

# Maximizing Ohio Sales/Use Tax Exemptions

While Avoiding Land Mines in the Audit & Appeal Process



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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](http://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

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- 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

# ONE: Casual Sale Exemption

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- Previously subject to any state's taxing jurisdiction
- Used by seller (i.e., not inventory and titled vehicles)

## TWO: Distribution Center Exemption


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- Used primarily in storing, transporting, mailing, or handling “purchased sales inventory” primarily distributed outside the state to related retail stores or via direct marketing.
  - Purchased sales inventory – include manufactured by taxpayer?

R.C. 5739.02(B)(42)(j)

Note:

- Separate direct marketing exemption. R.C. 5739.02(B)(35)(b) and (c)



THREE: Support Nontaxable Service  
Building Maintenance  
and Janitorial Service



# Building Maintenance and Janitorial Services

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- *Great Lakes Bar Control, Inc. v. Testa*, 2018-Ohio-5207
  - Issue: Whether inspecting and flushing draft beer lines is a taxable service?
- Nontaxable inspection: “cleaning” interpreted in context of “janitorial”, focusing on ordinary meaning (and not hyperliteral reading)
- Extends to other cleaning/not a traditional or contemplated janitorial service

# FOUR: Support Nontaxable Services

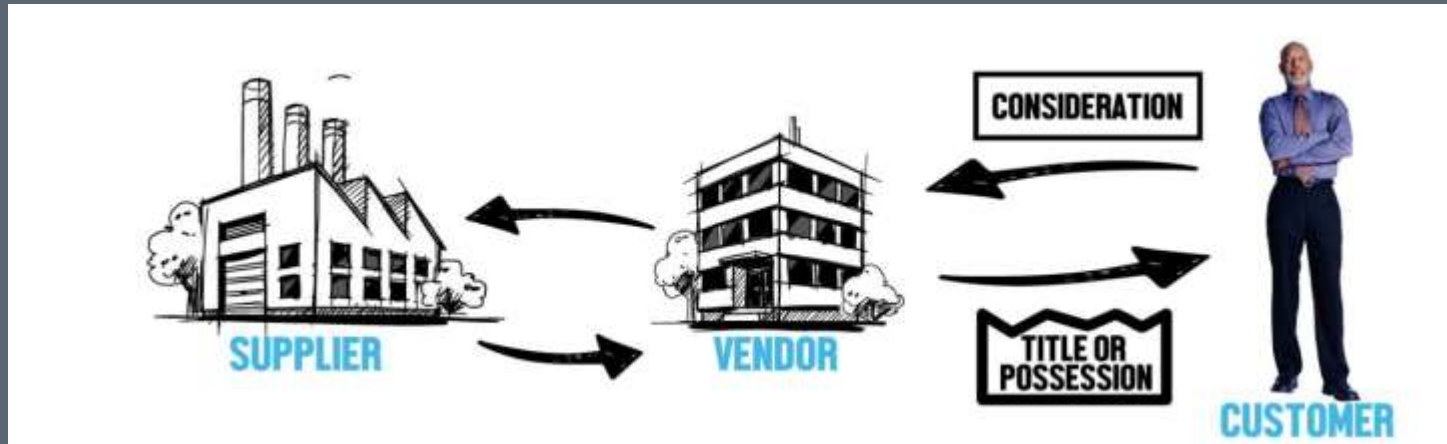
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## Employment Services (repealed effective 10/1/21)

- One-year permanent assignment exception
- Contractor / subcontractor exception
- Refunds?

# FIVE: Resale Exemption

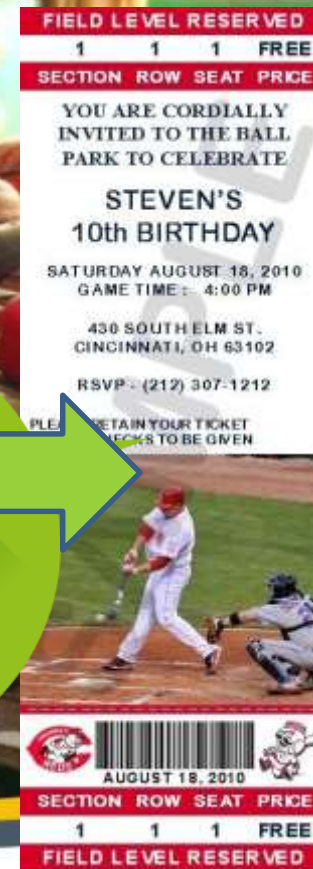
Transfer of title or possession for consideration



## Cincinnati Reds v. Testa, 2018-Ohio-4669

Bobbleheads and other promotional items were resold *for consideration* with ticket purchase.

- Advertising prior to game induced ticket sales
- Fans purchased tickets with the expectation that promotional items were part of the bargain.
- Not unexpected, gratuitous items



# Transfer of Title or Possession

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*Karvo Paving Co. v. Testa*, BTA Case No. 2016-782 (Jan. 4, 2018).

- Possession of traffic maintenance property was transferred to ODOT.
  - Controlled by ODOT during paving project
  - Fulfilled State's obligation to safely maintain roads
  - Not used or consumed in paving



# Requirements Contract

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- Proctor & Gamble / General Motors
  - Tooling
- G & J Pepsi Cola Bottling, Inc. (bilateral requirements – risk of loss)

# SIX: Manufacturing Exemption Primary Use

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# Manufacturing Exemption

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- Define scope of manufacturing operation
  - Beginning of production
  - End of production





# Beginning of Manufacturing

- Raw materials are committed upon the earlier of:
  - Cessation of material handling from initial storage; or
  - Materials mixed, measured, blended, heated, cleaned or otherwise treated or prepared.



# End of Production

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- Product is complete - all processes that change state or form or enhance value are finished (even though subsequently tested or packaged).

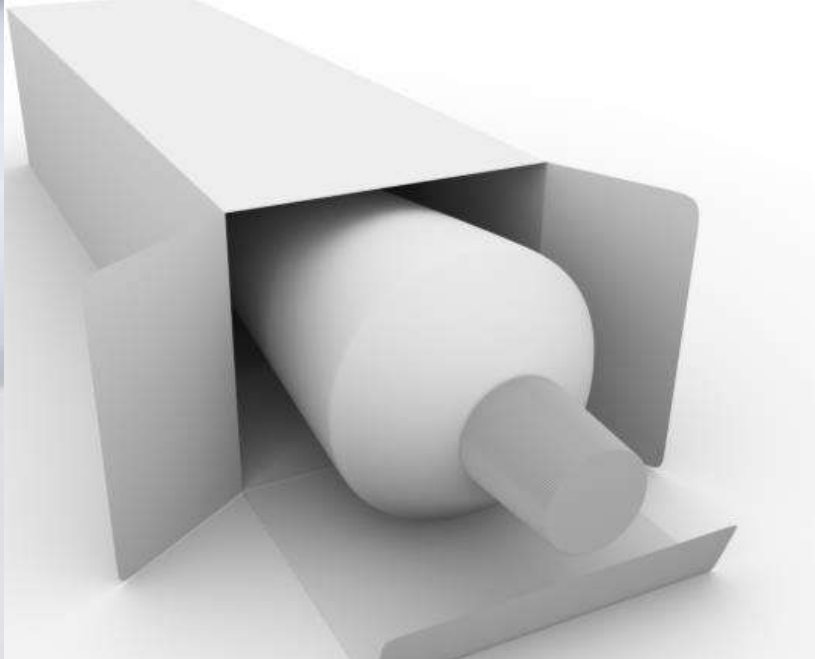


## SEVEN: Packaging Exemption

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- Material restrains movement of enclosed contents in more than one plane of direction.
  - Includes individual and bulk packaging





A close-up photograph of industrial packaging machinery. The machine features several large rollers, some of which are yellow and others are white. A clear plastic strip is being processed by the machine. A semi-transparent blue rectangular box is overlaid on the right side of the image, containing text. The background is slightly blurred, showing more of the industrial environment.

## Packaging Equipment

- Placing in package
- Integral part of placing in package
- Making package or label
- Labeling

# EIGHT: Transportation for Hire Exemption

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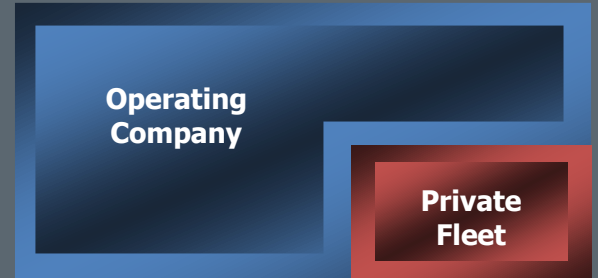
- Property of Another (control over property)
- >50% test



# Transportation for Hire

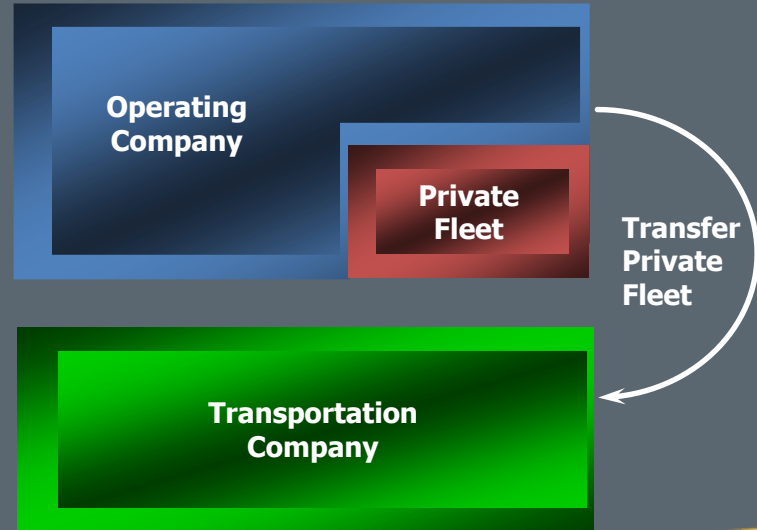
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- Sales and use tax savings
- Applies to companies with a private fleet of trucks (i.e., companies that haul their own raw materials or finished goods)



# Transportation for Hire

- Restructure a company's fleet into a wholly owned entity to take advantage of various state SUT exemptions





# NINE: Classification of Property

(Real vs. Personal Property)

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- Background
- Permissible business use?
- Permanent attachment devoted to business but destroys property upon removal
- Tangible personal property classification beneficial
  - Manufacturing exemption
  - Resale exemption

## TEN: Multiple Points of Use

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- R.C. 5739.033:  
contemporaneous records to  
support apportionment





# Handling Audits & Appeals

# Audit (including managed audit)

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- Solidify facts (and acceptance thereof)
- Eliminate issues/items
- Understand the difference between factual and legal issues

# Appeal to Tax Commissioner

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- Specifications of errors in writing
- Copy of audit report (agents remarks)
- Hearing before representative (within one year)



# Appeal to Tax Commissioner

- Memorandum In Support



# Appeal to Tax Commissioner

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- Journal Entry with Final Determination (within one year)



# Appeal to BTA –

## 60 days of taxpayer's receipt of Final Determination

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- Hearing in Columbus before representative of Board (Attorney Examiner). Attorney General (Tax Division) represents Tax Commissioner
- Must be attorney or officer of taxpayer (or taxpayer itself)
  - Authority to practice in Ohio – hot area in OBA – “unauthorized practice of law” (particular problem in real estate area – valuation)
- Similar to regular (civil) court
  - Depositions (if anyone, usually State)
  - Present evidence (documents/testimony)
    - Rules of evidence apply (hearsay, “Best Evidence”), but relaxed a bit
  - Court reporter
  - File briefs



# Appeal to BTA

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- Very time consuming and expensive process. No legal arguments are presented at the hearing; strictly an evidentiary proceeding
- Historically big push on mediation
- Possible to waive hearing and briefs and rely on record; unless strictly a legal issue, never do since Tax Commissioner's findings are presumed to be accurate
- Hearing also seems to spur settlement discussions
- No jurisdiction to address constitutional questions (but will make factual findings to support appeals court)

## Appeal to BTA

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- Obtain copy of Tax Commissioner's file (audit notes/memos)
- Now the complete file



# Appeal of BTA Decision

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- 30 days to file appeal with either Court of Appeals in your district or the Ohio Supreme Court (automatic right)
  - Within 30 days of entry of decision (not date of receipt)
  - Jurisdiction limited to issues raised at lower level (so, if new issue at BTA did not address, have to pay tax and file refund claim); collateral estoppel / res judicata?
  - Very precise/technical rules

# Deciding to Appeal

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- Factual Issue: appellate court will not substitute its judgment for BTA; merely determines from record if decision is unreasonable or unlawful
  - (i) Thus, need to develop facts at lower level (create a good record)
- Legal Issue: taxpayer seems to have better success at Court of Appeals and Supreme Court
- Sometimes have no choice but have to go along for the ride (e.g. Attorney General appeals)
- What occurs at Supreme Court?
  - only briefs and oral argument

# Court of Appeals

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- May be more favorable to local bar
- But, if choose Court of Appeals, no automatic right of appeal to Supreme Court (i.e., Supreme Court has discretion as to whether will take case)

# Appeals of Ohio Supreme Court can be made to U.S. Supreme Court

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- No automatic right
- Only constitutional issues (process/interstate commerce)



**THANK YOU!**

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**Think differently!!**



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**Steven 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** specializes in State & Local Taxes for The Sherwin-Williams Company. The company has nearly 5,000 retail locations and over 70 Plants and Distribution Centers throughout the United States. Kurt oversees compliance in Sales/Use, Real, Personal and Unclaimed Property, Payroll Taxes, OHIO CAT, Business Licenses, Gross Receipts, 1099's, W9's and Federal Excise Taxes. His group also handles tax audits for all property tax areas as well as Payroll Taxes, Business Licenses/Gross Receipts, OHIO CAT and 1099's.

Kurt has worked at Sherwin-Williams for 34 years with the past 29 years in Tax. He has held various tax positions over that time. Prior to that he worked in Accounting specializing in Real Estate, Fixed Assets and General Accounting.

He 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 will become President of TEI – Cleveland next month after being on the Board for 12 years.



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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.