

**OHIO STATE BAR ASSOCIATION TAXATION COMMITTEE**  
**Sales/Use Tax Subcommittee Report**  
**September 24, 2020**

**Steven A. Dimengo, JD, CPA, MT**  
**Richard B. Fry III, JD, MT**  
BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC  
3800 Embassy Parkway, Suite 300  
Akron, OH 44333  
(330) 258-6460 / (330) 258-6423  
[sdimengo@bdbl.com](mailto:sdimengo@bdbl.com)  
[rfry@bdbl.com](mailto:rfry@bdbl.com)

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## **I. EXEMPTIONS**

### Resale Exemption

*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.

## **II. LEGISLATION**

S.B. 26 and H.B. 197: 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).

### III. OHIO ADMINISTRATIVE CODE

- A. Ohio Admin. Code 5703-9-62 effective 5/9/2020: Clarifies that gym membership fees entitling one to use of a facility only during organized instructor-led classes are not taxable physical fitness facility services.

Ohio generally taxes gym, athletic club, and health spa memberships that allow members to use the facility for physical exercise. R.C. 5739.01(B)(3)(n) & (r). Tax is imposed on membership dues paid for the right to use all or part of a physical fitness facility—essentially making monthly or annual fees for unlimited use of gyms and other fitness facilities taxable. But fees paid for instructor-led classes, even if unlimited, are not taxable because the member does not have open access to the facility.

- B. Non-substantive changes effective July 17, 2020

- OAC 5703-9-02 (Maintenance of records)
- OAC 5703-9-03 (Exemption certificate forms—change made to revision date of Certificate of Exemption for Streamlined Sales and Use Tax)
- OAC 5703-9-05 (Transactions for storage of tangible personal property)
- OAC 5703-9-06 (Imposition of tax on transportation services)
- OAC 5703-9-08 (authority to prepay or prearrange sales tax—statutory reference corrected)
- OAC 5703-9-11 (Returned merchandise and rejected services—statutory reference corrected)
- OAC 5703-14-04 (sales of stamps on credit)

### IV. DEPARTMENT OF TAXATION GUIDANCE

- A. Tax Commissioner Opinion 20-1 (April 21, 2020) - Construction materials incorporated into Port Authority Exempt from Tax: Explains that building and construction materials and services sold to construction contractors and incorporated into real property owned by an Ohio port authority are exempt from sales and use tax. The taxpayer must be a “construction contractor” under Ohio Adm. Code 5703-9-14(A). Further, the exemption applies only to materials that will become part of the completed structure or improvement to the real property. Tangible personal property or business fixtures installed as part of the project will not qualify for the exemption under R.C. 5739.02(B)(13).

- B. Tax Commissioner Opinion 20-2 (July 1, 2020) – Survey service constitutes taxable electronic information service: Taxpayer’s survey service is taxable electronic information services because survey results are viewed and retrieved through taxpayer’s online platform. These services involve identifying survey participants and administering the survey developed by the customer, with results available to the customer through the taxpayer’s online platform. Relying upon previous cases involving market research and call / mailing lists, the Tax Commissioner determined these did not constitute a personal or professional service.

The service is sourced to the location where the customer receives the service under R.C. 5739.033. If the survey results are concurrently available to the customer's employees, the taxpayer may use a reasonable, consistent, and uniform method to apportion the purchase price. If using such a method, the taxpayer must obtain a certification from the customer. R.C. 5739.033(D)(2).

- C. Information Release ST 2020-01 – Internet Tax Freedom Act Summary (June 2020): As of July 1, 2020, Ohio sales tax no longer applies to Internet access services provided for business use and services that are incidental to the provision of such services. This is due to the expiration of the grandfathering clause under the Federal Internet Tax Freedom Act.
- D. Information Release ST 2004-03 – Equipment used primarily in Providing Internet Services (Sept. 2020): Updated to address business model changes of an Internet service provider that also operates as a telecommunications service vendor, mobile telecommunications vendor, or satellite broadcasting service vendor. R.C. 5739.02(B)(34) exempts sales of property and services used directly and primarily in certain telecommunications services if sold to telecommunications service vendors, mobile telecommunications service vendors, and satellite broadcast service vendors. Equipment owned by these vendors may be used to provide multiple types of services, but the *primary use* determines the equipment's taxability.

Equipment used "*primarily in transmitting, receiving, switching, or recording any interactive, one- or two-way electromagnetic communications*" qualifies for the exemption. For example, if a vendor that is not a telecommunications service vendor purchases a server that its customers use to store and retrieve emails, the purchase is not exempt. However, if the same server is purchased by a telecommunications service vendor and used to store and retrieve emails, the exemption applies.
- E. Information Release ST 2009-03 – Ohio updates guidance on sourcing marketplace facilitator sales (Updated July 2020): Revised to reflect that sales facilitated by "marketplace facilitators" are sourced to the destination of the sale—i.e., the location where the consumer receives the tangible personal property or service, regardless of where the marketplace facilitator or seller is located. Marketplace facilitators are entities that operate a marketplace to facilitate sales on behalf of third-party sellers and are obligated to collect tax on facilitated sales delivered to Ohio locations (assuming the marketplace has exceeded the nexus threshold of \$100,000 of sales or 200 transactions delivered to Ohio). On the other hand, intrastate sales are sourced to the origin of the sale, meaning a marketplace facilitator's *direct sales* are sourced to the location where the *order* is received, if the order is received in Ohio.
- F. Information Release ST 1989-03 – Human Organs and Tissue (Updated May 2020): Updated to clarify the example and update citations. The transfer of human organs, bone, tissue, blood and blood products for injecting, transfusing, or transplanting into the human body are not subject to Ohio sales & use tax. R.C. 2108.18. 42 U.S.C. 274e. This does not apply to human hair, manufactured items, animal organs, and other products not of human origin. The example specifies that a physician that implants an artificial joint is subject to sales / use tax as he/she is consuming it in providing medical services, unless an exemption applies. Remember the resale exemption and R.C. 5739.02(B)(19) – *See M.S. Osher M.D. & R.S. Kerstine M.D., Inc. v. Linbach*, 65 Ohio St.3d 312 (1992).

G. Information Release ST 1993-04 – Exterminating Service (Reissued and Revised Aug. 2020): Exterminating services are taxable and providers thereof must obtain a county vendor’s license or transient vendor’s license. Serval examples and FAQs are provided explaining the application of tax to these types of services. “Exterminating service” means the service of eradicating or attempting to eradicate vermin infestation from a building or structure, or the area surrounding a building or structure, and includes activities to inspect, detect, or prevent vermin infestation of a building or structure. R.C. 5739.01(LL). According to the Tax Commissioner, taxable exterminating services include applying chemicals to eradicate termites / insects, trapping or removing small animals (e.g., mice, rats, skunks, bates, raccoons, squirrels, etc.), setting out poison to kill such animals, and using a dog to detect bed bugs and other vermin.

The service provider is entitled to exemption on its purchase of items permanently transferred to the consumer as an integral part of providing the service. R.C. 5739.02(B)(42)(m). However, the service provider would be required to pay tax on its tools and equipment used in providing the service.

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