OHIO STATE BAR ASSOCIATION TAXATION COMMITTEE

Sales/Use Tax Subcommittee Report

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I. EXEMPTIONS

A. Resale.

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.

B. Manufacturing / Assembling.

Accel, Inc. v. Testa, Ohio BTA Case No. 2012-2840 (July 15, 2015); appeal pending before the Ohio Supreme Court as Case No. 2015-1332. 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. The gift sets were found to be a discrete consumer good, not packaging. Although the operation to produce a gift set was not manufacturing since there was no change in state / form, the taxpayer was found to be engaged in exempt "*assembly*" – putting together various parts to make an operative whole.

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.

C. Farming.

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.

D. Transportation for Hire.

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).

II. TAXABLE SERVICES

A. Employment Services (permanent assignment exception).

1. *A.M. Castle and Company v. Testa*, Ohio BTA Case No. 2013-5851 (March 9, 2015); appeal pending before the Ohio Supreme Court as Case No. 2015-0551. 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:

   a. 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

   b. 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.

2. *Accel, Inc. v. Testa*, Ohio BTA Case No. 2012-2840 (July 15, 2015); appeal pending before the Ohio Supreme Court as Case No. 2015-1332. Assigned workers were consistently provided predominately for the period of May through October / November each year. The Tax Commissioner asserted this did not qualify as "*permanent"* but was disallowed "*seasonal"* labor. The BTA accepted the taxpayer's argument as to permanency, stating*: "The concept of temporary or seasonal labor implies that the employees are assigned for a short time period; the testimony presented at this board's hearing indicates that Accel adjusted its labor needs for*

each project by decreasing each employees' hours, rather than by accepting a smaller number of employees during less busy time periods. However, employees were not reassigned elsewhere and remained assigned to Accel for an indefinite period. We find nothing in the statute or related case law that requires that employees work a constant number of hours. Rather, it is only required that the employees be assigned on a permanent basis".

As an independent basis for concluding the arrangement to be nontaxable, the Board found the provided personnel were not under Accel's supervision or control since the provider "*supplied supervisors, on its own payroll, not Accel's, to supervise and direct the employees provided for Accel's production activities*".

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

B. Building Maintenance and Janitorial Services.

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).

III. PROCEDURE

A. Responsible Party Liability.

1. *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.

2. *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.

3. *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.

B. Markup Audits.

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.

IV. LEGISLATION - AMENDED SUBSTITUTE HOUSE BILL 64

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

Presumption of substantial nexus is raised when the seller:

1. 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).

2. 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.

3. 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.

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

5. 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.

B. 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.

C. 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.

D. 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.

V. CREDIT ACCOUNT BALANCES

R.C. 5703.05(P) and R.C. 5703.77 (effective Sept. 17, 2014) – Tax Commissioner is required to notify taxpayers of a sales/use tax "credit account balance" at least 60 days prior to expiration of the statute of limitations for a refund claim. Tax Commissioner *may* apply such a credit to the next reporting period or issue a refund to the taxpayer, but must first apply such any credit to a tax debt certified to the attorney general. Since the Tax Commissioner is not required to take either action, taxpayers should file a refund claim to ensure proper credit / refund is issued.

VI. ADMINISTRATIVE RULES – EFFECTIVE FEBRUARY 19, 2015

A. O.A.C. 5703-9-07 – Refund procedure incorporates form STAR Application for Sales / Use Tax Refund and specifies documents required to be submitted to support refund claim. The application must be accompanied by a complete listing of every invoice included in the refund application, which must be provided in a Microsoft-compatible spreadsheet if the refund encompasses more than 25 invoices.

B. O.A.C. 5703-9-08 – The proportion of taxable sales for prearranged and predetermined payment agreements is to be determined by either a test check or agreement of the vendor and Tax Commissioner.

C. O.A.C. 5703-9-10 – Incorporates by reference the State Regarding Sale of a Motor Vehicle, Off-Highway Motorcycle, or All-Purpose Vehicle to an Out-of-State Resident.

D. O.A.C. 5703-9-28 – Amended to reflect that magazine subscriptions are no longer exempt from sales / use tax.

VII. DEPARTMENT OF TAXATION GUIDANCE

A. SSUTA Taxability Matrix and Certificate of Compliance – Revised twice effective May 14, 2015 and August 1, 2015. Only substantive change was to add reference to sales tax holiday for school supplies and clothing during August 7-9, 2015.

B. Tax Alert (May 15, 2015) – Instructs auctioneers selling repossessed and salvage motor vehicles to non-dealers not to collect use tax. Instead, the purchaser will pay the tax to the Clerk's office when titling the vehicle. Tax is owed on the winning bid plus any auctioneer fees / commissions.