

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

A. Equipment Used in Production of Crude Oil and Natural Gas:

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.

B. Real Property Classification:

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.

C. Resale Exemption:

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.

II. PROCEDURE

A. Responsible Party Liability:

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.

III. LEGISLATION

A. 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 clotting 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).

B. 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).

C. 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).

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