

# Ohio Sales and Use Taxes

## Taxation of Services

2009 Annual Ohio Tax Course

# Sales & Use Tax: Services

- Statutorily Taxable Services
  - Employment services
  - EIS, Computer Services, ADP
  - Repairs & Warranties
- Mixed Transactions
- Siting
- Multiple Points of Use

# Sales & Use Tax: Services

- Sales tax was traditionally a tax on TPP
- Certain services have been made taxable

# Taxable Services

- **R.C. 5739.01(B)(2)**
- lodging by a hotel, furnished to transient guests
  - “hotel” R.C. 5739.01(M)
  - “transient guest” R.C. 5739.01(N)

# Taxable Services

- **R.C. 5739.01(B)(3)**
- (a) repair services
  - Adm. Ohio Code 5703-9-37
- (b) installation services
  - Adm. Ohio Code 5703-9-42

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (c) washing, cleaning, waxing, polishing, or painting a motor vehicle
  - (d) laundry cleaning services
    - on & after 8/1/03 laundry and dry cleaning services
    - definition R.C. 5739.01(BB)

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)  
(e) automatic data processing, computer services, electronic information services
  - definitions - R.C. 5739.01(Y)
  - Adm. Ohio Code 5703-9-46

# ADP – Computer - EIS

- **Automatic Data Processing:**
  - processing of others' data, including keypunching or similar data services together with verification thereof, or providing access to computer equipment for the purpose of processing data.

# ADP – Computer - EIS

- **Computer Services:**

- providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems

# ADP – Computer - EIS

- **Electronic Information Services:**

- providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

- (i) Examining or acquiring data stored in or accessible to the computer equipment;

- (ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.

# ADP – Computer - EIS

- *Quotron Systems, Inc. v. Limbach* (1992), 62 Ohio St.3d 447
- *Amerestate, Inc. v. Tracy* (1995), 72 Ohio St.3d 222
- *PNC Bank, Ohio, N.A. v. Tracy* (July 7, 1995), BTA No. 93-T-1316
- *MIB, Inc. v. Tracy* (1998), 83 Ohio St.3d 154
- *Marc Glassman, Inc. v. Levin* (2008), 119 Ohio St.3d 254

# ADP – Computer - EIS

- *Quotron Systems, Inc. v. Limbach* (1992), 62 Ohio St.3d 447
  - Tax Commissioner was correct in imposing use tax on computer service provided by vendor.
  - Vendor gave subscribers access to computer equipment that allowed subscribers to examine or acquire stock price data stored in vendor's computer equipment.

# ADP – Computer - EIS

- *Amerestate, Inc. v. Tracy* (1995), 72 Ohio St.3d 222
  - Tax Commissioner was correct in imposing sales/use tax on vendor who provided ADP service.
  - Vendor gave subscribers access to computer database that contained real estate sales information.
  - Customers overriding purpose was to obtain access to vendor's database; it was not to obtain vendor's analysis or interpretation of that information.

# ADP – Computer - EIS

- *PNC Bank, Ohio, N.A. v. Tracy* (July 7, 1995), BTA No. 93-T-1316
  - Services provided in connection with electronically sending credit card information and retail sale amount to taxpayer for purposes of allowing taxpayer to analyze same in order to authorize sale were not taxable ADP services because intermediary did not have access to Taxpayer's computers. Intermediary's computers were used solely as a mode of communicating information to Taxpayer.

# ADP – Computer - EIS

- *MIB, Inc. v. Tracy* (1998), 83 Ohio St.3d 154
  - True object was receipt of ADP or computer services rather than receipt of personal or professional services.
  - Members had “access” to taxpayer’s computers even though members did not have the ability to independently search the data stored therein.
  - Members’ computers worked in direct concert with taxpayer’s computers to provide members with access to the information sought.
  - Taxpayer did not alter, analyze, interpret or adjust the data provided by its members.

## ADP – Computer - EIS

- *Marc Glassman, Inc. v. Levin (2008)*, 119 Ohio St.3d 254
  - Service which taxpayer purchased to determine whether particular purchases of prescriptions were covered by insurance was not a taxable electronic information service.
  - Taxpayer did not receive access to the data maintained by the insurance companies.
  - Taxpayer received a conclusion formulated by the insurer in response to a routine request.

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (f) telecommunications services including:
    - prepaid calling service
    - prepaid wireless calling service
    - ancillary service
    - not coin operated telephone

Definitions - R.C. 5739.01(Y)

Adm. Ohio Code 5703-9-46

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (g) landscaping and lawn care service
    - definition – R.C. 5739.01(DD)
    - *Inverness Club v. Wilkins* (May 11, 2007), BTA No. 2004-R-338

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (h) private investigation service and security service
    - definition – R.C. 5739.01(EE)
  - (i) information services or tpp via a 900 telephone call
    - definition – R.C. 5739.01(FF)

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (j) building maintenance and janitorial service
    - definition – R.C. 5739.01(II)

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (k) employment services
    - definition – R.C. 5739.01(JJ)

# Employment Services

- “Employment service” is the providing or supplying of personnel, on a temporary or long-term basis, to perform work under another's supervision or control, when the personnel receive their wages, salary, or other compensation from the supplier or provider of the employment service or from a third party that provided or supplied the personnel to the provider or supplier.

R.C.5739.01(JJ)

# Employment Services

- “Employment service” does not include
  - (1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser.
  - (2) Medical and health care services.
  - (3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.
  - (4) Transactions between members of an affiliated group, as defined in division (B)(3)(e) of this section.
  - (5) Transactions where the personnel so provided or supplied by a provider or supplier to a purchaser of an employment service are then provided or supplied by that purchaser to a third party as an employment service, except “employment service” does include the transaction between that purchaser and the third party.

R.C.5739.01(JJ)

# Employment Services

- ***H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1**
  - A review of the actual employment contracts between the firm and its clients was made to determine whether an employee was assigned for a definite or indefinite term.

# Employment Services

- Resale of employment services
  - *Bellemar Parts Industries, Inc. v. Tracy* (2000), 88 Ohio St.3d 351
  - *Corporate Staffing Resources, Inc. v. Zaino* (2002), 95 Ohio St.3d 1
  - *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356, 2005-Ohio-2167

# Employment Services

- *Bellemar Parts*

- The manufacturer did not purchase the services for resale in the same form as it received them.
- The manufacturer's benefit was a flexible, more efficient, and less costly work force.
- This benefit was not resold in an unchanged form to the manufacturer's customers.

# Employment Services

- *Corporate Staffing Resources*
  - The actual benefit to the computer hardware provider, was not the product of the workers' labor, but a temporary and flexible work force of sufficient size and expertise.
  - The actual benefit to the computer hardware provider's customers was to have functioning hardware.

# Employment Services

- *Crew 4 You*
  - The trucking company was not a seller of employment services since it did not pay wages to the technicians and if the trucking company did not sell employment services, it could not resell them.

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (l) employment placement service
    - definition – R.C. 5739.01(KK)
  - (m) exterminating service
    - definition – R.C. 5739.01(LL)
  - (n) physical fitness facility service
    - definition – R.C. 5739.01(MM)

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (o) recreation and sports club service
    - definition – R.C. 5739.01(NN)
  - (p) on & after 8/1/03 satellite broadcasting service
    - definition – R.C. 5739.01(XX)
    - Adm. Ohio Code 5703-9-18

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (q) on & after 8/1/03 personal care service
  - (r) on & after 8/1/03 transportation by motor vehicle or aircraft within Ohio
    - Adm. Ohio Code 5703-9-06

# Taxable Services

- **R.C. 5739.01(B)(3)** (cont'd)
  - (s) on or after 8/1/03 motor vehicle towing service
  - (t) on or after 8/1/03 snow removal service

# Taxable Services

- **R.C. 5739.01(B)(7)**

- warranty, maintenance, service contract –by which agree to repair/maintain tangible personal property

# Repairs and Warranties

- The repair of an item of tangible personal property is a taxable sale. R.C.5739.01(B)(3)(a)
- All transactions in which a warranty or repair contract is to be provided are taxable. R.C.5739.01(B)(7)

# Repairs and Warranties

- Ohio cases re: warranties
  - *Mitsubishi Motor Sales of America, Inc. v. Zaino* (Oct. 11, 2002), BTA No. 01-V-181
  - *Gen. Motors Corp. v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869
  - *DaimlerChrysler Corp. v. Levin*, 117 Ohio St.3d 46, 2008-Ohio-259

# Repairs and Warranties

- *Mitsubishi Motor Sales of America, Inc. v. Zaino*
  - Goodwill warranty.
  - Mitsubishi was not liable for tax when the repairs were made outside of the warranty.
  - Only if problem originated within the warranty period.

# Repairs & Warranties

- *Gen. Motors Corp. v. Wilkins*
  - GM was liable for use tax on parts and services used under its warranty program.
  - GM exercised sufficient rights or powers incidental to ownership of repair parts.
  - GM was the consumer of the parts and services.

# Repairs and Warranties

- *DaimlerChrysler Corp. v. Levin*
  - Goodwill warranty.
  - Daimler was not the consumer of the parts and labor because they were not fulfilling an obligation under warranty.
  - Vehicle owner paid for the goodwill repair as part of the initial price of the vehicle.

# Taxable Services

- **R.C. 5739.01(B)(9)**

on & after 8/1/03 storage services

- i.e. storage facilities
- not for property that the consumer of the storage holds for sale in regular course of business
- Adm. Ohio Code 5703-9-05

# Non-taxable Services

- Personal services
- Professional services
- Services on property the purchase of which is exempt

# Non-taxable Services

- Personal services
  - “any intellectual or manual act involving a recognized skill performed by a person who is specifically engaged by the purchaser to perform the act.”

*Emery Industries, Inc. v. Limbach* (1989), 43 Ohio St 3d 134, 539 NE 2d 608

# Non-taxable Services

- Professional service
  - “any act performed by a person pursuant to a professional license, certificate, or other legal authority.”

*Emery Industries, Inc. v. Limbach* (1989), 43 Ohio St 3d 134, 539 NE 2d 608

# Mixed Transactions

- An otherwise tax-exempt professional or personal service is taxable if it is part of a transaction involving a transfer of tangible personal property as a consequential element and the charge for the property is not separately stated.

# True Object Test

- If the overriding purpose of the purchaser is to obtain tangible personal property produced by the service, the transfer of the property then becomes a consequential element of the transaction and the entire transaction is taxable. Conversely, if the purchaser's overriding purpose is to receive the service, the transfer of the personal property then becomes an inconsequential element of the transaction and the entire transaction is not taxable.

*Emery Industries, Inc. v. Limbach* (1989), 43 Ohio St 3d 134, 539 NE 2d 608

## Separately Stated

- ***Ameritech Publishing, Inc. v. Wilkins***  
(2006) 111 Ohio St. 3d 114, 2006-Ohio-5337
  - T/P asserted that paper management fee should not be taxable because the definition of “sale” and “selling” specifically exclude personal services that involve the transfer of TPP as an inconsequential element of the transaction.

# Situsing

- Historically, sales taxed at vendor's place of business. Origin sourcing.
- Impact of direct mail and internet sales
- SSTP – move towards destination sourcing

# Situsing

- R.C. 5739.034(C) – telecommunication services
- R.C. 5739.035 – other services

# Multiple Points of Use

- R.C. 5739.033(D)
  - Business consumers purchasing a digital good, computer software or a service that will be used in more than one taxing jurisdiction may pay tax directly to the state or may use a reasonable method of apportionment with the vendor.