



Construction Contracts, Sales & Use Tax and CAT

August 13, 2009

Sales and Use Tax Issues

- ▶ The contractor's dilemma
 - ▶ Consumer or vendor?
 - ▶ *Smink Electric* case

- ▶ Defining a construction contractor

- ▶ The problem – complexity upon complexity
 - ▶ Property classification
 - ▶ Incidence of the tax
 - ▶ Exemptions

- ▶ Importance of addressing the issues
 - ▶ Who bears the burden of figuring all this out?
 - ▶ Who bears the consequences of doing it wrong?
 - ▶ Potential for “under” or “over” compliance

Property Classification

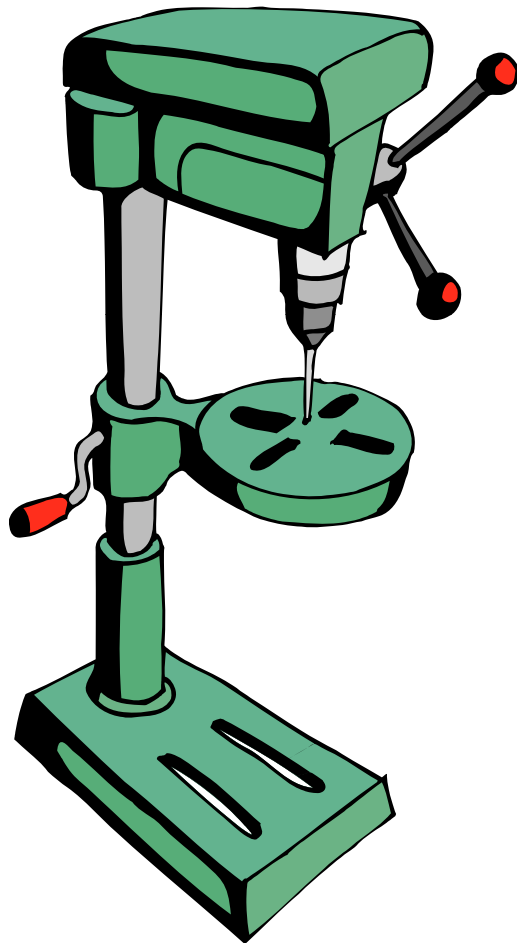
- ▶ Real Property – ORC § 5701.02
- ▶ Personal Property – ORC § 5701.03
- ▶ Court decisions that can be difficult to apply
- ▶ Importance to contractors
 - ▶ Accurately bid the job
 - ▶ Claim resale or pay tax on materials purchases
 - ▶ Collect tax (or exemption certificate) on sales of tangible personal property
 - ▶ Efficiently set up job documentation and billing procedures
 - ▶ Avoid sales tax assessment and 50% penalty
 - ▶ Avoid use tax assessment on materials

Real Property

- ▶ Land
- ▶ Building
- ▶ Structure
- ▶ Improvement
- ▶ Fixture



Tangible Personal Property



- ▶ Everything not attached to real property
- ▶ Things attached temporarily
- ▶ Business Fixtures

Business Fixtures

- ▶ Permanently affixed
- ▶ Primarily benefits the business, not the real estate
- ▶ Can include parts of buildings
- ▶ Excludes fixtures that are common to buildings no matter what business is conducted

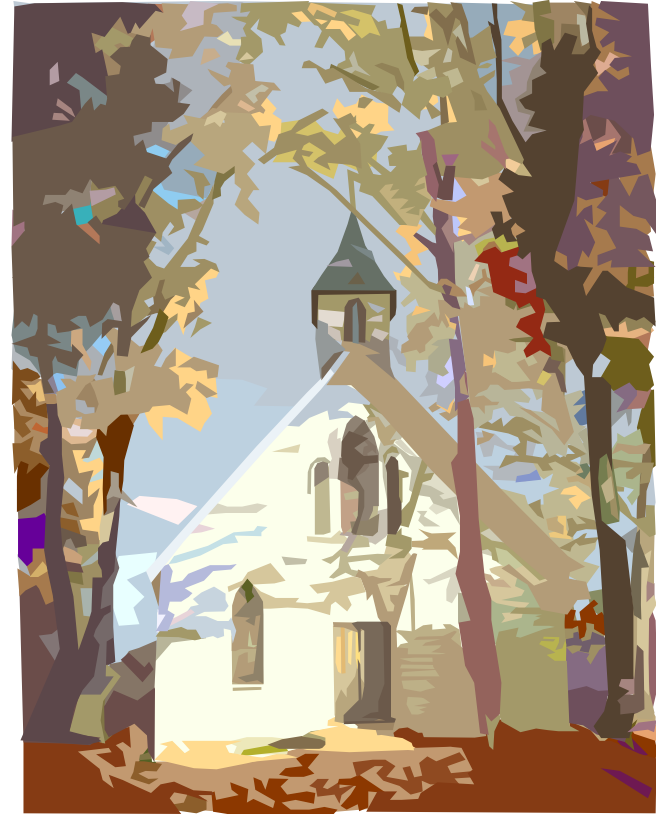
Sales Tax Exceptions

- ▶ Carpeting
- ▶ Farm drain tile and grain bins
- ▶ Landscaping

Flow-Through Exemptions

- ▶ Government jobs
- ▶ Churches
- ▶ Charitable organizations
- ▶ Non-profit schools

- ▶ Exemption only for *materials*
- ▶ Exemption certificates



Other Considerations

- ▶ Sales/Use tax base and contractors that manufacture
- ▶ Local sales and use taxes
- ▶ Out-of-state jobs

Contractee Certification

- ▶ ORC § 5733.03(C), OAC 5703-9-14(G)
 - ▶ Intent is to give contractor the opportunity to shift the burdens for, and consequences of, making determinations to the property owner
 - ▶ Mechanics
 - ▶ Result is the centralization in the owner of classification and taxability determinations
 - ▶ Certification not applicable to contractor's equipment, tools, and supplies

CAT Issues Faced by Construction Contractors

- ▶ Imposition
 - ▶ All persons having nexus without regard to form of organization or entity tax classification
 - ▶ Economic nexus standard/bright-line presence

- ▶ Incidence of tax
 - ▶ CAT imposes on person generating taxable receipts
 - ▶ May not be separately billed or invoiced to customer
 - ▶ NOTE – HB1 addition of ORC 5751.06(I) (\$500 penalty)
 - ▶ May pass through to customer as cost
 - ▶ Pyramiding of CAT on jobs with multiple tiers of subcontractors

- ▶ Exclusions
 - ▶ Agency exclusion – ORC 5751.01(G)(2)(I)
 - ▶ OAC Rule 5703-29-13
 - ▶ Tax Commissioner Opinions

Question and Answers