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

A. Resale

1. ***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 promotional items were advertised before the game, 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.

2. ***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.

B. Transportation for Hire

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.

C. Farming

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.

D. Charitable Purpose

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).

II. TAXABLE SERVICES

A. 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 at the job site. 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.

B. Building Maintenance and Janitorial

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 "*hyperliteral 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 hyperliteral meaning of the statutory definition is incorrect.

III. PROCEDURE

A. Refund

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).

IV. LEGISLATION

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).

V. OHIO ADMINISTRATIVE CODE

Manufacturing Exemption Regulation Amended – Ohio Admin. Code § 5703-9-21 (eff. 12/13/18). Provides the following are exempt from tax:

- Machinery, equipment, detergents, supplies, solvents, and other property located at a manufacturing facility that are used in cleaning towels, linens, clothing, floor mats, mop heads, or other similar items and supplied to the consumer as part of a laundry and dry cleaning service, when the towels, floor mats, mop heads, or other similar items belong to the service provider.

- Equipment and supplies used to clean processing equipment used in producing dairy products (e.g., milk, ice cream, yogurt, cheese, etc.) for human consumption. Updated Examples 63 & 64 accordingly.

Property used in research and development removed from exclusion in (D)(8) in recognition that certain research and development property has its own separate exemption. *See* R.C. 5739.02(B)(42)(i).

Replaced Example 54 – Specialized ventilation and exhaust equipment used to exhaust harmful fumes from welding robots are not exempt because not necessary for the purpose of continuing production and not used to totally regulate the environment in a limited area of the facility.

VI. DEPARTMENT OF TAXATION GUIDANCE

Interest rate increased to 5% for 2019. Ohio Tax Commissioner Journal Entry No 10/15/2018: Interest Rate Certification for Calendar Year 2019 (10/15/18).