicit determination that the Tax Commissioner acted with such an attitude). Accordingly, the BTA was reversed for being clearly erroneous.

B. Markup Calculation.

Shaks-Korner, Inc. v. Zaino, Ohio BTA Case No. 99-M-1442 (September 7, 2001). The Tax Commissioner's gross markup calculation from the test check period used to determine taxable sales of a convenience store was incorrect because it included exempt sales pertaining to lottery tickets and check cashing fees. Rather than removing such actual sales from the vendor's computed gross sales, they should have been removed from sales in the computation of the gross markup percentage. The Board accepted the vendor's objection even though it had signed a letter of agreement since there was a mutual mistake of fact.

Our Time, Inc. v. Testa (December 5, 2013), BTA Case No. 2011-4719. Assessment against convenience store based upon markup analysis was affirmed. There was no evidence to support vendor's assertions as to employee theft and purchases erroneously attributed to vendor.

Woodville One Stop Center (April 8, 2014), BTA Case No. 2013-5988. Taxpayer/vendor was not allowed to challenge markup percentages since an agreement had been signed. Furthermore, the taxpayer could not support spoilage and employee theft.

A.B.C. Foods, Inc. v. Testa (April 29, 2014), BTA Case No. 2013-6479. Although it appears there was no markup agreement executed, the auditor's markup calculation was accepted due to lack of evidence to support lower markup percentages.

Lotto Express, Inc. and Christine Markho v. Testa (May 18, 2014), BTA Case No. 2013-6569. The auditor did a markup analysis (apparently without an executed agreement) which was upheld due to lack of evidence to support lower markup percentages.

Murali, Inc. v. Testa (October 22, 2014), BTA Case No. 2014-1169. Markup assessment against convenience store affirmed due to lack of sufficient evidence to support lower

liability. *See also,* ***Tabateh, Inc. v. Testa*** (October 22, 2014), BTA Case No. 2014-1150 (markup assessment affirmed); and ***Manes v. Testa*** (September 2, 2014), BTA Case No. 2013-5590. Markup analysis affirmed consistent with executed memorandum of agreement.

M&A Food Store, Inc. v. Testa, BTA Case No. 2013-4504 (January 27, 2015). The Board affirmed the Tax Commissioner's sales tax assessment against a retail convenience store. The taxpayer attempted to support its contention that the assessment was overstated by offering its 2010 corporate income tax return and an email from a Department of Taxation representative regarding potential allowable adjustments based upon previously provided records. The Board treated the Department's email as a settlement offer, but found insufficient evidence supporting the adjustments discussed in the email. The tax return and email were not probative evidence to reduce the assessment without testimony from the taxpayer's representative to corroborate the representations therein.

Castle's Gas & Deli, LLC v. Testa, Ohio BTA Case No. 2015-311 (January 11, 2016). This is one of the few favorable BTA decisions at least initially rejecting the Tax Commissioner's mark-up analysis when the vendor (convenience store operator) could support it had relevant records that were not considered – those records that reflected total daily taxable sales. There appeared to be conflicting evidence as to whether the records detailed the specific items sold. More importantly, the Tax Commissioner asserted such records did not identify all of the sold inventory (i.e., presumably, additional imputed unreported cash sales were not captured). Regardless, the BTA found that all "*appropriate*" records should have been considered. Since there was no evidence the vendor's records were deficient, the case was remanded back to the Tax Commissioner for full consideration of the vendor's "*sales tax records*" to determine the accuracy of the amount assessed.

However, in a second case, the BTA affirmed a second assessment against this vendor because it failed to provide any new documentary evidence challenging the assessment or the mark-up methodology (and the record was complete as to all of the evidence the auditor considered in arriving at the mark-up liability). *See* ***Castle's Gas & Deli, LLC v. Testa***, Ohio BTA Case No. 2016-1477 (June 29, 2016).

Baker v. Testa, Ohio BTA Case No. 2015-1479 (June 24, 2016). Mark-up audit of a dance/entertainment nightclub / bar was affirmed because the taxpayer provided only bare assertions as to the incorrectness of the assessment. When contesting the Tax Commissioner's determination, the Taxpayer has the burden to establish his "*actual tax liability*", as well as other errors in the assessment through "*competent, probative*" evidence. *See also,* ***Saim Inc. v. Testa***, Ohio BTA Case No. 2015-317 (January 22, 2016).

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).

Willard Drive Thru v. Testa, Ohio BTA Case No. 2016-16 (January 19, 2017). A convenience store mark-up audit was affirmed. The four core deemed sale categories (beer, wine, liquor/other alcohol and cigarettes) were determined by the state statutory minimum pricing, while the mark-ups for other products fell within the ranges of the vendor's own product checklist (as well as industry standards).

Club Ethio v. McClain, Ohio BTA Case No. 2022-28 (December 27, 2022). Markup audit upheld since taxpayer failed to provide probative/credible evidence to establish an alternative to audit's conclusions. No BTA evidentiary hearing occurred.

C. Successor Liability.

Ohio Department of Taxation v. B/G 98 Co., LLC, 141 Ohio App.3d 678 (Ham. Cty.; March 2, 2001). The judicial sale exception to successor liability did not apply to a court-supervised sale under the bankruptcy code. Such exception only applies when the court assumes the role of vendor, which is not the case in a court-supervised sale where the debtor-in-possession remains the vendor. Therefore, the purchaser of the debtor company's assets was responsible for the debtor's unpaid Ohio sales tax; it could have withheld a sufficient amount from the purchase price to pay the taxes.

D. Audit Methodology.

MCI Telecommunications Corp. v. Tracy, Ohio BTA Case No. 98-K-1299 and 98-K-1300 (April 19, 2002). Telecommunications service provider (calling cards) was liable for uncollected permissive tax even though it did not have the ability to determine the Ohio county to which its sales were sitused. The Board found that an impossibility exception to sales tax collection did not exist.

Beck v. Zaino, (August 20, 2004), Ohio BTA Case No. 2003-14-1257. The Board held that the inclusion in the test sample of an installation charge erroneously accounted for by the taxpayer as a monitoring charge, when the examining agent had acknowledged installation charges were properly accounted for by the taxpayer, skewed the sample result and was, thus, permitted to be excluded from the sample.

Design Molded Plastics, Inc. v. McClain, Ohio BTA Case Nos. 2021-183 and 2021-313 (October 11, 2022). The BTA upheld the agreed to audit sampling methodology, noting that it can only potentially be successfully challenged as unrepresentative (e.g., due to inclusion of an expense in the wrong account) upon quantifying the impact of alleged sampling errors on total tax due. More importantly, the taxpayer waived any argument due to the executed sample arrangement.

E. Quick Service Restaurants (QSR) Sales Tax Compliance Report: New Options to Consider During a Sales Tax Audit.

Following a series of interested party meetings, the Department issued its QSR Sales Tax Compliance Report presenting additional audit options QSR vendors may utilize, as well as a new "*restaurant compliance program*" (RCP). If the Department initiates an audit, the QSR may choose from: (1) standard test check; (2) modified test check with expanded days / hours and seasonality considerations; (3) managed test check to be conducted by the QSR or a third-party; and (4) enhanced statistical analysis agreement whereby a taxable sales percentage based upon a comparable peer group is agreed upon. Additionally, the Department implemented a voluntary RCP which reduces the likelihood of an audit and allows the QSR to avoid the 15% penalty if audited. The RCP includes education for the QSR's employees and requires the taxpayer's POS system to default to taxable (except registers separated for drive-through sales), among other compliance measures.

F. Bad Debt Deduction.

Chrysler Financial Co. L.L.C. v. Wilkins, 102 Ohio St. 3d, 2004-Ohio-3922. The taxpayer (financing company) was not entitled to a bad debt deduction for installment accounts

acquired from its dealers since it was not the "vendor", which is a prerequisite to such deduction under R.C. 5739.121. A "vendor" is defined as a person by whom the transfer affected by a sale is to be made. Accordingly, the taxpayer would be a vendor with respect to the transactions at issue only if it was the entity that made the transfers generating the sales for which a bad debt deduction is being claimed. Since the taxpayer did not make the sales, it was not the vendor and, thus, was not entitled to the bad debt deductions.

O.A.C. 5703-9-44 (effective 4/26/2005). Allows multi-state vendors to allocate their bad debt deduction among multiple states, claiming the appropriate amount against their Ohio sales as supported by the vendor's books and records.

Home Depot USA, Inc. v. Levin, 121 Ohio St. 3d 482, 2009-Ohio-1431. The "merchant discount" attributable to credit card sales did not reduce the vendor's taxable sales as a bad debt since it was not reflected as a loss on the merchant's books. The vendor must actually experience the bad debt to take the deduction.

Ohio Admin. Code § 5703-9-44 (Bad debts) (Effective June 14, 2018) – To qualify for the bad debt deduction when the vendor assigns account receivables or uses a third party to facilitate financing, the claimant must be the vendor and the bad debt deduction must appear on the vendor's books and records.

G. Boats.

Lipinsky v. Zaino (May 7, 2004), Ohio BTA Case No. 2003-G-923. A vessel used in Ohio was taxable even though it had been documented by the U.S. Coast Guard.

Satullo v. Wilkins 111 Ohio St.3d 399, 2006-Ohio-5856. The Ohio Supreme Court affirmed the assessment of use tax on boats used in Ohio, making the following determinations:

1. In holding the boats were not held for resale, the Court recited many facts to support they were essentially purchased by the individual for his personal use. The documentation was not consistent with the individual's position as to a related corporation's ownership for business use (and primarily being held for resale).
2. The nonresident, "transient use" exception of R.C. 5741.02(C)(4) did not apply because the individual was an Ohio resident and the boats were not purchased for use outside Ohio.
3. Assessments of the same liability against the individual and a related corporation were acceptable since the liability would only be collected once.
4. The reduction in tax base for a nonresident business consumer's temporary use in Ohio is only available if a nonresident conducts business in Ohio with such property.
5. A trade-in credit was not allowed since the boat was not purchased from an Ohio licensed dealer.

H. Personal Liability of Corporate Taxpayer's Officers or Employees for Failure to Pay Sales Taxes.

1. Responsible Party Status.

Hyan Kyung Kim v. Tracy, Ohio BTA Case No. 1998-S-228 (March 17, 2000). Even though appellant was misled by her business partner as to full payment of taxes, she was liable for the sales tax delinquency as a responsible corporate officer.

Lehman v. Tracy, Ohio BTA Case No. 97-N-1573 (July 27, 2001). An officer was found to be a mere investor in a tavern and not responsible for unpaid sales taxes. The other owner/operator of the business withheld all relevant information from such investor. Although the investor had filed the corporation's returns in the past, for the period at issue, he did not file any returns since he was shut out from the business.

Davis v. Tracy, Ohio BTA Case No. 98-P-1037 (June 8, 2001). A corporate secretary was not liable for the unpaid sales taxes of the delinquent corporation even though he owned 45% of the stock and was part of an officer group that owned more than 50% of the corporation's shares. Ohio Administrative Code Rule 5703-9-49 (F), which effectively deems such officers to be automatically liable, could not be applied in the absence of acts that show the requisite control over financial affairs of the delinquent corporation. There was no evidence that substantiated the Tax Commissioner's contention that the officer was in control of financial matters of the corporation beyond mere title as secretary and stock ownership. He was responsible for overseeing the marketing and sales of the business. Although he had check writing authority, he was not responsible for the corporation's financial matters, and never signed sales tax returns or had responsibility for the same. See also, ***Pallay v. Zaino***, Ohio BTA Case No. 00-M-884 (December 14, 2001) (officer not liable under similar circumstances).

Nusseibeh v. Zaino (2003), 98 Ohio St. 3d 292. Pending the transfer of the underlying liquor permit, a purchaser of a convenience store took possession of the store under a management agreement. The sole officer of the corporate seller was per se liable for the corporation's unpaid sales taxes accruing during the period covered by the management contract. The sole officer could not delegate his responsibility for execution of the corporation's fiscal responsibilities.

Brandia Graves, d.b.a. Unique Fashions v. Zaino (December 20, 2002), Ohio BTA Case No. 2002-J-478. An officer was liable even though the outside accountant was convicted of filing false sales tax returns and retaining the corporation's sales tax (having been sentenced to 3 years in prison).

Palmquist v. Zaino (November 14, 2003), Ohio BTA Case No. 2003-J-220. The secretary/treasurer of an interior design company was not liable for unpaid sales tax because she had mere check signing authority but was not allowed to sign checks. She was not involved in the day-to-day management of the company or aware that sales tax obligations were delinquent.

Morrow v. Zaino (April 9, 2004), Ohio BTA Case No. 2003-R-542. An attorney assessed as a responsible party for unpaid sales tax paid the assessment and filed a refund claim contending he was not personally liable. The Board agreed. In reaching its holding, the Board held that the attorney had standing to obtain a refund of his previously paid assessment even though he was not a vendor.

Johnson v. Zaino (December 3, 2004), BTA Case Nos. 2003-M-2113 and 2004-M-605. The president of the delinquent corporation was responsible for unpaid taxes even though she did not actually participate in financial matters. She did have check writing authority and periodically filed sales tax returns (with the sales tax remittance). Since fiscal matters were ordinarily within the scope of her responsibilities even though she may not have exercised such responsibilities, she was personally liable for the delinquency.

Smith v. Wilkins (September 30, 2005), Ohio BTA Case No. 2004-R-371. A 49% shareholder that was vice president and secretary was not responsible for the corporation's deficiency even though he had check signing authority. He essentially had no financial responsibilities and was not connected to the sales tax returns. He only had production responsibilities.

Myer v. Wilkins (March 24, 2006), BTA Case No. 2005-A-127. One–third shareholder and officer (secretary/treasurer) was a responsible party even though bank controlled collection and disbursement of funds due to a loan arrangement.

Errington v. Levin (December 20, 2011), BTA No. 2009-A-282, 2009-A-283. Personal liability found even though trust fund taxes (sales tax) to be remitted by delinquent company were seized by lending bank. The BTA relied upon the Supreme Court's decision in ***Willis v. Lindley*** (1980), 61 Ohio St.2d 356 (personal liability even though delinquent corporation's funds controlled by bank which determined creditors to be paid).

Borger v. Levin (January 10, 2012), BTA No. 2008-A-1905. No personal liability because the individual was neither an officer nor employee of delinquent corporation. For purposes of personal liability, an individual is not an "employee" if he/she does not receive compensation from the business for personal services rendered. The BTA did not consider affidavits provided by the individual's parents which supported his personal liability, relying upon his testimony instead.

State v. Smith (February 13, 2012), 197 Ohio App 3d 742 (3rd District Court of Appeals). Criminal conviction for failure to timely file two sales tax returns was upheld. The criminal penalty under R.C. 5739.99(B) applies to sales tax returns filed late or never filed. Defendant was a corporate officer responsible for filing sales tax returns based upon the following evidence:

- Defendant's admissions regarding responsible officer status.
- Vendor's license listed defendant as secretary/treasurer.

Radigan v. Testa (December 18, 2013), BTA Case No. 2012-892. Fifty-one percent shareholder who served as president, maintained check-signing authority and signed sales tax returns was personally responsible for corporate delinquency.

Gillan v. Testa (October 22, 2014), BTA Case No. 2014-1340. Assessment against responsible party affirmed even though there may be "more responsible" individuals (including a corporate controller). There can be multiple responsible parties.

Qaimari v. Testa (October 22, 2014), BTA Case No. 2014-538. Consistent with Supreme Court precedent, assessment against responsible party affirmed even though person had delegated responsibilities to a third party. Also, the taxpayer was precluded from challenging the underlying assessment against the business, as the appeal is limited to responsible party status.

Wilson v. Testa (September 19, 2014), BTA Case No. 2013-1349. Person asserting mere investor status was liable due to his display of fiscal responsibilities by:

- Signing two loan agreements (personally guaranteeing both);
- Having check signing authority;
- Soliciting new investors; and
- Paying delinquent sales tax.

This case is interesting in that the individual was not a responsible party for federal payroll taxes, as accepted by the IRS. The BTA noted that a different standard applied.

Leishman v. Testa, Ohio BTA, Dkt. No. 2013-6262 (February 3, 2015). The taxpayer asserted the company was managed by another individual who independently determined the sales tax due and reported that amount to the taxpayer, who then paid the stated amount. The taxpayer's involvement was "*merely on paper*" and the result of pressure from her then-husband. She was not involved in day-to-day operations. Despite being sympathetic to the taxpayer regarding coercion by her ex-husband, the Board stated she "*clearly had financial responsibility*" for the company, as evidenced by her signing checks, filing sales tax returns, and being listed as president of the store's ownership entry. Moreover, the Board affirmed that "*delegation of the day-to-day business responsibilities to another . . . does not relieve one of responsibility under R.C. 5739.33*." She still had the relevant authority/responsibility.

COMMENT: The individual was liable even though the decision did not reflect officer or employee status.

Painter v. Testa, Ohio BTA Case No. 2015-111 (February 26, 2015). President / sole shareholder was found liable as responsible party since fiscal duties were within his responsibility even though he delegated management under separate management agreements with potential buyer.

Kingery v. Testa, Ohio BTA Case Nos. 2012-887; 2012-888; 2012-889; 2012-890 (January 27, 2015). The Board found the taxpayer was not a responsible party. She was "*not an Officer, Stock Holder, or an employee*," but was hired as an independent contractor, working part-time on financial matters (and presented a consulting service agreement confirming such arrangement). Despite earlier being the secretary/treasurer and vice president of the company, the Board found she was not a responsible party because the corporate minutes clearly showed she resigned well before the years at issue. Furthermore, the Board found she was not an employee, having received no compensation for services performed.

Singh v. Testa, Ohio BTA Case No. 2017-1160 (September 10, 2018). Assessment affirmed since convenience store liquor license was in individual's name who continued to be associated with the business as a responsible party/owner.

Crawford v. McClain, Ohio BTA Case No. 2021-577 (October 8, 2021). Bartender (representing herself/pro se) was not a responsible party liable for unpaid sales tax since she had no meaningful financial responsibilities. Although she participated in the company's audit and served as the manager before the owner died, she never had access to bank accounts, sales tax returns, financial documents or any information associated with the Ohio Business Gateway account. She was not an owner.

Dunn v. McClain, Ohio BTA Case No. 2019-2999 (December 7, 2021). Sole owner of bar listed as the CEO on both the vendor's license application and liquor permit was responsible party due to his officer status and holding the liquor license.

Brooks v. McClain, Ohio BTA Case No. 2020-1152 (December 9, 2022). Responsible party status affirmed. Individual claimed he merely lived next door to the LLC's owner and became a member of the LLC to assist the owner obtain a lease; the owner was a felon. He allegedly did not receive financial gain and had no financial interactions with the LLC. The BTA affirmed the individual as a responsible party because he was publicly listed as a member of the LLC, signed a check, and signed the LLC's lease (including as guarantor).

Sousa v. Harris, Ohio BTA Case No. 2020-742 (August 23, 2023). Individual assessed as officer of delinquent corporation was not a responsible party although he continued to own the company. He was not an officer since he had ceased employment and relinquished all responsibilities associated with the company prior to the assessment period. Furthermore, he did not carry out any functions consistent with being an officer.

Biskind v. Harris, Ohio BTA Case Nos. 2019-2398 and 2019-2434 (August 24, 2023). 99% owner and President of cleaning company was liable for unpaid sales tax even though he was an absentee owner predominately residing in New Zealand. Applying existing Supreme Court precedent, he was fiscally responsible even though he delegated responsibility.

2. Defenses.

State of Ohio, Department of Taxation v. Lomaz (Ohio Court of Appeals Decision, Portage County Decision, 11th Appellate District, Number 2000-P-0106, 2001 Oh App. Lexis 4717 dated October 19, 2001). Responsible corporate officer was allowed to raise as an affirmative defense against a collection action against him that he never received notice of the relevant tax assessment.

Hill v. Testa (June 13, 2013), BTA Case No. 2012-Q-4709. Appeal of responsible party assessment dismissed for lack of jurisdiction (i.e. failure to specify an error) because appellant did not assert lack of responsible party status. Appellant only objected to the validity of the corporate assessments.

Tanner v. Testa (December 18, 2013), BTA Case No. 2013-2425. Taxpayer's appeal of responsible party liability assessment asserting liability had been paid was dismissed because the only appealable issue of a responsible party assessment is the lack of responsible party status.

Cruz v. Testa, 2015-Ohio-3292. The Supreme Court held that although an officer cannot challenge a corporate assessment for which he/she is derivatively responsible on the basis of a substantive tax law error (e.g., delinquent corporation's sales were exempt), the officer may challenge a corporate assessment on the basis it is procedurally defective. This is because the assessment is derivative in nature, allowing procedural delinquencies with respect to the corporate assessment to inure to the officer's benefit. Moreover, this is consistent with officers' due process rights in terms of ensuring the corporate assessment was the subject of proper notice and an opportunity to be heard before becoming final.

In this case, the officer established that the delinquent corporation was not properly served with respect to quite a few assessments, thereby invalidating them as well as her

resulting derivative liability. If the merits of the liability were at issue, she would have been precluded from contesting the same in her proceeding, as the only issue would be whether she was a responsible corporate officer.

Cruz v. Testa, Ohio BTA Case No. 2013-1010 (December 29, 2015). Following Supreme Court's remand, the Board held that the twenty underlying corporate assessments had been properly served so that the corresponding personal assessments against the individual taxpayer were valid.

3. Direct Pay Returns.

John H. Shaver v. Tracy, Ohio BTA Case No. 98-696 (November 22, 2002). The delinquent corporation held a direct pay permit, thereby requiring it to remit sales tax on its purchases, filing a return under R.C. 5739 for both sales and use tax. The Board addressed whether a corporate officer was potentially liable for unpaid sales tax due on the corporation's purchases. While noting there was incomplete evidence linking the officer to the responsibility for remitting tax due on the direct pay payment, the Board stated R.C. 5739.33 "should only be predicated upon the failure to remit sales tax collected by a vendor at the consummation of a retail sale". The Board further noted, "indicative of the doubtful authority of the Tax Commissioner in this instance to assess sales tax due on purchases is the legislative omission of personal liability of responsible corporate officers or employees for unpaid use tax assessed upon use or consumption of tangible personal property pursuant to Chapter 5741." Accordingly, the Board held that the officer was not personally liable for unpaid sales tax on the delinquent corporation's purchases.

COMMENT: A.M. Sub. H.B. 95 (effective July 1, 2003) now extends personal liability provisions to direct pay permit holders.

Dulay v. Testa, Ohio BTA Case No. 2014-2074 (December 3, 2015), appeal pending with Ohio Supreme Court as Case No. 2015-2111. Assessment affirmed with the Board only receiving evidence relevant to taxpayer's assertion that his equal protection and due process rights were violated through the application of the responsible party liability provisions to him. R.C. 5739.33.

4. Procedure

Maysalum Samad v. Testa, Ohio BTA Case No. 2016-952 (June 8, 2017). The Tax Commissioner filed a motion to dismiss because prior to issuance of the Final Determination appellant did not object in writing to asserted responsible party status, although she did orally object during the administrative appeal hearing before the Tax Commissioner. On such basis, the BTA was prepared to dismiss the appeal. However, since the Tax Commissioner actually addressed responsible party status in the Final Determination, the BTA found that the Commissioner assumed jurisdiction over the issue which also gave the BTA jurisdiction. Nonetheless, the BTA affirmed responsible party status since the appellant identified herself as "president" of the company, and there was no testimony to support lack of responsible party status (i.e., only written statements accompanying the notice of appeal which could not be verified).

Houser v. Testa, Ohio BTA Case No. 2015-221 (November 30, 2015). Appeal dismissed for lack of jurisdiction since individual admitted responsible party status and limited objection to challenging underlying corporate liability.

Columbus Cleaning Solutions, Inc. v. Testa, Ohio BTA Case No. 2015-347 (September 11, 2015). Appeal dismissed for lack of jurisdiction due to taxpayer's failure to object to responsible party liability status. The taxpayer asserted she should not be liable because the underlying delinquent corporation operated under a payment plan to satisfy its outstanding sales tax liability and remained current under the plan. The payment plan did not release responsible parties (of course until it was fully satisfied).

Derouchie v. Testa, Ohio BTA Case No. 2017-1264 (September 5, 2018). Assessment affirmed since individual did not contest status as responsible party, but only asserted that corporate assessment was erroneous. Per Ohio Supreme Court precedent, the BTA did not have jurisdiction to address merits of underlying corporate assessment.

Pastorek v. McClain, Ohio BTA Case No. 2020-415 (March 8, 2021). Taxpayer assessed as responsible party asserted that his criminal charge for failing to pay sales tax included a plea agreement to pay restitution to the State (but only the tax and not penalty, interest, fees and collection costs) so that such agreement constituted "*full payment of penalties and interest*". However, the BTA held such restitution does not control whether one is liable as a responsible party. The individual was still a responsible party liable for the underlying assessment, which was the entire liability.

I. Federalism Bars Challenge to Exemptions for Local Gas Suppliers.

Commerce Energy, Inc. v. Levin, U.S. Supreme Court, Dkt. 09-223 (June 1, 2010). Under the federal judicial doctrine of comity, retail natural gas suppliers were not allowed to challenge in federal court the exemptions from sales/use taxes and commercial activities tax that were available only to local gas suppliers. An adequate state-court forum was available to hear and decide the claims.

J. Credit for Tax Paid.

Equilon Enterprises LLC v. Levin (February 9, 2010), BTA Case No. 2007-V-441. Agreements with contractors for improvements to gas stations did not contain a reference to a specific amount of sales tax. Since sales tax was not specifically identified (and it was not established that the contractors actually remitted tax), the consumer did not receive credit for having paid any tax.

Gearheart v. Testa, Ohio BTA Case No. 2014-4592 (November 5, 2015). The case was remanded for the Tax Commissioner to consider additional evidence concerning the sale of an automobile to a family member which presumably included the price and payment of tax.

K. Class Action Against Vendor.

Ingrassia v. Ganley Management Co. (August 19, 2010), Ohio Court of Appeals, 8th District, No. 942661. Taxpayer's class action against vendor for over charging sales tax was dismissed. Since the injunction sought against the vendor would affect the state treasury, the claim was required to be brought in the Court of Claims which is the forum for claims against Ohio and its agencies.

L. Interest on 25% Refunds of Tax Paid on Equipment Used by Electronic Services Providers.

International Business Machines Corp. v. Levin, Ohio Supreme Court No. 2009-1296 (May 5, 2010). Statute allowing refund does not specifically refer to the payment of

interest (unlike the general refund statute which applies to taxes illegally or erroneously paid). Therefore, interest was not payable on this refund.

M. Agency Relationship.

Cincinnati Golf Mgt., Inc. v. Testa (June 27, 2012), 132 Ohio St. 3d 299. Company that managed City's golf course was not its agent with respect to purchases for the City's benefit for purposes of the R.C. 5739.01(B)(1) exemption for sales to political subdivisions. Therefore, the Company was liable for tax on such purchases. The Court stated: "A sale is a sale to a political subdivision under R.C. 5739.02(B)(1) only if the political subdivision is in actuality the purchaser that is consummating the sale by means of its agent – with the city thereby assuming and bearing the primary and essential liability to the vendor (rather than its agent doing so)." The asserted agent must have actual authority to bind the principal. Applying this test, the Court noted the Company could not bind the City on its purchases because the management contract expressly disclaimed an agency relationship. All purchase invoices were submitted to the City for approved reimbursement. Finally, the Company did not make "sales" of the purchased items to the City so as to qualify for the resale exemption. See also, R.C. 5739 (D)(3), which deems a facilities' management contractor to be the consumer of all items used in connection with the performance of its contract.

N. Construction Contracts

Durabilt, Inc. v. Testa (December 21, 2010), BTA Case No. 2008-M-501; affirmed, by 5th District Court of Appeals, No. 2008-M-501 (October 17, 2011). Durabilt asserted that its relationship with Holmes Lumber, which provided materials for construction jobs, was a joint venture in which Durabilt sold construction services while Holmes was the vendor of building materials selling directly to the customer (although Durabilt received a commission based on Holmes Lumber's sales). The BTA found that Durabilt was a "construction contractor" because it was required to assist in incorporating the property being purchased from Holmes Lumber into real property. Therefore, Durabilt was liable for sales tax on the deemed material purchases from Holmes Lumber. Affirming the BTA's decision, the Court of Appeals found the BTA reasonably concluded that Durabilt's relationship with Holmes Lumber involved the purchase of materials therefrom so that Durabilt was taxed as a construction contractor.

Armrel Byrnes Company v. Levin (July 12, 2011), BTA No. 2008-A-1261. Consistent with the Supreme Court's decision in ***R.W. Sidley, Inc. v. Limbach*** (1993), 66 Ohio St. 3d 266, the manufacturing exemption was not available to a construction contractor that manufactured asphalt for its own contracts. The taxpayer was deemed to be the consumer and not the seller of the. A manufacturer entitled to the manufacturing exemption must produce tangible personal property for sale.

PCM, Inc. v. Harris, Slip Opinion No. 2023-Ohio-2974. A contractor had paid tax on materials incorporated into a data center, the components of which were determined to be a "*business fixture*". PCM, as the contractee, was assessed for the failure to pay tax on the price of the business fixture and asserted the assessed tax should be reduced by the tax paid by the contractor. The Court held there is no basis/precedent for an offset against PCM's tax liability for the contractor's erroneous tax payment.

COMMENT: The contractor certainly could have obtained a refund of the erroneously paid tax on the materials and remit such refund to PCM.

O. Refund Claims

Destiny Auto Sales, LLC v. Levin (February 8, 2011), BTA No. 2008-M-1773. Since there was not a full refund of the purchase price on a returned car, sales tax cannot be refunded. There was a $100 mileage charge. See Ohio Adm. Code 5703-9-11.

Evans v. Levin (July 17, 2012), BTA No. 210-K-3177. Refund claim denied due to failure to support tax paid on purchases.

Pierce Point Cinema 10 LLC v. Testa (March 13, 2014), BTA Case No. 2012-3063. A movie theater operator was entitled to retain sales tax erroneously remitted on sales of movie ticket admissions because the customers did not separately pay the tax. There was no amount of tax stated on the tickets or receipts so that the customers had no reason to believe they paid the tax. Moreover, when the operator ceased remitting sales tax, it did not change its admission price, further confirming the customers had not paid the tax.

The Tax Commissioner had denied the taxpayer's refund, stating that the taxpayer was unable to identify customers to be reimbursed for the sales tax.

The Cornerstone Shop, Inc. v. Testa, Ohio BTA Case No. 2015-385 (December 14, 2015). Partial refund claim allowed for tax paid within four-year period preceding filing of claim. Waiver provisions of R.C. 5739.16(A)(3) arising in context of an audit/assessment, whereby refund period is extended consistent with assessment/extension, did not apply since there was no assessment at issue but, rather, there was a voluntary payment for which the refund was filed.

Pride of Cleveland Scooters, LLC v. Testa, Ohio BTA Case No. 2016-375 (April 11, 2017). Vendor asserted it overpaid sales tax for three years due to an error resulting from its sales being inflated on its sales tax returns. It filed refund claims for three years and submitted evidence supporting the actual sales amounts, including profit and loss statements, explanatory spreadsheets, and receipts from the Ohio Bureau of Motor Vehicles. The Tax Commissioner granted the refund claims for two years, but inexplicitly denied the refund for 2013, claiming the vendor failed to provide sufficient evidence supporting its amended sales tax return. The BTA held that "*sufficient evidence [was] provided [to the Tax Commissioner] to determine whether the Taxpayer's request for refund was proper*". The evidence included a month-by-month summary of sales transactions, including receipt number, customer name and transaction date, as further supplemented by testimony of the vendor's accountant.

Clerac, LLC v. Testa, Oho BTA Case No. 2018-216 (September 10, 2018). Sales tax refund not allowed due to lack of evidence that full purchase price was refunded.

Tallen v. Testa, Ohio BTA Case No. 2017-1616 (Dec. 4, 2018). Sales tax refund denied because full purchase price for vehicle was not refunded. The total purchase price included a non-refunded $250 document fee. The purchase price consisted of the cost for possession of the vehicle, as well as services necessary to complete the sale, including the $250 document fee (necessary to transfer the Taxpayer's property).

P. Vendor Status

Macke v. Levin (March 15, 2011), BTA No. 2007-A-1222. Sale of watercraft did not qualify for the casual sale exemption, being expressly excluded by statute. In addition, the casual sale exemption was not available due to the use of a yacht broker who brought the seller and taxpayer together, serving as a vendor in the transaction. "Vendor" status existed

because the person affected a transfer of title or possession. Actual conveyance of title is not required.

Satisfaction Charter Services, Inc. v. Levin (March 15, 2011), BTA Nos. 2008-M-940 and 2008-M-1157. "Vendor" status existed because the taxpayer "made a location available for a customer to consume tangible personal property, and charged that customer for the privilege of consuming such property" as part of a complete package collecting a single fee (and even though it was not the party actually providing the food).

Q. Exhaustion of Administrative Remedies.

Brown v. Levin, Ohio 10th District Court of Appeals No. 2012-Ohio-5768 (December 6, 2012). Taxpayer challenging the collection of Ohio sales tax on a vehicle's trade-in value was required to exhaust administrative remedies before pursuing judicial relief. R.C. 5739.07 refund procedure was an adequate remedy and not overly burdensome. Accordingly, the trial court should not have considered the case on its merits (erroneously having held that the taxpayer was not required to exhaust available administrative remedies).

R. Price.

Woody v. Testa, Ohio BTA Case No. 2014-3964 (September 21, 2015). Price of vehicle acquired in trade-in was its market value since there was no substantive evidence of agreed upon sale 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.

Kniffen v. McClain, Ohio BTA Case No. 2019-530 (December 31, 2019). The tax base for cab rides included $2.50 charge for candy (consumed off premises) that the customer paid for his/her "free" cab ride. Applying R.C. 5703.56, sham transactions can be re-characterized consistent with their economic reality when the transaction lacks a business purpose or profit expectation (other than tax benefits). The true object of the transaction was the cab ride so that the amount paid was allocated thereto and taxable.

S. Writ of Mandamus

State ex rel. Repeal the Lorain Cty. Permissive Sales Tax Committee v. Lorain Cty. Bd. Of Elections, Ohio Supreme Ct. 2017-1181 (September, 15, 2017). Writ of Mandamus seeking to compel the Lorain County Board of Elections to certify an initiative petition (to repeal a county permissive sales tax) for the November ballot was denied, as the Court held that R.C. 5739.022(A) did not provide the legal right to the relief sought since the petition was not enacted as an emergency measure.

T. Transient Use Exemption

Guile v. Testa, Ohio BTA Case No. 2017-2115 (September 5, 2018). Transient use exemption (R.C. 5741.02(C)(4)) not available for Ohio resident's purchase of vehicle driven by him from Ohio dealer to Montana residence. Only non-residents are entitled to exemption.

U. Tax Base

Rowitz v. McClain, 10th App. Dist., Dkt. Nos. 18AP-191-194 (December 31, 2019). Feminine hygiene products, such as tampons and menstrual pads, not made or dispensed

with a prescription are taxable. The Federal and Ohio Equal Protection Clauses were not violated since a fundamental right was not infringed (meaning the tax met the rational basis test, being rationally related to a legitimate government purpose of raising tax revenue). The sales tax is "*gender-neutral*" falling within the broad statutory provisions (and any potential disparity against women was incidental). In addition, the Federal Medical Device Amendments to the Food, Drug, and Cosmetic Act did not preempt the taxing statute since it was connected to safety issues.

Note: This decision on the merits is now moot as Ohio enacted an exemption for feminine hygiene products effective April 1, 2020.

Thorbahn Enterprises, LLC v. Ohio Dept. of Tax'n., Ohio Ct. App. (10th App. Dist.), Dkt. No. 21AP-18, December 16, 2021. Summary judgment for Department of Taxation was affirmed, finding taxpayer's records (Z-tapes) were inadequate to determine its liability and that the auditor's method was reasonable. Auditor used inventory markup procedure to determine unpaid sales tax and did not rely upon Z-tapes because they did not distinguish taxable from non-taxable sales (and did not state the total amount of each transaction and accompanying tax).

V. Unconstitutional Tax on Speech:

Lamar Advantage GP Co., LLC v. Cincinnati, Ohio S. Ct., Dkt No. 2020-0931 (September 16, 2021). Cincinnati imposed a tax on only off-site outdoor advertising signs (not those pertaining to 6 site's business) so that the burden fell predominantly on two billboard operators. The Supreme Court held the excise tax was unconstitutional, barring enforcement.

The tax did not survive the strict scrutiny standard relevant to a selective tax impermissibly infringing on the advertiser's rights to free speech and free press protected by the First Amendment of the U.S. Constitution. It was a selective/discriminatory tax (versus generally applicable tax) imposed on protected First Amendment activities of only the two billboard operators that did not further a compelling government interest tailored to achieve that interest although the City had an interest in raising tax money, there were more acceptable sources of revenue.

VII. NEXUS

Nexus Standards.

The Department of Taxation has issued an information release dated September, 2001 explaining nexus standards applied to determine whether an out of state vendor is required to collect Ohio tax from its Ohio customers. The release describes protected safe harbor activities as well as those levels of activity that create substantial nexus.

Use Tax: Warranties of Out-of-State Company.

Automotive Warranty Corp. of America v. Zaino, Ohio BTA Case No. 2000-V-920 (December 20, 2002). Alabama company selling automotive repair warranties through direct mail solicitations was liable for uncollected use tax on its sales. The company had nexus with Ohio merely because it had registered to do business with the Ohio Secretary of State. The Board lacked jurisdiction to determine whether the relevant portion of Ohio's nexus statute (R.C. 5741.01(I)(7)) was unconstitutional under such circumstances (as a violation of the Due Process and Commerce clauses).

VIII. SIGNIFICANT OR "RECENT" LEGISLATION (OR PORTIONS THEREOF)

A. Acceleration of Tax on Leases (H.B. 405, effective 2/1/02).

Effective for leases entered into on or after February 1, 2002 (and not the extension of a lease entered into before such date), the lessor is required to calculate tax on the entire amount to be paid during the lease period for leases of:

1. motor vehicles designed by the manufacturer to carry a load of not more than one ton;
2. watercraft;
3. outboard motors;
4. aircraft;
5. business equipment (excluding motor vehicles designed to carry loads in excess of one ton).

The entire amount of tax to be paid must be collected at the time the lease is consummated. If the total amount of the lease consideration includes amounts not calculated at the time the lease is executed, tax is calculated and collected at the time such amounts are billed to the lessee. If the lease is open ended, tax must be calculated on the basis of the total amount to be paid during the initial fixed term (and then for each subsequent renewal period as it comes due).

The Tax Commissioner may disregard sham transactions entered into for the purpose of avoiding the accelerated tax payment. Such transactions are presumed to include a lease containing a renewal clause and a termination penalty (or similar provision) that would apply if the clause is not exercised. Under such circumstances, tax is computed and paid on the basis of the entire lease period (including all renewals) until the termination penalty no longer applies.

B. S.B. 269 (effective 9/21/06). No Use Tax on Donated Property.

Use tax does not apply to property held for sale that is donated to either: (1) a nonprofit organization operated in Ohio exclusively for charitable purposes; or (2) Ohio or any of its political subdivisions exclusively for public purposes. No portion of the nonprofit organization's net income can inure to the benefit of any private shareholder or individual, and no portion of its activities can consist of carrying on propaganda or otherwise attempting to influence legislation.

C. Conformity with the Streamlined Sales Tax Project (Effective July 1, 2003 Except Where Noted).

1. Tangible Personal Property Deemed to Include Prewritten Computer Software.

a. Defined: computer software, including prewritten upgrades, not designed by the author or other creator to the specifications of a specific purchaser (essentially "canned" software).

b. Applicable only for sales/use tax purposes.

c. Combinations of prewritten computer software programs remain prewritten computer software.

d. Customized software remains nontaxable. Key: the author develops the program to the specifications of the purchaser.

e. Modifications/enhancements to canned software are nontaxable if separately stated.

Ohio Administrative Code Rule 5703-9-46 will need to be amended to eliminate 50% rule (which had exempted even the canned software if the modifications represented more than 50% of the aggregate cost of the software in one transaction with a single vendor).

2. Medical Property.

a. Outlined in Appendix A.

b. Concerns:

(i) prescription requirement:

- prosthetic devices
- durable medical equipment
- mobility enhancing equipment

(ii) yet, broad definition of "prescription".

3. Leases.

a. Nominal option price.

(i) deemed a sale (conditional sale) and not a lease thereby requiring tax to be collected on price at time of sale (upon entering into "lease"), which includes finance/interest charges.

Old law: any lease agreement with an option to purchase at the end of the lease term was considered a lease, regardless of the option price.

(ii) nominal if option to purchase does not exceed greater of $100 or 1% of total payments.

b. A lease with a renewal clause and a termination penalty or similar provision that applies if the renewal clause is not exercised is presumed to be a sham transaction. Tax must be calculated and collected on the basis of the entire length of the lease period, including any renewal periods, until the termination penalty or similar provision no longer applies.

4. Definition of Price.

a. Discounts: exclude all discounts provided by vendor (whether at the time or after the sale). Manufacturer's discounts continue to be taxable.

If the discount is taken after the vendor filed the sales tax return (i.e., 2% discount upon payment of invoice within 30 days), then vendor may reduce its taxable sales by the discount on its next return.

b. Delivery charges (effective August 1, 2003): included in the tax base are all charges passed onto the customer by the vendor for the preparation and delivery of taxable property to a location designated by the consumer. Delivery charges include transportation, shipping, postage, handling, crating and packing. Previously, delivery charges had been excluded from the tax base if they were separately stated.

Charges by delivery companies continue to be exempt from tax. Therefore, less sales/use tax is paid if consumer pays delivery company directly.

c. When the transaction involves telecommunications services, mobile telecommunications services or cable television services sold in a bundled transaction with other distinct services, the entire price is taxable unless the vendor can reasonably identify the nontaxable portion from its books and records kept in the ordinary course of business.

5. Electricity.

a. Included within the definition of tangible personal property (previously had been excluded from definition).

b. Offsetting exemption for sales of electricity delivered through wires.

6. Food (effective July 1, 2004).

a. Expanded to include items consumed for their taste or nutritional value (including bottled water and chewing gum).

b. Excludes alcoholic beverages, dietary supplements, soft drinks and tobacco. "Soft drinks" do not include beverages that contain milk or milk products, soy, rice or similar milk substitutes, or that contain greater than 50% vegetable or fruit juice by volume.

7. Bad Debts.

a. Refund claim is allowed to the extent bad debts on a return are greater than the taxable sales reported for the period. The refund claim must be filed within four years of the due date for the return that could have first claimed the bad debt.

b. Vendor's certified service provider ("CSP"), as defined in R.C. 5740.01, may claim a bad debt deduction on behalf of vendor.

(i) CSP must credit/refund full deduction amount to vendor.

(ii) Only vendor or CSP (on behalf of vendor) may claim a bad debt deduction.

D. Extension of Tax Commissioner Authority to Attack Transaction (effective June 26, 2003).

1. For all taxes, the Tax Commissioner can now apply the following doctrines: sham transaction, economic reality, substance over form and step transaction. Previously, these doctrines applied to only corporate franchise/income and personal income taxes.

2. A "sham transaction" is defined as any transaction or series of transactions that have no economic substance because there is no business purpose or expectation of profit other than obtaining tax benefits.

3. Burden of proof on taxpayer if member of controlled group.

E. H.B. 429.

1. Origin Sourcing.

All vendors must use origin sourcing for intrastate sales effective January 1, 2010. Vendors that had adopted destination sourcing are permitted to go back to origin sourcing earlier if desired. Out-of-state retailers selling into Ohio must continue to

collect sales taxes on the basis of the tax rate for the destination. EFFECTIVE 1/1/2010, CONSUMERS DO NOT OWE ADDITIONAL USE TAX LIABILITY ON PURCHASES OF TPP IF THEY PAID THE SALES TAX USING THE ORIGIN OR DESTINATION RATE EVEN IF THE ITEM IS CONSUMED IN A HIGHER RATE COUNTY.

2. Delivery Charges.

Effective July 1, 2008, a vendor refunding the price of an item less the delivery charge need not refund the tax on the delivery charge.

F. Miscellaneous Modifications to Administrative Code to Conform with the Streamlined Sales and Use Tax Agreement (Selected Provisions).

1. Computer software maintenance contracts that provide only upgrades and updates are considered the sale of taxable pre-written computer software. The provision of mere support services is nontaxable. If both types of services are provided, the invoice must be itemized. Otherwise, the entire amount is deemed taxable.

2. An exemption certificate must be obtained within 90 days of the sale and include the customer's name, address, tax identification number, business type, as well as the seller's name and address, the reason for exemption and the purchaser's signature (if in hard copy form).

3. Sales of ancillary services or internet access services are sourced to the consumer's place of primary use. Ancillary services include those incidental to the provision of telecommunications services and include conference bridging services, detailed communications building services, directory assistance, vertical service and voicemail services.

G. Am. Sub. H.B. 153.

1. Exemptions (effective July 1, 2011).

a. Computer Data Center Exemption.

Exemption for purchases of computer data center equipment, as well as the installation, labor and repair of such equipment, for businesses that invest $\geq$ $100 million in a computer data center project site during a three consecutive year period while maintaining a payroll $\geq$ $5 million at the center. An application must be filed with the Tax Credit Authority to enter into an agreement for the complete or partial sales tax exemption.

b. Agricultural Exemption.

Standard changed from "directly" to "primarily".

c. Livestock Buildings / Structures.

The exemption for livestock related property is extended to purchases of building materials and related services incorporated into a building or structure primarily to be used for keeping fish, horses or captive deer.

d. Highway Service Projects.

The transfer or lease of tangible personal property between the State and a successful "proposer" remains exempt as long as Ohio retains ownership of the

project. A "proposer" is defined as "a private sector entity, local or regional public entity or agency or any group or combination thereof, in collaboration or cooperation with other private sector entities, local or regional public entities, submitting qualification or a proposal for providing highway services."

2. Exclusion of Gift Cards from Definition of "Price". (effective July 1, 2011).

a. The vendor cannot receive compensation from a third party to cover the gift card value.

b. The gift card is distributed through a customer award, loyalty or promotional program.

3. Consumer Use Tax Assessments.

Seven year look-back limitation, but cannot assess use tax due prior to 2008.

H. Am. Sub. H.B. No. 59 Highlights (effective September 1, 2013).

- Increase in state tax rate from 5.5% to 5.75%.
- The statute provides that Ohio is to become a full member in the Streamlined Sales and Use Tax Project (SSUTP) by adopting any necessary conforming legislation if Congress passes the Marketplace Fairness Act (or similar legislation). This will enable the State to collect more use tax from remote sellers, defined as those vendors not legally required to collect Ohio sales tax until provided by federal law. Since Ohio's laws now comply with the SSUTP, on July 9, 2013 Governor Kasich signed an Executive Order directing Tax Commissioner Testa to immediately apply for full membership in the SSUTP. Such full membership became effective January 1, 2014.
- Elimination of exemption for magazine subscriptions.
- Exemption for sales to a "qualifying corporation", defined as:
  - Nonprofit corporation organized in Ohio.
  - Leases real property from an "*eligible county*".
  - The real property is part of a recreational facility used by a major league professional athletic team or minor league baseball for a significant portion of its home schedule.
  - Excess revenue paid to county; this consists of the revenue in excess of expenses, capital costs and reserves.
  - Upon dissolution, all assets are transferred to the County.
- Expansion of tax base to include sales of "*specified digital products*" for permanent or temporary use. This consists of electronically transferred (e.g., conveyed other than by tangible storage media):
  - Digital audiovisual work: a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.
  - Digital audio work: a work that results from the fixation of a series of musical, spoken, or other sounds, including digitized sound files that are downloaded onto a device and that may be used to alert the customer with respect to a communication.

- Digital books: a work that is generally recognized in the ordinary and usual sense as a book.

▪ Exemption for sales to or by a cable service provider, video service provider, or radio or television broadcast station regulated by the federal government of cable service or programming, video service or programming, audio service or programming, or electronically transferred digital audio visual or audio work.

I. Amended Sub. H.B. 64 (2015).

1. "*Substantial Nexus*" Definition Modified – R.C. 5741.01(I).

Presumption of substantial nexus is raised when the seller:

a. Uses an office, distribution facility, warehouse, storage facility or similar place of business in Ohio whether operated by the seller or any other person (other than common carrier acting in its capacity as a common carrier).

b. Regularly uses employees, agents, representatives, repairers, salespersons or other persons in Ohio to conduct the seller's business or engage in business with a person that: (i) sells the same or a similar line of products and has the same industry classification; or (ii) uses the same or similar trademarks, service marks or trade names in Ohio.

c. Uses any person (other than a common carrier) in Ohio to: (i) receive or process orders; (ii) advertise, promote or facilitate Ohio sales; (iii) deliver, install, assemble or perform maintenance services for seller's customers; or (iv) allow customers to pick up property sold by the seller.

d. Is affiliated with a person that has substantial nexus with Ohio.

e. Enters into an agreement with one or more residents of Ohio where the resident, for a commission or other consideration, refers potential customers to the seller, whether by weblink, telemarketing, or otherwise, where sales from such referrals exceeds $10,000 during the preceding 12 months.

All nexus presumptions may be rebutted by the seller upon showing the activities are not significantly associated with the seller's ability to establish or maintain an Ohio market. With respect to item 5 above, such proof can include sworn statements provided in good faith from each resident with whom such seller has an agreement that the resident did not solicit in Ohio.

Registration with the Ohio Secretary of State or registration with any state agency to transact business, in and of itself, no longer establishes substantial nexus. However, an out-of-state seller must register to collect Ohio use tax before it provides property or services to any Ohio state agency.

2. Exemption for Meat Sanitation Services - R.C. 5739.02(B)(42)(p).

Building maintenance and janitorial services excludes sanitation services provided to meat slaughtering or processing operations necessary to comply with federal meat safety regulations under 21 U.S.C. 608.

3. Exemption for Rental Vehicles Provided by Warrantor - R.C. 5739.02(B)(42)(p).

Exemption added for rental vehicles provided to a person whose motor vehicle is being repaired or serviced, if the rental vehicle cost is reimbursed by the manufacturer, warrantor, or provider of a maintenance, service or similar contract, with respect to the vehicle being repaired. The Tax Commissioner must abate any unpaid taxes, interest, and penalties for these rental vehicle transactions occurring prior to the effective date of the exemption, provided the taxpayer paid sales/use tax on its other taxable transactions.

4. Tourism Development Districts.

Certain municipalities are authorized to impose additional taxes on businesses making sales, admission charges and real property leases within a tourism development district (TDD) to fund tourism development and promotion. TDDs may only be formed in counties with population between 375,000 and 400,000 with a sales tax rate not greater than 0.5% (currently, only Stark County) and cannot be more than 200 contiguous acres. The tax may be passed onto the consumer.

The Pro Football Hall of Fame Village is being considered to be designated as a TDD.

J. Exemption for Natural Gas Sold by Municipal Gas Companies – H.B. 390.

Sales of natural gas by a municipal gas utility are exempt from tax. R.C. 5739.01(RRR) and 5739.02(B)(7).

K. Exemption for Investment Bullion and Coins – S.B. 172.

Investment metal bullion and investment coins are exempt from tax. R.C. 5739.02(B)(54). "Investment metal bullion" has the same meaning as in I.R.C. § 408(m)(3)(B) and "investment coins" are coins primarily composed of gold, silver, platinum or palladium.

L. H.B. 49 – Budget Bill – Effective September 29, 2017.

1. Substantial Nexus Presumption Expanded – Sellers with greater than $500,000 of Ohio sales in the current or preceding calendar year are presumed to have nexus for use tax collection purposes if the seller either: (i) uses in-state software to make taxable sales to Ohio consumers (e.g., cookies); or (ii) provides or uses a content distribution network using servers in Ohio to accelerate or enhance delivery of seller's website to Ohio consumers. R.C. 5741.01(I)(2)(h) and (i).

2. Jukebox Exemption – Purchases of digital audio sold through a single-play commercial machine that accepts direct payments (i.e., jukebox) are exempt from tax. R.C. 5739.02(B)(55).

3. Direct Mail – Adopts definitions of "advertising and promotion direct mail" and "other direct mail" to conform with the Streamline Sales and Use Tax Agreement. Advertising and promotional direct mail is sourced to where it is delivered to the recipient, if such information is provided by the consumer. If delivery information is not provided (and the consumer does not provide an exemption certificate or direct pay permit), the sale is sourced to the location from which it was shipped. Other direct mail is sourced to the consumer's location maintained by the direct mail vendor in the ordinary course of business. R.C. 5739.033(F).

4. Vendor's License Database – The Tax Commissioner must maintain an online system allowing county auditors to issue vendor's licenses and publish the list of active and inactive vendor's licenses. R.C. 5739.18.

5. Suspension of Vendor's License – The Tax Commissioner can suspend a vendor's license based upon the failure to pay employer withholding taxes under R.C. 5747.07. Further, a suspended vendor's license may not be reinstated until all returns have been filed and taxes paid (including penalties and related charges) required under R.C. 5747.07. R.C. 5739.30(C) and (D).

6. 2018 Sales Tax Holiday – Purchase of certain items (clothing less than $75, school supplies less than $20, and school instructional materials less than $20) are exempt from tax August 3-5, 2018. Similar to 2017 sales tax holiday. Uncodified Section 757.120.

M. Sub. H.B. 69 – Counties and transit authorities may levy local sales / use tax rates in increments of 0.1% or 0.25%. R.C. 5739.021 and R.C. 5739.023. Previous law (H.B. 49) had changed law to authorize 0.1%, but eliminated increments of 0.25%.

N. S.B. 8 – Corrective eyeglasses and contact lenses are exempt from sales / use tax effective July 1, 2019. Added to definition of "prosthetic devices" in R.C. 5739.01(JJJ).

O. H.B. 430 (Oil/Gas Production) - Clarifies the exemption for property used in the production of, or exploration for, crude oil and natural gas. Technological advancements (specifically fracking operations) facilitated the need to clarify and identify certain property and activities that are exempt, but may not have been contemplated when the exemption was enacted decades earlier.

The legislation specifies the following activities and equipment relating to oil and gas production are exempt:

- Construction of permanent access roads, well sites, and temporary impoundments;
- Equipment used to create a wellbore pathway to underground reservoirs;
- Drilling and services used within a subsurface well;
- Casing, tubes, and float and centralizing equipment;
- Well completion services and equipment used in providing such services;
- Wireline evaluation, mud logging, and perforation, and equipment used in providing such services;
- Pressure pumping and artificial lift equipment; and
- Wellhead and well site equipment used to separate, stabilize, and control hydrocarbon phases and control water.

The amendment also lists several types of oil and gas property that is not exempt. The list of exempt and nonexempt equipment is set forth in R.C. 5739.02(B)(42)(q). As a clarification of existing law, this amendment applies to pending audits and appeals.

P. S.B. 226 - makes sales tax holidays permanent beginning the first Friday through Sunday in August each year. Sales tax holiday was held August 3 – 5, 2018 and will occur from August 2-4, 2019. The sales tax holiday applies to: (1) school supplies priced $20 or less; (2) school instructional materials priced $20 or less; and (3) clothing priced $75 or less. R.C. 5739.02(B)(56).

Q. L. 2018, H133: Exempts the temporary use in Ohio of any equipment by an out-of-state disaster business to repair a public utility or communications infrastructure damaged by a declared disaster during a defined period of time.

R. Temporary Storage for Export Exemption – S.B. 51 (eff. 3/20/19)

Exemption for sales to a foreign citizen, and not a U.S. citizen, that are: (1) delivered to a person in Ohio that is not a related person; (2) for the sole purpose of temporary storage and package consolidation in Ohio; (3) subsequently delivered to the purchaser outside the U.S.; and (4) present in Ohio for no more than 60 days. R.C. 5739.02(B)(57). Exemption does not apply to goods required to be registered or licensed in Ohio (e.g., motor vehicles).

S. Am Sub. H.B. 166

a. Economic Nexus – (eff. 8/1/2019)

Economic nexus was enacted, replacing the previous click-through and software/network nexus provisions. Beginning August 1, 2019, out-of-state sellers and marketplace facilitators that had at least $100,000 of sales or 200 separate transactions delivered to Ohio in the previous or current calendar year are presumed to have nexus for Ohio use tax collection. R.C. 5741.01(I)(2)(g) and (I)(2)(h). These thresholds include sales of tangible personal property and services delivered to Ohio customers. A seller that meets either threshold must obtain an Ohio seller's use tax license and collect tax, unless it can overcome the substantial nexus presumption by establishing that these activities "are not significantly associated with the seller's ability to establish or maintain" its Ohio market. R.C. 5741.01(I)(3).

b. Marketplace Facilitators – (eff. 8/1/2019)

Marketplace facilitators, such as eBay, are presumed to have substantial nexus for Ohio use tax collection if the facilitator meets the same economic thresholds as above: $100,000 in sales or 200 separate transactions delivered to Ohio. R.C. 5741.01(I)(4). In determining the amount of sales and transactions for these thresholds, sales made directly by the marketplace facilitator and those made on behalf of marketplace sellers are both included. A "marketplace facilitator" with substantial nexus with Ohio is treated as the seller of sales it facilitates and, therefore, responsible for collecting and remitting Ohio tax on such sales (unless the marketplace seller obtains a waiver, as discussed below). R.C. 5741.01(E).

A "marketplace facilitator" is "a person that owns, operates, or controls a physical or electronic marketplace through which retail sales are facilitated." R.C. 5741.01(T). An electronic marketplace is defined broadly to digital distribution services and platforms, online portals, computer software applications, in-app purchase mechanisms, and other digital products. R.C. 5741.01(V). However, a marketplace facilitator does not include: (1) advertising platforms that do not collect or transmit payments, provide payment processing services, or provide virtual currency that consumers may use to make the purchase; and (2) services facilitating the sale of lodging provided by a hotel. R.C. 5741.01(T) & (W)(3).

A sale is facilitated by a marketplace facilitator on behalf of a marketplace seller if both of the following occur:

1. The facilitator, directly or indirectly, does any of the following:
    a. Provides the marketplace where the sale is made;

b. Lists, makes available, or advertises sales by sellers;

c. Transmits or communicates offers and acceptance between sellers and purchasers;

d. Owns, rents, licenses, makes available, or operates the infrastructure, or any property, process, method, copyright, trademark, or patent, that connects sellers to purchasers;

e. Provides fulfillment or storage services for marketplace sellers;

f. Determines the price of sales by marketplace sellers;

g. Provides or offers customers service, or accepts or assists with taking orders, returns, or exchanges for or on behalf of marketplace sellers;

h. Identifies itself as a marketplace facilitator.

2. The facilitator collects or transmits payment (including through a third-party), provides payment processing services, or provide virtual currency for the sale.

R.C. 5741.01(W)(1) & (W)(2)

a. Destination Sourcing- R.C. 5741.05(B) requires marketplace facilitators to source sales they facilitate to the location where the consumer receives the property or service that is sold.

b. Waiver- R.C. 5741.071 allows marketplace sellers meeting certain conditions to apply for waivers from the Tax Commissioner that waive the facilitators responsibility for collecting and remitting use tax. To qualify, the marketplace seller must have greater than $1 billion of U.S. sales, be publically traded, and compliant with other Ohio taxes (except if subject to a bona fide dispute).

c. Cleaning services and supplies for food processing – R.C. 5739.011(B)(13). Beginning October 1, 2019, the sales tax exemption for equipment and supplies used to clean dairy processing equipment is expanded to include equipment and supplies used to clean equipment for processing food for human consumption.

d. Vetoed expansion of "vendor" to include "technology platforms" – R.C. 5739.01. As passed by the General Assembly, a "technology platform" that connects a consumer with a person providing a taxable service would be treated as the vendor for sales / use tax purposes. After veto, only a "peer to peer car sharing program" is considered the vendor.

e. Repealed Sales / Use Tax Exemptions (eff. 10-1-19)

- Motor Racing Teams- Repealed the exemption for sales of vehicles, parts and repair services sold to qualified motor racing teams.

- Investment Bullion and Coins- Repealed exemption available for sales of investment bullion and coins.

T. "Prosthetic Device" – Am. Sub. S.B. 8.

The definition for prosthetic device extends the existing sales and use tax exemption for prosthetic devices to include corrective eyeglasses or contact lenses sold on or after July 1, 2019. The exemption previously specifically excluded eyeglasses and contact lenses. R.C. 5739.01(JJJ).

U. Exemption for Fuel used for Refrigeration Unit – Am. Sub. H.B. 62 (eff. 9/1/2019).

Motor fuel used to power a refrigeration unit on any vehicle other than a unit used for the comfort of vehicle occupants will be exempt from sales tax. The taxpayer claiming this exemption must provide proof of the percentage of fuel used to power a refrigeration unit. R.C. 5739.02(B)(6)(b).

V. Exemption for Feminine Hygiene Products and Prescribed Diapers and Incontinence Underpads.

S.B. 26 – Effective April 1, 2020, the following are exempt from sales / use taxes: (1) feminine hygiene products, which means tampons, panty liners, menstrual cups, sanitary napkins, and other similar tangible personal property designed for feminine hygiene in connection with the human menstrual cycle, but excludes grooming and hygiene products; and (2) prescription diapers and incontinence underpads for the benefit of a Medicaid recipient with a diagnosis of incontinence, provided that the Medicaid program covers such products as an incontinence garment. R.C. 5739.01(TT); R.C. 5739.02(B)(56) and (B)(57).

W. Am. Sub. H.B. 110 (2021).

- Repeal of tax on "employment services" and "employment placement services".
- Investment bullion and coins exemptions reinstated under R.C. 5739.02(B)(57).
- Refunds: R.C. 5703.70 explicitly authorizes the Tax Commissioner to adjust the amount of a state tax refund multiple times before issuing a final refund determination in response to the refund requestor's submission of additional information following notice of the Commissioner's preliminary determination.

X. Semiconductor Megaproject Exemptions: Enacted in H.B. 687, the following exemptions apply to purchases made after Jan. 1, 2022:

1. R&D exemption expanded to include items used primarily by a megaproject operator to perform R&D at a semiconductor megaproject site. R.C. 5739.01(HH)(2).

2. Building and construction materials incorporated into real property used primarily as or in support of a manufacturing or R&D facility at a semiconductor megaproject site owned by the megaproject operator upon completion are exempt from sales / use tax. R.C. 5739.02(B)(13).

3. Sales to a megaproject operator of property used for the following purposes at the megaproject during the term of the operator's JCTC agreement:

(a) To store, transmit, convey, distribute, recycle, circulate, or clean water, steam, or other gases used in or produced as a result of manufacturing activity, including items that support or aid in the operation of such property;

(b) To clean or prepare inventory, at any stage of storage or production, or equipment used in a manufacturing activity, including chemicals, solvents, catalysts, soaps, and other items that support or aid in the operation of property;

(c) To regulate, treat, filter, condition, improve, clean, maintain, or monitor environmental conditions within areas where manufacturing activities take place; and

(d) To handle, transport, or convey inventory during production or manufacturing.

Y. Bad Debt Deduction Expanded to Private Label Credit Accounts – H.B. 223.

Amends R.C. 5739.121 to allow vendors to deduct bad debts from private label credit accounts carrying, referring to, or branded with the vendor's name or from purchases from the vendor, its affiliates, or franchisees. The amount of the deduction is the unpaid balance on private label credit accounts or such receivables that are bad debts and charged off as uncollectible on the lender's books after July 1, 2023. To qualify for the deduction, the lender must have complied with applicable federal and Ohio consumer protection laws.

The vendor may carry forward bad debts exceeding its taxable sales for the month on succeeding tax returns. Supersedes previous cases limiting bad debt deduction to debts written off *by the vendor* on its own books. *See e.g.*, *Home Depot USA, Inc. v. Levin*, 2009-Ohio-1431; and *Chrysler Financial Co., LLC v. Wilkins*, 2004-Ohio-3922.

Z. H.B. 567 - 134th General Assembly – Effective April 6, 2023

A nonresident purchaser of a motor vehicle who immediately removes it from Ohio is not required to provide a notarized affidavit of the purchaser's intention. The nonresident purchaser only needs to provide Form STEC-NR, which need not be notarized. R.C. 5739.029. See also Ohio Dept. of Taxation, Info. Release ST 2007-04 (updated 3/1/23).

AA. H.B. 66 – 134th General Assembly – Effective May 1, 2023

1. Documentary service fees charged on motor vehicle or manufactured or mobile home sales are exempt from tax. R.C. 5739.02(B)(59). *See also* Ohio Dept. of Taxation, Info. Release ST 1982-01 (updated 3/1/23).
2. Added electronic filing of individual income tax returns or related documents and paying such taxes to the list of personal / professional services excluded from the definition of ADP, EIS, and computer services. R.C. 5739.01(Y)(2)(l). Exclusion does not apply to employer withholding tax returns or payments.
3. Authorizes the refund of penalties on illegal or erroneous assessments of sales / use taxes. R.C. 5739.07(A) and (B). R.C. 5741.11.

a. A vendor is entitled to a refund of penalties assessed on sales tax either: (i) illegally or erroneously collected from, but refunded to a consumer; or (ii) illegally or erroneously billed to a consumer, but not collected. R.C. 5739.07(A)

b. A consumer is entitled to a refund of penalties assessed on sales or use tax overpaid, or illegally or erroneously paid to the Ohio Treasurer or Tax Commissioner. R.C. 5739.07(B). R.C. 5741.11.

4. Watercrafts are exempt from Ohio use tax if they are in the state only for storage and maintenance between October and April of any year, are not required to be registered with Ohio, and the owner paid tax to another jurisdiction or the jurisdiction does not impose a similar tax on the ownership or use of the watercraft. R.C. 5741.02(C)(11).

BB. H.B. 33 – 135th General Assembly – Biennium Budget Bill (primarily eff. 10/1/23)

1. Children products exemption – Children's diapers, therapeutic creams, wipes, car seats / boosters, cribs, and strollers are exempt from sales / use tax. R.C. 5739.02(B)(60), (61), (62), (63), and (64). Diaper defined in R.C. 5739.01(SSS).

2. Expanded Sales Tax Holiday – There will be an expanded sales tax holiday in 2024 with the length to be determined by the Tax Commissioner, Director of Office of Budget and Management, and County Commissioners Association. Gov. DeWine Veto Message, Item No. 26. Extended to items that are not more than $500, excluding watercrafts, motor vehicles, alcoholic beverages, tobacco, vapor products, and marijuana. R.C. 5739.01(TTT) and (UUU). Tax Commissioner to coordinate with SSUTA governing board on Streamline compliance.

   Future sales tax holidays in 2025 and beyond may also be expanded depending upon surplus revenue in GRF. Current 3-day sales tax holiday for school supplies and clothing suspended for years when the expanded sales tax holiday will take place.

3. *Karvo Paving* Codified – A construction contractor's purchase or rental of temporary traffic control equipment or structures that will be permanently or temporarily possessed by the State or any political subdivision, including for use by the general public, are exempt from tax. R.C. 5739.02(B)(1)(a). Services / labor to provide temporary traffic control or structures are also exempt. R.C. 5739.02(B)(1)(b). Similar provision applies to sales and rentals of such equipment or services to U.S. government. R.C.5739.02(B)(10)(a) and (b). Gov. DeWine vetoed retroactive application as clarification to current law. Veto Message, Item No. 17.

4. Separately stated fireworks fees are exempt from tax. R.C. 5739.02(B)(57). The fee is 4% paid to the state fire marshal.

5. Updates notice provisions to be provided in the manner under R.C. 5703.37. R.C. 5739.19 (revocation or suspension of vendor's license). R.C. 5741.11 (seller's use tax assessments).

Appendix A

As part of an effort to make Ohio consistent with other states, substantial changes were made to the exemption for medical property effective July 1, 2003. These are summarized below. The left column reflects property exempt through June 30, 2003. The right column reflects the new exemption.

Exemptions through June 30, 2003	**"New" Law**
1. Drugs dispensed by a licensed pharmacist upon the order of a licensed health professional authorized to prescribe drugs to a human being	Expanded to exempt if merely sold pursuant to a prescription[1] (thereby allowing exemption for drugs dispensed by a physician during the course of his/her practice).[2]
2. Insulin	No change
3. Urine and blood testing materials of diabetics or persons with hypoglycemia to test for glucose or acetone	No change
4. Hypodermic syringes and needles of diabetics for insulin	No change
5. Epoetin alfa when purchased for use in the treatment of persons with end stage renal disease	Expanded to exempt treatment for any medical disease
6. Hospital beds for use by persons with medical problems for medical purposes	No change
7. Oxygen and oxygen dispensing equipment for use by persons with medical problems for medical purposes	Must be "medical" oxygen and equipment
8. Prosthetic devices for humans	Must be sold pursuant to a prescription[3].
9. Catch All a) Braces or other devices for supporting weakened or nonfunctioning parts of the human body	Replaced with exemption for the following property used by

[1] A "prescription" is defined as an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by Ohio laws to issue a prescription. The drug must be of a type that can only be dispensed pursuant to a prescription, meaning sales of OTC drugs are not exempt (unless sold to patients in a medical facility or nursing home where a prescription is required?)

[2] A "drug" is defined as a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food, dietary supplements, or alcoholic beverages that is recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplements to them; is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or is intended to affect the structure or any function of the body.

[3] A "prosthetic device" is defined as a replacement, corrective, or supportive device worn on or in the human body to artificially replace a missing portion of the body, prevent or correct physical deformity or malfunction, or support a weak or deformed portion of the body (and does not include corrective eyeglasses, contact lenses, or dental prosthesis).

Exemptions through June 30, 2003	"New" Law
b) Crutches or other devices to aid human perambulation	humans when sold pursuant to a prescription: -- Durable medical equipment for home use (defined below) -or- -- Mobility enhancing equipment (defined below) for home use or in a motor vehicle
c) Items used to supplement impaired functions of the human body such as respiration, hearing or elimination	
d) Wheelchairs	
e) Items incorporated into or used in conjunction with a motor vehicle for the purpose of transporting wheelchairs	
f) Items incorporated into, or used in conjunction with, a motor vehicle to assist a disabled person to access or operate the vehicle	

"Durable medical equipment" is defined as equipment that can withstand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of illness or injury, and is not worn in or on the body.

"Mobility enhancing equipment" is defined as equipment that is primarily and customarily used to provide or increase the ability to move from one place to another and is appropriate for use either in a home or a motor vehicle, that is not generally used by persons with normal mobility, and that does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer.

Observations

The clear change is with respect to items enumerated in Section 9 above. All of the enumerated items, other than those described in paragraph 9(c), appear to be incorporated into the exemption for "mobility enhancing equipment" (or the exemption for prosthetic devices).

With respect to the items in paragraph 9(c), the exemption is substantially changed, including within the definition of "durable medical equipment" formerly taxable items and excluding formerly exempt items. The exemption is broadened to include any property used for a medical purpose. However, it must be sold pursuant to a prescription, durable, not worn in or on the body, and "for home use". This means equipment purchased for physicians' offices, hospitals or nursing homes for their use in treatment of patients does not qualify for exemption unless another exemption is available such as the exemption available for purchases by an exempt entity (i.e., state or political subdivision or charitable or IRC §501(c)(3) institution).

Exemption includes bath and shower chairs, traction equipment and dialysis equipment. No longer exempt are adult diapers, bandages or nasal strips, since they are not designed for repeated use.