

Consumer's Use Tax Basics & More

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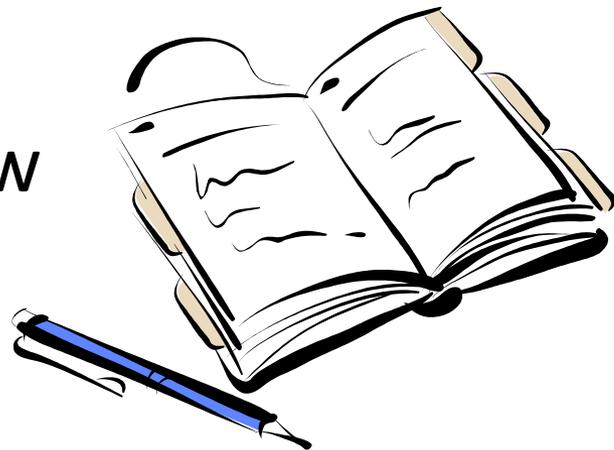
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Department of
Taxation

Agenda for Today's Presentation

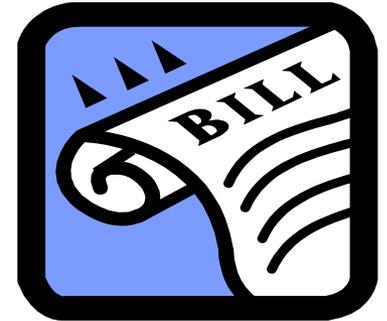
- Consumer's Use Tax Overview
- What is Subject to Use Tax?
- What are Business Fixtures?
- How Do I Report and Pay Consumer's Use Tax?
- Voluntary Disclosure Agreements (VDA)
- Questions



Use Tax Overview

Brief History

- Sales tax enacted effective 1/1/1935 (ORC Chapter 5739)
- Companion use tax enacted effective 1/1/1936 (ORC Chapter 5741)
- Creates a level playing field for in-state and out-of-state vendors
- All states that have a sales tax also have a use tax



Use Tax Overview

Statutes



- Ohio Revised Code (R.C.) 5741.02 levies an excise tax on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided....
- R.C. 5741.02(G) presumes “that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established.”

Use Tax Overview

Examples of transactions where sales tax is not charged:



- Catalog purchases
- Out-of-state vendors not required to collect tax
- In-state vendors that do not collect tax
- Intercompany transactions
- Internet purchases

Use Tax Overview

MYTH: The Internet Tax Freedom Act exempts all sales made on the Internet from state and local sales tax.

Internet Tax Freedom Act does not relate to purchases made over the Internet, but rather prohibits states from taxing Internet access (unless Internet access was already taxed by the state)

What is Taxable?

- All storage, use or consumption of tangible personal property in Ohio; and
- The enumerated services R.C. 5739.01(B)(2) — (11)



Taxable Services

- Repair of tangible personal property
- Installation of tangible personal property
- Washing a motor vehicle
- Laundry and dry cleaning
- Automatic data processing (“ADP”), electronic information services (“EIS”)
- Telecommunication



Taxable Services

- Physical fitness facility service
- Recreation and sports club service
- Landscaping and lawn care
- Private investigation and security
- Building maintenance and janitorial
- Employment service
- Employment placement
- Exterminating
- Motor vehicle towing



Taxable Services

- Snow removal
- Electronic publishing
- Intra-state transportation by motor vehicle or aircraft
- Printing
- Fabrication of tangible personal property
- Warranty, maintenance contract or service contract for tangible personal property



Are There Any Exemptions?

- Approximately 113 exceptions or exemptions
- Found in 5739.01 and 5739.02 [most found in .02(B)]
- Taxpayer must establish it is entitled to exception or exemption
- Narrowly construed against exemption

What is the Tax Base?

R.C. 5739.01(H)(1)(a) "Price," means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

- Cost of the property sold
- Labor or service costs, interest, losses, all costs of transportation to the vendor
- Charges by the vendor for any services necessary to complete the sale
- Delivery charges
- Installation charges
- Credit for trade-in



What is Subject to Use Tax?

All businesses - tangible personal property

- Office equipment
- Computers, monitors, printers, scanners, staplers, copiers, telephone systems, application software
- Office supplies
- Paper, tape, CDs, business cards, calendars, toner
- Cleaning supplies



What is Subject to Use Tax?

All businesses - tangible personal property

- Mops, brooms, cleaners, paper towels, gloves
- Furniture—desks, chairs, tables, lights, televisions
- Business fixtures (R.C. 5701.03(B))
- Signage
- Data cabling
- Special purpose lighting
- Specialized HVAC



What is Subject to Use Tax?

All businesses - services

- Installation of tangible personal property
- Repair of tangible personal property
- Employment service (temporary labor)
- Landscaping/lawn care
- Exterminating
- Janitorial and maintenance
- Snow removal



What is Subject to Use Tax?

Service Providers

R.C. 5739.01(D)(5): A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under R.C. 5739.01(E)

R.C. 5739.02(B)(42)(m): To use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service

What is Subject to Use Tax?

Landscaping

- Taxable: trimmers, mowers, blowers, saws, trailers



- Exempt: trees, dirt, sod, flowers, over-the-counter sales, tangible personal property sold outright at a storefront or other location.



What is Subject to Use Tax?

Personal Care

- Taxable: tanning beds, razors, massage tables



- Exempt: nail polish, make-up, over-the-counter products, i.e., shampoo, conditioner



What is Subject to Use Tax?

Physical Fitness

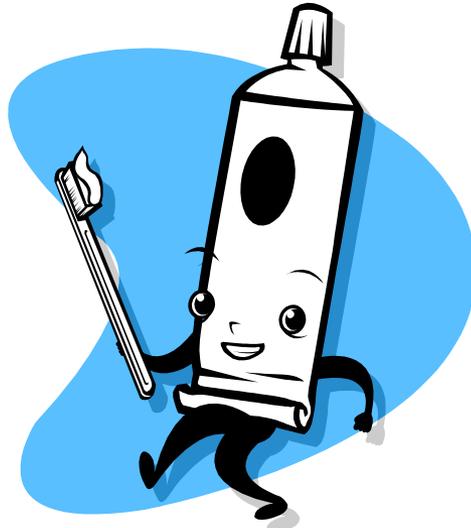
- Taxable: weights, treadmills, towels, tanning beds
- Exempt: tangible personal property purchased for resale to customers



What is Subject to Use Tax?

Doctors/Dentists

- Taxable: medical equipment, gloves, masks, implants, materials used for restoration
- Exempt: tangible personal property purchased for resale, i.e., toothbrushes, toothpaste,



What is Subject to Use Tax?

Hotels

- Taxable: lobby furniture, art and carpeting in common areas
- Exempt: tangible personal property in guest rooms including beds, televisions, soap furniture



What is Subject to Use Tax?

Grocery

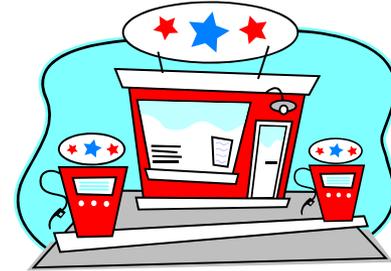
- Taxable: shelves, coolers, freezers, display cases



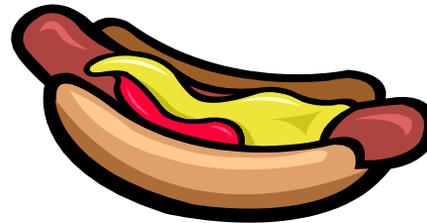
- Exempt: inventory purchased for resale, meat cutting equipment

What is Subject to Use Tax?

Convenience/Gas



- Taxable: shelves, checkout counters, canopies, gas tanks
- Exempt: inventory purchased for resale, hot dog cookers, soda machines



What is Subject to Use Tax?

Restaurant

- Taxable: cash registers, buffet counters, storage racks



- Exempt: food, food preparation items, food preservation items

What is Subject to Use Tax?

Department Stores

- Taxable: checkout counters, specialized lighting, display fixtures, hangers



- Exempt: inventory purchased for resale, tangible personal property that prices and describes, i.e., catalogs

What is Subject to Use Tax?

Manufacturers

- Taxable: storage equipment, waste equipment, employee protection equipment, environmental items
- Exempt: raw materials, manufacturing equipment, packaging and packaging equipment



Real Property vs. Tangible Personal Property—What are Business Fixtures?

- R.C. 5739.01(B)(5) – for sales tax purposes a “sale” does not include “a construction contract in which tangible personal property is incorporated into a structure or improvement on and becoming a part of real property”
- A construction contractor is the consumer of all tangible personal property incorporated into realty as a part of a construction contract

Real Property vs. Tangible Personal Property—What are Business Fixtures?

- R.C. 5701.02 –Real Property - Land and, unless otherwise specified, buildings, structures, improvements and fixtures on the land
- 5701.03(A) - Personal Property – Every tangible thing that is the subject of ownership and is not real property
- 5701.03(B) – Business Fixture – An item of tangible personal property that is permanently affixed to realty and that primarily benefits the business conducted by the occupant on the premises and not the realty



Real Property vs. Tangible Personal Property—What are Business Fixtures?

- Real v tangible personal property determination has an impact on:
 - Who pays the tax
 - Tax base for calculating the tax
 - Necessary to accurately determine bid or budget
 - Contractor at RISK

Real Property vs. Tangible Personal Property—What are Business Fixtures?

- Real Property
 - Contractor pays tax as consumer
 - Contractor pays tax at material cost, possibly produced cost
- Personal Property
 - Contractee pays tax as consumer
 - Contractee pays tax on the materials, mark-up including installation labor

Real Property vs. Tangible Personal Property—What are Business Fixtures?



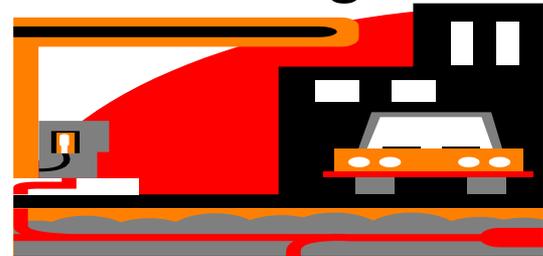
Funtime, Inc. v. Wilkins, 2004-Ohio-6890

- If item does not meet definition of real property in 5701.02, item is tangible personal property
- If item meets definition of real property in 5701.02, item is real property unless otherwise specified as tangible personal property
- *Newcome Electronic Systems v. Tracy*, Ohio BTA, No. 97-M-320
- BTA found data cabling was a business fixture because it primarily benefitted the business

Real Property vs. Tangible Personal Property—What are Business Fixtures?

F. P. & E., Inc. vs. Tracy, Ohio BTA No. 96-M-806

- BTA found service station canopies were tangible personal property



Oregon Ford, Inc. v. Wilkins, Ohio BTA No. 2005-A-111

- Personal property tax case
- Parking lot lighting used to illuminate inventory was tangible personal property

Real Property vs. Tangible Personal Property—What are Business Fixtures?

- R.C. 5739.02(B)(13) – Provides exemption for building and construction materials and services incorporated into certain exempt construction contracts
- R.C. 5739.03(B)(6) – Contractor claiming exemption under R.C. 5739.02(B)(13) must obtain certification (construction contract exemption certificate) from contractee stating the contract is exempt
- R.C. 5739.03(C) – Contractor may obtain from a contractee a certification stating what portion of the contract is for real property and what portion is for personal property. The contractor may rely on this certification and the contractee will be liable for tax on anything erroneously certified as personal property

Real Property vs. Tangible Personal Property—What are Business Fixtures?

O.A.C. Rule 5703-9-14

- Paragraph (A) – Definition of a “construction contract” and a “construction contractor”
 - Basically, a contractor is performing a construction contract when the contractor is incorporating tangible personal property into real property



Real Property vs. Tangible Personal Property—What are Business Fixtures?

O.A.C. Rule 5703-9-14

- Paragraph (B)
 - Provides that contracts to affix items to real property that are “business fixtures” are not construction contracts but are sales subject to sales tax. Contracts where title to the items affixed to realty does not transfer to the owner or lessee of the realty are not construction contracts since affixation is not permanent; and
 - Tangible personal property temporarily affixed to realty during construction are not incorporated into the realty, even if they remain affixed after construction

Real Property vs. Tangible Personal Property—What are Business Fixtures?

O.A.C. Rule 5703-9-14

- Paragraph (D) – A construction contractor that purchases materials or taxable services for incorporation into real property is the consumer of those materials and services, even if a subcontractor is hired to perform the incorporation. The materials and services are taxable to the contractor



Real Property vs. Tangible Personal Property—What are Business Fixtures?

O.A.C. Rule 5703-9-14(D) (cont'd)

A contractor may purchase materials and services exempt from tax if they are incorporated into:



- 1) realty on a government contract
- 2) realty to be accepted for ownership by a government agency on completion of the contract
- 3) a house of public worship as defined in R.C. 5739.02(B)(12)
- 4) the original construction of a sports facility under R.C. 307.696
- 5) a hospital facility entitled to exemption under R.C. 140.08

Real Property vs. Tangible Personal Property—What are Business Fixtures?

O.A.C. Rule 5703-9-14(D) (cont'd)

A contractor may purchase materials and services exempt from tax if they are incorporated into:

6) horticulture structure or livestock structure as defined in R.C. 5739.01 for a person engaged in the business of horticulture or producing livestock



7) real property in another state, if the materials or services, when sold to a construction contractor in that state for incorporation into real property in that state, would be exempt from a tax on sales levied in that state

Real Property vs. Tangible Personal Property—What are Business Fixtures?

O.A.C. Rule 5703-9-14(D) (cont'd)

- Contractor needs to check other states' laws on how that state handles materials incorporated into real property – some states do not allow an exemption for materials incorporated into realty of a government job
- If no exemption in other state and materials come into Ohio first, first use would be Ohio & sales/use tax would be due

Real Property vs. Tangible Personal Property—What are Business Fixtures?

O.A.C. Rule 5703-9-14

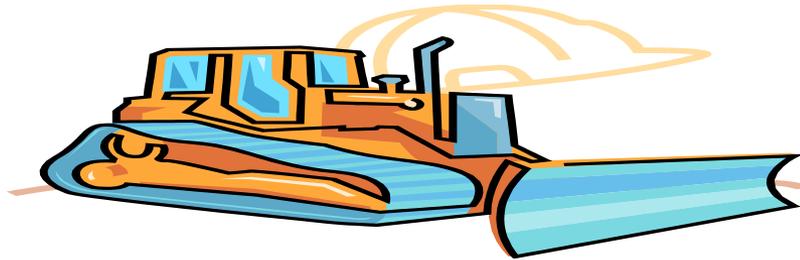
- Paragraph (G) – Contractee certification of portions of the contract to be personal property
- Paragraph (H) – Machinery, tools, equipment and supplies used by a construction contractor to perform a contract are taxable to the contractor
- Paragraphs (I) and (J) – Exemption certificate requirements



Construction Contract Audit Issues

Equipment and tools

- Job trailers, lift equipment, earth movers, drills, and saws



- Repair parts and consumable items like drill bits and saw blades
- Equipment rental with an operator is exempt

Fuels

- Off-road diesel and gas, propane, and welding gases

Construction Contract Audit Issues

Taxable Services

- Employment services
- Landscaping services
- Private investigation and security services

Safety Equipment

- helmets, goggles, gloves, and uniforms



Construction Contract Audit Issues

Temporary items:

- Electricity
- Water
- Fencing
- Construction elevators
- Shoring lumber
- Cofferdams



Construction Contract Audit Issues

Remember per O.A.C.
5703-9-14(B)



Even if these temporary items are left behind they are not being transferred to the owner but are being consumed and would be taxable

How Do I Report and Pay Consumer's Use Tax?

- If annual use tax liability exceeds \$1,000 must register for a consumer's use tax account



- May register online at Ohio Business Gateway, business.ohio.gov, or by calling 1-888-405-4039.
- If annual use tax liability less than \$1,000 may report liability on personal income tax return IT 1040 or make a voluntary payment with a VP-Use form

How Do I Report and Pay Consumer's Use Tax?

- If monthly use tax liability is \$5,000 or more must file monthly returns, returns and payment due by 23rd of following month
- If monthly use tax liability is less than \$5,000 file quarterly returns, returns and payment due by the 23rd of the month following the end of the quarter
- Returns must be filed electronically via Ohio Business Gateway



Direct Payment Permits

- R.C. 5739.031 allows tax commissioner to issue direct payment permits if payment by consumer directly to Ohio would increase efficiency in administering the tax.
- Allows consumer to:
 - Provide direct payment permit number to vendor;
 - Accrue and pay use tax on all taxable purchases directly to the state.



Direct Payment Permits

- A procedures document outlining, among other things, the DP holders accrual process needs to be completed by the taxpayer.
- Allows for payment of sales tax to the vendor on certain purchases (telecom, p-card, hotel).



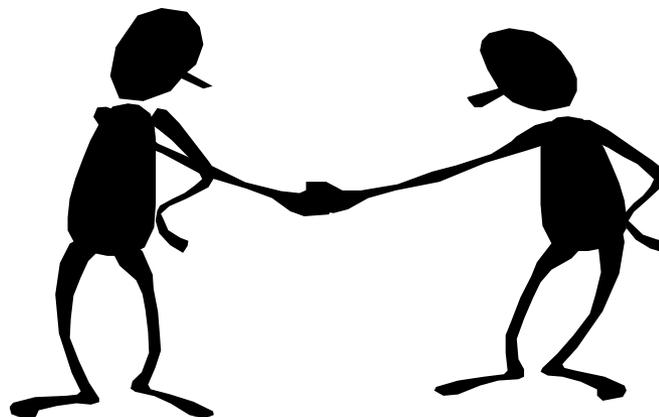
Voluntary Disclosure Agreements

- Already registered taxpayers may come forward
- Generally a three year look back on uncollected sales tax and unreported use tax
 - No penalty, but interest must be paid
- Tax collected not remitted
 - Unlimited look back, 10% penalty plus interest
- VDA application (ST VDA)
 - Available on the Department's website at tax.ohio.gov
 - May be emailed to the VDA mailbox



Voluntary Disclosure Agreements

- Initial VDA application may be anonymous
- VDA application must be submitted prior to any oral or written contact by the Department's:
 - Audit Division;
 - Tax Discovery Division; or
 - Investigation and Enforcement Division
- Taxpayer must disclose the taxable purchases to the tax commissioner



Voluntary Disclosure Agreements

- Taxpayer must make a non-refundable payment of the tax and interest
- Taxpayer must register and file for appropriate sales and use tax accounts
- Tax commissioner will forego previously unbilled sales/use tax liability prior to the disclosure period
- Tax commissioner will forgo penalties except in case of tax collected/not remitted
- Tax commissioner may audit the disclosure period

Advantages to a Voluntary Disclosure Agreement

- Waive civil and criminal penalties (except for tax collected, but not remitted)
- Limit liabilities to the voluntary disclosure period (except for sales tax collected, but not remitted)
- Not disclose the company's identity to other parties (except as provided/allowed)
- Allow the company to remain anonymous, if desired, until the signed agreement is returned



How Do I Stay Up to Date on Use Tax Law?



<http://tax.ohio.gov/OhioTaxAlert/isUserInfo.asp>

How Do I Contact the Department?



General Information for Sales & Use Tax

- Phone: 1-888-405-4039
- P.O. Box 530, Columbus, OH 43215
- Or visit tax.ohio.gov

Questions



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