

**OHIO STATE BAR ASSOCIATION TAXATION COMMITTEE**  
**Sales/Use Tax Subcommittee Report**  
**January 27, 2022**

**Steven A. Dimengo, JD, CPA, MT**  
**Richard B. Fry III, JD, MT**

BUCKINGHAM, DOOLITTLE & BURROUGHS, LLC  
3800 Embassy Parkway, Suite 300  
Akron, OH 44333  
(330) 258-6460 / (330) 258-6423  
[sdimengo@bdbl.com](mailto:sdimengo@bdbl.com)  
[rfry@bdbl.com](mailto:rfry@bdbl.com)

---

**I. EXEMPTIONS**

Casual Sale Exemption:

*Karvo Paving Co. v. McClain*, Ohio BTA Case No. 2016-782 (November 3, 2021); on appeal to Ninth District Court of Appeals. Upon remand from the Court of Appeals, the BTA held that the casual sale exemption was not available for property leased solely to a related entity. The leasing activity represented an “ongoing and recurring” business for several years. Since the lessor was engaged in systematic leasing, the activity ceased to be occasional, casual or isolated and instead became a significant part of its business, thereby disqualifying for the casual sale exemption.

**II. PROCEDURE**

Responsible Party Liability:

*Crawford v. McClain*, Ohio BTA Case No. 2021-577 (October 8, 2021). Bartender (representing herself/pro se) was not a responsible party liable for unpaid sales tax since she had no meaningful financial responsibilities. Although she participated in the company’s audit and served as the manager before the owner died, she never had access to bank accounts, sales tax returns, financial documents or any information associated with the Ohio Business Gateway account. She was not an owner.

*Dunn v. McClain*, Ohio BTA Case No. 2019-2999 (December 7, 2021). Sole owner of bar listed as the CEO on both the vendor’s license application and liquor permit was responsible party due to his officer status and holding the liquor license.

Proof of Sales:

*Thorbahn Enterprises, LLC v. Ohio Dept. of Tax’n.*, Ohio Ct. App. (10<sup>th</sup> App. Dist.), Dkt. No. 21AP-18, December 16, 2021. Summary judgment for Department of Taxation was affirmed, finding taxpayer’s records (Z-tapes) were inadequate to determine its liability and that the auditor’s method was reasonable. Auditor used inventory markup procedure to determine unpaid sales tax and did not rely upon Z-tapes because they did not distinguish taxable from non-taxable sales (and did not state the total amount of each transaction and accompanying tax).

### III. MISCELLANEOUS

#### Unconstitutional Tax on Speech:

*Lamar Advantage GP Co. LLC et al. v. City of Cincinnati et al.*, Ohio S. Ct., Dkt. No. 2020-0931, 09/16/2021; cert filed, U.S. S. Ct., Dkt. No. 21-900, cert filed 12/14/2021. Cincinnati's tax imposed on offsite outdoor advertising signs (not those on the business' site) was unconstitutional because its burden fell predominantly on only two billboard operators, being a selective/discriminatory tax (versus generally applicable tax) imposed on protected First Amendment activities. The tax did not further a compelling government interest tailored to achieve that interest.

#### Use Tax on Vehicles:

*Berry v. McClain*, Ohio BTA Case No. 2020-1222 (January 3, 2022). Vehicles owned by a Montana company but stored, used and consumed in Ohio were subject to use tax. The vehicles consisted of a motor home, truck, motorcycles and van. The individual owner of the Montana LLC was an Ohio resident and could not establish that the vehicles were not present in Ohio.

### IV. LEGISLATION

- A. PENDING: Ohio Tax Amnesty Bill H.B. 45: Creates a special tax amnesty program from July 1, to Aug. 31, 2022. If passed by Senate and signed into law, taxpayers could come forward to resolve their tax delinquencies for a variety of state and local taxes including sales and use taxes.

### V. OHIO ADMINISTRATIVE CODE

- A. FINAL REVIEW: 5703-9-63: Rule amplifying the statutory requirements regarding exemption for tangible property used directly in the production of crude oil and natural gas for sale. The Rule provides various definitions used for determining whether property is being used in the production of crude oil or natural gas.

### VI. DEPARTMENT OF TAXATION GUIDANCE

- A. Tax Commissioner Opinion 21-0001 (November 9, 2021): Video Display Systems are "business fixtures" subject to sales / use tax: Explains that Video Display Systems installed in sports stadiums / arenas and digital billboards and signs that broadcast videos and messages to visitors or passersby are business fixtures. The Displays at issue consisted of one to hundreds of video cabinets either welded or anchored to the building or structure and installed based upon the customer's planned use. The Tax Commissioner explained the Displays are composed of separate pieces of tangible personal property assembled on-site similar to equipment, signs, or broadcasting systems that are specifically identified as business fixtures in R.C. 5701.03(B). Further, the displays are generally intended to benefit

the business conducted on the premises. Therefore, the Tax Commissioner concluded that the Video Display Systems were business fixtures.

AK3:1352937\_V1