

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

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I. EXEMPTIONS

A. Transportation for Hire

Boyco Trucking, LLC v. Testa, Ohio BTA Case No. 2014-4951 (November 17, 2015). Taxpayer provided insufficient evidence (i.e., non-descriptive invoices) to support vehicle was used primarily to transport tangible personal property belonging to others.

B. Construction Contract (Real Property)

Hoffman Properties Limited Partnership v. Testa, Ohio Ct. App. 9th Dist., Dkt. No. 14C0041-M (September 28, 2015). Ohio Supreme Court appeal pending, Case No. 2015-1779. The court affirmed the Board's holding that a golf course irrigation system was a "business fixture" and, thus, not real property. It was highly specialized and designed/installed to address the unique needs associated with the golf course operation, primarily benefitting the business and not the land. Moreover, its removal would only cause repairable, temporary damage (and not permanent damage). Although subject to debate, the Court found the Board's decision in *Inverness Club v. Wilkins*, Ohio BTA Case No. 2004-R-338 (May 11, 2007) to be distinguishable as addressing only whether improvements constituted landscaping or lawn care services; the court stated that the Board found the construction company services to be construction, not landscaping, and did not address the characterization of an irrigation system.

II. TAXABLE SERVICES

A. Automatic Data Processing

Columbus Oncology Associates, Inc. v. Testa, Ohio BTA Case No. 2014-3984 (September 28, 2015); *Dayton Physicians, LLC v. Testa*, Ohio BTA Case No. 2014-3986 (September 28, 2015). Medical transcription services were taxable automatic data processing services (not personal/professional services). The transcriptionist merely reduced a physician's recordings to a precise written form and did not alter, analyze, interpret or adjust the physician's dictation (i.e., verbatim transcript of physician's spoken words). The Board further noted the transcriptionists had no specialized training, licensing, certification or overseeing regulatory authority.

III. PROCEDURE

A. Price

Woody v. Testa, Ohio BTA Case No. 2014-3964 (September 21, 2015). Price of vehicle acquired in trade-in was its market value since there was no substantive evidence of agreed upon sale price.

B. Responsible Party Liability

1. *Houser v. Testa*, Ohio BTA Case No. 2015-221 (November 30, 2015). Appeal dismissed for lack of jurisdiction since individual admitted responsible party status and limited objection to challenging underlying corporate liability.
2. *Columbus Cleaning Solutions, Inc. v. Testa*, Ohio BTA Case No. 2015-347 (September 11, 2015). Appeal dismissed for lack of jurisdiction due to taxpayer's failure to object to responsible party liability status. The taxpayer asserted she should not be liable because the underlying delinquent corporation operated under a payment plan to satisfy its outstanding sales tax liability and remained current under the plan. The payment plan did not release responsible parties (of course until it was fully satisfied).
3. *Dulay v. Testa*, Ohio BTA Case No. 2014-2074 (December 3, 2015), appeal pending with Ohio Supreme Court as Case No. 2015-2111. Assessment affirmed with the Board only receiving evidence relevant to taxpayer's assertion that his equal protection and due process rights were violated through the application of the responsible party liability provisions to him. R.C. 5739.33.
4. *Cruz v. Testa*, Ohio BTA Case No. 2013-1010 (December 29, 2015). Following Supreme Court's remand, the Board held that the twenty underlying corporate assessments had been properly served so that the corresponding personal assessments against the individual taxpayer were valid.

C. Refund Claim

The Cornerstone Shop, Inc. v. Testa, Ohio BTA Case No. 2015-385 (December 14, 2015). Partial refund claim allowed for tax paid within four year period preceding filing of claim. Waiver provisions of R.C. 5739.16(A)(3) arising in context of an audit/assessment, whereby refund period is extended consistent with assessment/extension, did not apply since there was no assessment at issue but, rather, there was a voluntary payment for which the refund was filed.

D. Penalty Remission

Neptune v. Testa, Ohio BTA Case No. 2014-4620 (November 12, 2015). Penalty assessment upheld due to failure to support a Tax Commissioner abuse of discretion. The taxpayers asserted one spouse's long-standing severe health conditions forced them to rely on the other to maintain proper records for the remittance of sales tax. The Tax Commissioner abated a portion of the penalty, and there was no evidence the Tax Commissioner abused his discretion.

E. Payment of Tax

Gearheart v. Testa, Ohio BTA Case No. 2014-4592 (November 5, 2015). The case was remanded for the Tax Commissioner to consider additional evidence concerning the sale of an automobile to a family member which presumably included the price and payment of tax.

IV. DEPARTMENT OF TAXATION GUIDANCE

A. Sales/Use Tax for Alcoholic Beverages in Bar or Restaurant – Sept. 2015.

Outlines audit procedures for determining taxable alcohol sales for bars or restaurants. The Department often uses a mark-up analysis to determine the tax due and compares this

amount with the actual sales tax paid. Purchase invoices are used to verify purchases and mark-up cost. Such a method is necessary when detailed primary records are unavailable or inaccurate. *“Cash register records only substantiate those sales that are rung into the register, and do not capture ‘comped’ drinks, cash transactions that are not rung up, or product loss due to spillage, breakage or pilferage.”*

Ohio law does not provide for waste, which is the taxpayer’s burden to establish. The Department will accept specific documentation to establish waste, for example, daily summary reports documenting spillage or breakage. Nonetheless, consistent with the IRS and other states, Ohio will use a standard allowance of 5% waste for draft beer and 10% for liquor.

The Department will generally enter into a sampling agreement with the taxpayer typically providing for a one-year sample analysis. This will include analysis of a weighted average of a representative sample of different product categories, including most popular cocktail drinks, discounted for the waste allowance.

B. SSUTA Taxability Matrix – Revised Nov. 30, 2015

Sellers are relieved from tax and penalties resulting from: (1) erroneous information in tax administration section of the taxability matrix; (2) changes to the tax administration practices section of the taxability matrix; and (3) changes to the definitions section of the taxability matrix. With respect to (2) and (3), relief is provided for tax charged and collected until the first day of the calendar month that is at least 30 days after notice of the change.

C. Information Release ST 1999-04 – On-line Services and Internet Access (Revised Dec. 2015).

The Department cautions that providing many services for a single fee, utilizing vague descriptions, one of which is an electronic information service, may result in the service being treated as a mixed transaction with the entire amount being subject to tax. The following are examples of services which the Department has found to be electronic information services:

1. Subscription Services – Providing access to retrieve, view, copy and/or print information stored online are taxable electronic information services. Examples include subscriptions for investment information, history of an item (e.g., Carfax), resumes, and value of an item (e.g., Kelley Blue Book).
2. Inventory Advertising – Electronic information service includes services where the vendor has access to the service provider’s platform to control the online listing / advertisement, such as updating product descriptions, contact information, pictures / videos of the product, or to show real-time inventory.
3. On-line Chat Features – The service of providing a platform for instant online chat with a potential customer regarding a desired inventory item is a taxable electronic information service. Normally, these services are provided by a service provider in connection with another electronic information service for an additional monthly charge.
4. Mass E-mails – Customers are provided with the ability to send mass e-mails to advertise products / services or send satisfaction surveys. Such services are taxable if

the customer has access to the service provider's database of e-mail templates or the ability to store and access the business' customer list.

5. Credit Reports – Electronic information service includes providing vendors with access to the results from credit rating companies to discern creditworthiness of a potential customer.

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