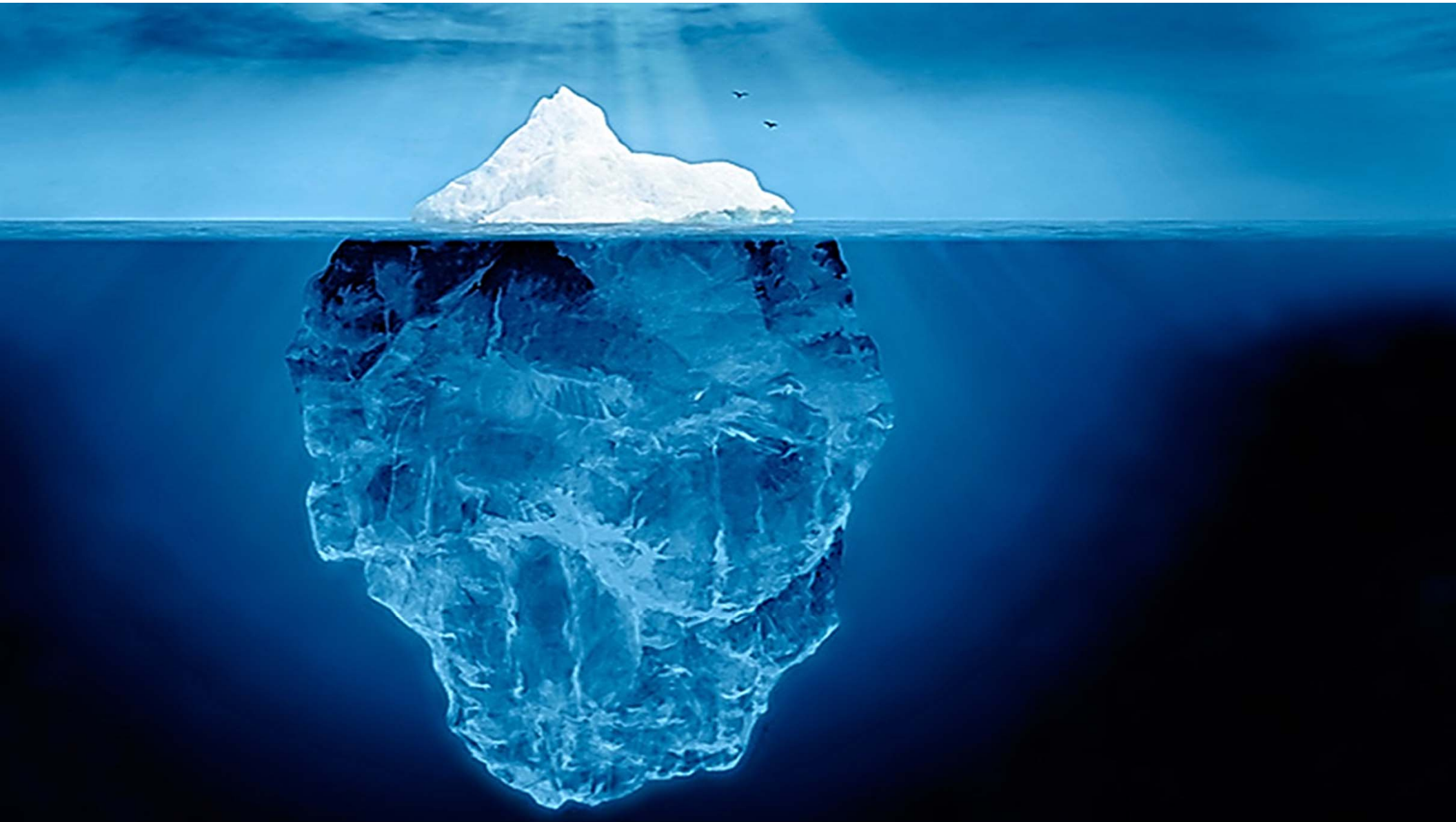


Cutting Edge Ohio Sales & Use Tax Trends, Developments, and Planning Opportunities

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Ohio Business Tax Seminar
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Comprehensive Outline and Taxpayer Resources

“Ohio Sales/Use Tax: Recent Trends, Developments and Planning Opportunities”

- Always available at:
<http://ohiostatetaxblog.com/resources>

Additional Taxpayer resources are available for public consumption at tax.ohio.gov, including, but not limited to FAQs, Final Determinations, and Information Releases which cover an assortment of sales and use tax areas.



Background

- Presumptions:
 - Sale of TPP → taxable (unless exemption)
 - Sales of services → nontaxable (unless specifically enumerated and no exemption)
 - Construction contract (real property)
 - Mixed transaction:
 - Service or property?
 - Overriding purpose.



Use Tax?

- Storage, use, consumption
- Same exemptions/exceptions as sales tax

Montana LLC for Vehicles?

(Berry v. McClain, Ohio BTA 1-3-22)

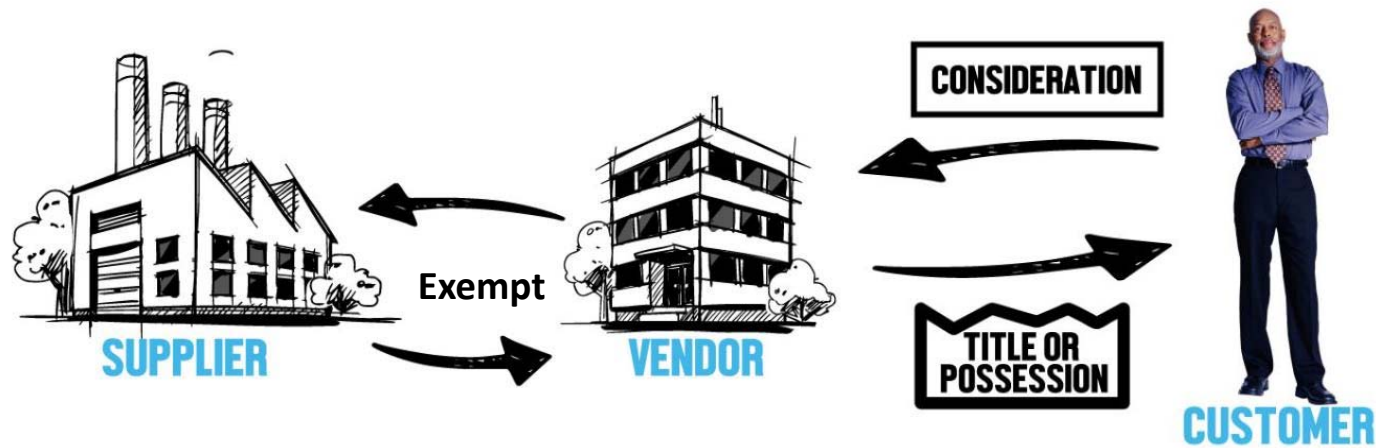
- Tax Free RV, LLC also Ohio resident during period at issue
- Holding motor home, truck, 3 Harleys & Ford Econoline
- No evidence that tax was paid in other jurisdiction
- BTA found vehicles stored used and consumed in Ohio

Ohio Sales & Use Tax Developments / Opportunities

- Resale Exemption
- Employment Services
- Electronic Information Services
- Transportation for Hire Exemption
- Casual Sale Exemption
- Professional Services
- Real vs. Personal Property
- Audit Issues
- Recurring Procedural Problems

Resale Exemption – R.C. 5739.01(E)

Transfer of title or possession for consideration



Resale Exemption

- *Pi in the Sky, LLC v. Testa*, 2018-Ohio-4812
 - Airplane lease lacked business purpose (i.e., economic gain) and factual/economic substance
- *Domokur Aviation Services LLC et al. v. McClain*, BTA Case No. 2019-694
- *Cincinnati Reds, LLC v. Testa*, 155 Ohio St.3d 512, 2018-Ohio-4669
 - Bobbleheads and other promotional items exempt from tax under the resale exemption

Employment Services

- Permanent assignment exception
 - *Post Accel*
 - Temp-to-hire
- *Post Seaton Corp.* extension of retention of supervisor/control through on-site manager?
- Effect of repeal of Employment Services and Employment Placement Services, effective October 1, 2021

Electronic Information Services

R.C. 5739.01(B)(3)(e); 5739.01(Y)(1)(c)

Providing access to computer equipment via telecommunications for the purpose of:

- (1) accessing information; or
- (2) storing data to be retrieved.
- New frontiers?



Professional Services

- A “professional service” is any act performed by a person pursuant to a professional license, certificate, or other legal authority.
 - *Emery Industries, Inc. v. Limbach*, 43 Ohio St.3d 134, 539 N.E.2d 608
- *Cincinnati Federal Savings & Loan v. McClain*
 - Pending with the Ohio Board of Tax Appeals (on remand from the Supreme Court of Ohio)

Transportation for Hire Exemption

- Property belongs to others

N.A.T. Transportation, Inc. v. McClain, Supreme Court of Ohio, 2021-Ohio-1374 (Case No. 2020-0110)

Facts:

- Transporter of waste to landfills; both residential and commercial waste.
- Possessed PUCO certificate as a for-hire carrier.
- Received payment for transportation.

Issue:

- Was the waste property that belonged to others?

Transportation for Hire Exemption (cont.)

Holding:

- Yes, but only commercial waste since customers controlled its disposition/destination.
- Exemption available for Peterbilt trucks that primarily carried commercial waste.
- Commercial waste customers continued to exercise “powers of ownership” over the waste.

Planning:

- Contract language supports customer control over disposition/destination.
- If some taxable carriage, track portion of time used for nontaxable carriage.

Casual Sale Exemption

- Requirements:
 - Acquired for own use; and
 - Previously subject to a state's taxing jurisdiction
- Apply to lease?
- *Karvo Paving Co. v. McClain*, BTA No. 2016-782 (Nov. 3, 2021) (exemption not available since the leases systematically reoccurred and became part of the lessor's business, rather than occasional, casual or isolated).

Real vs. Personal Property



Real vs. Personal Property

Contractor is the consumer of building materials, tools and other supplies used in real property improvement.

- Business fixtures are distinct items of tangible personal property that:
 - Are permanently attached or affixed to the land or to a building structure or improvement; and
 - Have a specific business purpose
- Tangible personal property classification beneficial
 - Manufacturing exemption
 - Resale exemption

Audit Issues

- Manufacturing process (beginning/end)
- Packaging exemption
- Real vs. Personal Property
- Collection of properly executed Exemption Certificates from customers

Audit Issues (cont.)

- Proof of primary usage for claimed exemptions
 - i.e. detailed usage studies, vehicle logs, photographic or video evidence
- Refunds

Recurring Procedural Problems

- Mark-up Audits
 - Must have records to rebut presumption of taxability
 - Submit calculations with the corroborating documentation to support contentions
- Failure to Prove Case
 - Administrative Appeal (Tax Commissioner)
 - Correlation of documentary evidence to contentions
 - Board of Tax Appeals

Recurring Procedural Problems (cont.)

- Responsible Party Liability
 - Lack of status is a defense (i.e., officer without “fiscal responsibilities” or employee without sales tax responsibilities)
 - Management Agreements
 - Vendor’s Licenses and Liquor Licenses

THANK YOU!

Think differently!!



Biographical Information

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Steve Dimengo is Managing Partner of Buckingham, Doolittle & Burroughs, LLC. His practice focuses on consultation and representation with respect to federal and Ohio tax law matters, often representing before the Ohio Tax Commissioner, the Ohio Board of Tax Appeals and the Supreme Court of Ohio. He is routinely engaged to structure proposed transactions in a manner to obtain optimum tax minimization. Steve is a certified public accountant. He received his B.A., magna cum laude, from the University of Akron; his J.D., cum laude, from the University of Akron College Of Law and his M.A. in taxation from the University of Akron. He has published many articles including two in *The Journal of Multistate Taxation and Incentives*, a national publication. He was the recipient of the Dr. Frank L. Simonetti Distinguished Alumni Award from the University of Akron College of Business. He has been recognized by *Inside Business Magazine* as a Leading Lawyer in Northeast Ohio in Tax Law, and listed in The Best Lawyers in America® and Ohio's Super Lawyers™ both for nearly 20 years. He was Best Lawyers in America® "Lawyer of the Year" for Tax Law in 2017 and 2021. He has a Martindale-Hubbell Rating of AV® Preeminent™. He is an active member in the Akron and Ohio State Bar Associations, and past-chair of the Ohio State Bar Association Sales and Use Tax Committee. He is an adjunct professor at the University of Akron in its Masters of Taxation Program. He previously served on Buckingham's Board of Managers and was the Business Practice Group Leader and Head of the Taxation & Employee Benefits Section. Most recently (May 2022), Steve was the recipient of the University of Akron Outstanding Law Alumni Award.

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Kurt Davies is currently Director of Tax specializing in State & Local Taxes for The Sherwin-Williams Company. He oversees compliance areas in Sales/Use, Real & Personal Property, Payroll Taxes, Unclaimed Property, Ohio CAT, Business Licenses, Gross Receipts, 1099's and W9's. His group also handles audits for all property tax areas as well as business license/gross receipts, OHIO CAT and 1099's. Kurt has worked at Sherwin-Williams for 33 years. He spent his first 5 years in the Accounting Department working in Real Estate, Fixed Assets and General Accounting. He then moved into the Tax Department and has held various tax jobs over the last 28 years. Kurt received his Bachelor of Business Administration degree in Accounting from Cleveland State University. He passed the Ohio CPA exam and received his Masters Degree in Taxation from The University of Akron. He is a member of the AICPA, Tax Executives Institute (TEI) and IPT. He has also spent the last 11 years on the Board of TEI and is currently First Vice President of the Cleveland Chapter as well as Committee Chair for SALT.

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Steve Votaw is a Director at DuCharme, McMillen & Associates, Inc. He conducts sales/use tax overpayment reviews and transaction analyses for large public and private companies throughout the U.S. He also performs nexus reviews, develops tax matrices, and reviews sales/use tax audit assessments. He assists in providing training seminars to clients and conducts tax research on an ongoing basis. His core focus at DMA is the study of sales/use tax law to ensure exceptional sales/use tax services are provided to DMA's clients. Steve has 17 years of sale/use tax experience, working with DMA clients in diverse industries throughout the Midwest and Northeast. He has performed sales/use tax reviews and extensive research for clients in a variety of industries including manufacturing, financial services, utilities, pharmaceuticals and mining. Steve holds a Bachelor of Business Administration from Cleveland State University. He continues to expand his knowledge of state and local taxation through research and involvement in the tax community.