

**OHIO STATE BAR ASSOCIATION TAXATION COMMITTEE**  
**Sales/Use Tax Subcommittee Report**  
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**I. EXEMPTIONS**

A. Direct Use in Farming

**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)).

B. Manufacturing Exemption

**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 contaminants. 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.

## II. PROCEDURE

### Penalty Abatement

**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.

## III. LEGISLATION

### A. Am Sub. H.B. 166

#### 1. 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).

#### 2. 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 transmit 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)

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.

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).

3. 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.

4. 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.

5. 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.

B. “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).

C. 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).

## **IV. OHIO ADMINISTRATIVE CODE**

A. Ohio Admin. Code 5703-9-21 (eff. 3/24/19)

Updated to conform with previous amendments to R.C. 5739.011(B)(12) and (B)(13).

Example 54: Special ventilation and exhaust systems installed in the vicinity of welding robots to exhaust harmful fumes created thereby are taxable. These systems are not incorporated into manufacturing equipment and not used to regulate a limited area of the facility.

B. Ohio Admin. Code 5703-9-23 (eff. 7/5/19)

Rule reorganized consistent with exemption in R.C. 5739.02(B)(17) which include tangible personal property purchased by someone engaged in farming, agriculture, horticulture or floriculture that is:

1. Used primarily in farming, agriculture, horticulture or floriculture to produce tangible personal property for sale;
2. Incorporated into tangible personal property produced for sale by farming, agriculture, horticulture or floriculture;
3. Used primarily in producing tangible personal property that will be used to produce products for sale by farming, agriculture, horticulture or floriculture; or
4. Used primarily in conditioning or holding products produced for sale by farming, agriculture, horticulture or floriculture.

Property incorporated into real property is not exempt, unless used to build livestock or horticulture structures. Further, persons engaged in rendering farming, agriculture, horticulture or floriculture services for other are considered to be engaged directly in farming, agriculture, horticulture or floriculture (e.g., veterinarian treating a farmer's livestock is entitled to exemption for property used in treatment).

C. Non-substantive changes effective July 10, 2019.

- OAC 5703-9-51 (County and transit authority rates)
- OAC 5703-9-52 (Delivery charges)
- OAC 5703-9-53 (Rate changes; effective date to services)
- OAC 5703-9-54 (Taxability matrix)
- OAC 5703-9-55 (Sales and use tax, change in state tax rate)
- OAC 5703-9-56 (Streamlined Sales and Use Tax –certified automated system software)
- OAC 5703-9-57 (Relief from liability for certified service providers)
- OAC 5703-9-58 (Relief of liability for purchasers)
- OAC 5703-9-59 (Transactions involving computer software maintenance contracts)
- OAC 5703-9-60 (Use tax amnesty payment plan)
- OAC 5703-9-61 (Electronic filing and payment of “consumer’s use tax”)

**V. DEPARTMENT OF TAXATION GUIDANCE**

A. Changes to the Motor Fuel Definition, Tax rates and Refunds: Information Release XT 2019-01, ST 2019-01 (June 2019).

Compressed natural gas (CNG) is now included in the definition of motor fuel and a definition of CNG has been added to R.C. 5735.01.

Sales to the state or any of its political subdivisions are exempt from tax. A transit authority, school district, or county development disabilities board would be considered a political subdivision and thus exempt from sales tax.

- B. Drugs, Durable Medical Equipment, Mobility Enhancing Equipment, and Prosthetic Devices: Information Release ST 2010-01 (Issued September 2010; Revised May 2019). Updated to address change to definition of “prosthetic device.”
- C. Tax Alert: Substantial Nexus and Marketplace Facilitator Changes (7/23/19).

Discusses changes enacted by Am. Sub. H.B. 166 effective 8/1/19.

When a marketplace facilitator exceeds the nexus threshold, it must register and begin collecting tax on the first day of the first month that begins at least 30 days after the threshold is met.