

# Quick Service Restaurants (QSR) Sales Tax Compliance Report

*The enclosed report and additional information serves to provide guidance to quick service restaurants (QSR) by citing applicable sales tax statutes in the Ohio Revised Code and further answering frequently asked questions.*



Ohio Department of Taxation  
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**Ohio**

**Department of  
Taxation**

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October 31, 2014

The Honorable John Kasich, Governor of the State of Ohio  
The Honorable Keith Faber, President of the Ohio Senate  
The Honorable William Batchelder, Speaker of the Ohio House of Representatives

RE: House Bill 483 Provisions

Gentlemen:

Ohio's treatment of the taxability of food, while simple on the surface, manifests itself in complex practicalities. The advent of the Quick Service Restaurant (QSR) and the prevalence of prepared meals being sold for consumption off premises can present tax law compliance issues.

An "interested party" group was assembled with representation from both industry and government: the Restaurant Industry Association and two of its members, the Ohio Council of Retail Merchants, the Ohio Chamber of Commerce, the National Federation of Independent Business, the International Franchise Association, tax practitioners, the Ohio Department of Taxation (ODT), the Common Sense Initiative (CSI) and the Governor's Office. This group met six (6) times from April to October 2014 to gather data and consider options which could be offered to QSRs beyond ODT's traditional methods for both prospective sales tax returns and if a QSR is selected for audit.

Statistical analysis of restaurant sales tax returns was performed and presented; the Ohio Constitution, the Ohio Revised Code and applicable court cases were reviewed; and ODT practices as well as QSR operations were discussed at these meetings. An expanded "Frequently Asked Questions" document was developed as was a webinar for the QSR industry which was promoted by the associations to their members and presented on July 23, 2014.

The outcome described in this report greatly expanded the options now being made available by ODT for the QSR vendors. They include modifications to the standard test check, the application of empirical data from sales tax returns from the industry, and a totally new Restaurant Compliance Program.

The Restaurant Compliance Program focuses on education for managers and cashiers provided on the ODT website and memorialized through the issuance of a certificate; a "taxable" default requirement on cash registers except those cash registers segregated for drive-through sales; and a requirement of registration and compliance with all applicable state taxes, including accurate and timely filings and payments, with no certified assessments for unpaid liabilities unless de minimis. The benefit to the vendor is a new education program for their employees, a reduced likelihood of being selected for audit, and the waiver of the 15% penalty applied to an audit should one occur.

These options will help the industry as well as ODT in achieving a higher level of compliance with the ORC while preserving the "business friendly" approaches taken by ODT and this administration.

I wish to thank all the participants from the industry, ODT, CSI and the Governor's Office for their many hours and contributions throughout this process which resulted in this positive outcome.

Sincerely,



Joseph W. Testa  
Tax Commissioner



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# QUICK SERVICE RESTAURANTS (QSR) SALES TAX COMPLIANCE REPORT

## INTRODUCTION

In April 2014, the Ohio Department of Taxation (ODT) initiated interested party meetings with the Quick Service Restaurant (QSR) industry to discuss issues regarding the collection and remittance of sales tax. The 130<sup>th</sup> Ohio General Assembly passed language in House Bill (H.B.) 483 to enable the tax commissioner and a vendor to use an alternative method to determine sales tax liability under a prearranged agreement (see Ohio Revised Code (R.C.) Section 5739.05(C) which becomes effective November 3, 2014). This report includes information detailing the statutory definition of food, sales tax law related to food consumed on premises, constitutional provisions prohibiting the taxation of food consumed off premises, statutory provisions for predetermined and prearranged agreements for sales tax liability, ODT's past audit practices and new options that ODT will offer, summaries of interested party meetings, and guidance ODT provided to the industry via sales tax information releases, frequently asked questions and a webinar. Also included are the revised prearranged agreement template and the application for that agreement.

## **RELEVANT LAWS AND HISTORY**

Ohio imposes a sales tax on each retail sale made in the state (R.C. 5739.02). Therefore, all retail sales of food are presumed to be taxable, unless it is established that the sale is exempt. In Ohio, vendors have the duty to collect and remit the applicable state and local sales tax (R.C. 5739.03). For their effort in this regard and in the event of timely filing and payment, vendors are allowed to retain 0.75% of the taxes they collected; this is known as the vendor discount.

Under Ohio law, vendors are personally liable for non-collection or non-remittance (R.C. 5739.13 and R.C. 5739.33). Sales tax is a "trust" tax, in that the State of Ohio trusts the vendors to collect and remit the tax that is due from the customer. Because sales tax is a trust tax, the individual owners, officers and those responsible for tax filings are held personally responsible for non-collection or non-remittance.

The Ohio General Assembly levied a sales tax on all sales of tangible personal property made in Ohio in 1935, with very limited exemptions. Shortly thereafter, voters placed a referendum on the ballot to ensure that groceries were not subject to sales tax. The referendum passed, resulting in a change to the state's constitution. Article XII, Section 3(C) of the Ohio Constitution prohibits the levy of an excise tax on food for consumption off the premises where sold (also see R.C. 5739.02(B)(2)). This constitutional provision was adopted years before the advent of the fast-food industry. That provision authorizes the General Assembly to levy certain taxes and states:

"Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold."

Food consumed on premises in Ohio (dine-in) has always been taxable (R.C. 5739.01). However, the Ohio Constitution prohibits taxing food sold for consumption off the premises where sold (take-out). Most other states have a different approach to taxability of food. Commonly, the tax applies to prepared food which is (1) food sold in a heated state or that is heated by the seller; (2) two or more food ingredients mixed or combined by the seller for sale as a single item; or (3) food sold with eating utensils provided by the seller, including knives, forks, spoons, glasses, cups, napkins, straws, or plates, but not including a container or packaging used to transport the food. Although adopting this approach to taxation may be easier for restaurants and consumers alike, this change would require Ohio voters to approve a constitutional change through passage of a state-wide referendum.

Ohio's statutory definition of food conforms to guidelines set forth by the Streamlined Sales Tax Project. What constitutes food is important because food consumed off the premises is not subject to Ohio sales tax. Per R.C. 5739.01(EEE)(1):

"Food' means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. 'Food' does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco."

R.C. 5739.01(EEE)(2)(c) defines soft drink as:

“...nonalcoholic beverages that contain natural or artificial sweeteners. “Soft drinks” do not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contain greater than fifty per cent vegetable or fruit juice by volume.”

R.C. 5739.01(K) defines premises as follows:

“...any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.”

For your reference, copies of applicable laws and rules are included in this report.

## **COMPLIANCE WITH THE LAW**

Strict compliance with sales tax laws can be challenging for restaurant owners. Understanding the distinction between what is considered food, which is not taxed unless it is consumed on premises, and what is not food, such as soft drinks or sweetened beverages, is difficult for some restaurant owners. In addition, the staff at the cash registers may not be adequately trained to differentiate between taxable and non-taxable sales, or they may apply the law on an inconsistent basis, by not always asking whether the order is for dine-in or take-out. Depending on the business model and adding to the complexity of the QSR, asking the question "Is this for here or to go" may require the QSR employee to take a specific action totally unrelated to sales tax. For example, the coffee may be served in a ceramic mug instead of a Styrofoam cup, or the food may be put on a plate or tray instead of inside a box or a bag.

Restaurant owners that become aware that tax was not collected appropriately may enter into a voluntary disclosure agreement (VDA) with ODT. For example, the point-of-sale system (POS) may not have been properly programmed to calculate tax on a sweetened beverage newly added to the menu, such as lemonade. A VDA is available to taxpayers that voluntarily come forward in order to comply with Ohio's tax laws. Companies are eligible for a VDA if they submit a written request to ODT prior to an oral or written contact by ODT's Audit Division, Tax Discovery Division, or Enforcement Division. In exchange for entering into a VDA, ODT will agree to waive civil and criminal penalties and limit tax liabilities to the VDA period (except for sales tax collected, but not remitted). The tax liability is calculated and reported by the taxpayer. ODT reserves the right to audit the VDA period. Copies of the Sales and Use Tax VDA and frequently asked questions about the VDA are included in this report and can be found at the bottom of ODT's sales and use tax webpage: [http://www.tax.ohio.gov/sales\\_and\\_use.aspx](http://www.tax.ohio.gov/sales_and_use.aspx).

Years ago, when an audit of a restaurant was conducted, the business owner was required to produce original receipts and records to substantiate sales transactions. This resulted in restaurants retaining a voluminous amount of paper so as to be prepared in the event of an audit. R.C. 5739.11 became effective in October 2003, and allows a food service operator to maintain a sample of the primary records. On a quarterly basis, ODT publishes a record retention notice prescribing fourteen specific dates that can be retained instead of retaining records of all sales. An example of this notice is included with this report.

R.C. 5739.05, which was enacted in 1971, allows vendors to enter into a prearranged agreement. Pursuant to R.C. 5739.05(C), a prearranged agreement may be granted to a vendor within the food service industry and allows sales tax to be remitted to the State of Ohio based on a set percentage of taxable gross sales. The authority is granted upon application and approval by the tax commissioner, and requires an agreement between the vendor and the tax commissioner. H.B. 483, which is effective November 3, 2014, allows the tax commissioner to enter into a prearranged agreement based on the proportions and ratios determined by either a test check agreed to by the tax commissioner and the vendor or any other method agreed to by the tax commissioner and the vendor. In the past, the only basis for establishing the proportion of taxable sales to all sales to be used in the agreement was through a test check.

ODT uses various methods to provide guidance about practical application of tax law to taxpayers. One method is the issuance of an Information Release. A Tax Alert announcing the issuance of a new or updated Information Release is sent to those individuals who have signed up to receive such electronic notifications. Two Information Releases are particularly relevant to QSRs: Information Release ST 2004-1, *Food Definition Change Effective July 1, 2004*, issued

May, 2004 and revised June, 2007; and Information Release ST 2012-01, *Restaurants and Other Food Vendors*, issued December, 2012 and revised August, 2014. Additionally, in June, 2013, ODT collaborated with the Ohio Restaurant Association on an article for ORA's newsletter. Copies of these documents are included with this report.

To ensure vendors are collecting and remitting sales tax accurately and properly, ODT conducts audits. Sales tax audits are a formal review of a vendor's sales and sales tax returns to confirm that gross sales and exempt sales were properly and accurately reported, and the resulting tax liability was remitted to the State of Ohio, including the county and transit piggyback taxes.

In the case of a QSR, the legal presumption is that all food will be consumed on premises and is therefore subject to sales tax. When audited, the dilemma for the business owner and ODT is the lack of documentation to verify the accuracy of the exempt sales. There are no exemption certificates from customers stating that their food purchase was consumed off premises and recording the cost of that purchase. Cash register tapes and sales registers clearly document those sales for which sales tax was collected. However, the non-collection of sales tax does not necessarily mean the underlying transaction was tax exempt. The cashier may have failed to properly determine the taxability of the sale when ringing it into the POS system. Taxability is commonly determined based on the answer to the question, is this dine-in (for here) or take-out (to go).

A QSR may be selected for audit for a variety of reasons including but not limited to: filing history, observed or reported non-compliance, and data analytics. Factors include an unusually low ratio of taxable to gross sales, a test buy or witnessed event indicating non-compliance with sales tax law, or anomalies when compared with peer group sales reported for that type of business structure (generally a stand-alone store, a store located in a strip mall, a store in a shopping mall's food court, or a restaurant inside a big box retail store such). For example: soft drink sales typically account for at least 10% of a QSR's total sales, and soft drink sales are always taxable. A QSR reporting taxable sales of 10% or less may be selected for audit. Please note that the type of business structure is not identified on the sales tax return, but is determined when selected for audit.

If selected for audit, initial contact will be made by telephone, followed by an audit commencement letter that defines the audit period, explains the audit process and sets forth the expectations of both parties. Typically, the ODT auditor inspects the source documentation that supports the sales tax returns that have been filed during the audit period, and ensures that tax reported has been remitted. ODT has used two methods to determine the reasonableness of the exempt sales reported by the QSR on their sales tax returns: the test check or comparison with peer group historical filings. The QSR signs an agreement, authorizing the method's use.

The first method is a test check. Sampling through a test check is authorized by R.C. 5739.10(B). ODT and the vendor agree to the methodology to be used during the test check period (location and schedule). Emphasis is placed on defining a test check period that will be representative of sales for the entire audit period. The observations are typically conducted in three-hour blocks of time over seven days. During the observation, a tally is kept of sales, categorizing them as taxable or exempt based on the customer's response to the cashier's question, is that dine-in (for here) or take-out (to go). The tally is then matched to the cash register tape at the end of the three hours. The taxable percentage is then computed as an average of the test check results.

The second method is an agreement on percentage based on comparable restaurants. This method uses a comparative sample from similarly situated restaurants and applies the average

percentage of taxable sales to the restaurant under audit. The restaurant and ODT come to agreement on an acceptable percentage of taxable sales.

Both methods have been contested through the appeal process, and ODT has prevailed. See, e.g., *Russo v. Donahue*, 10 Ohio St.2d 201, syllabus at ¶3 (1967); *National Delicatessens, Inc. v. Collins*, 46 Ohio St.2d 333, 334(1976); and *Akron Home Medical Services v. Lindley*, 25 Ohio St.3d 107, 111 (1986). Cases approving the use of information obtained from test checks of similar businesses include *Pato Foods, Inc. v. Lindley*, 7 Ohio App.3d 22 (3<sup>rd</sup> Dist. Ct. App. 1982); and *Perkinswood Market, Inc. v. Limbach*, 1994 WL 590312 (11<sup>th</sup> Dist. Ct. App. 1994).

With either method, the taxable percentage is applied to reported and verified sales for the audit period. Credit is given for sales tax previously remitted by the vendor. If the unpaid tax liability is de minimis, then returns may be accepted as filed with no assessment. If the QSR does not select one of the methods, and does not offer an alternative method for determining the taxable sales, ODT will independently calculate a percentage and resulting liability based on its knowledge and experience.

When unpaid tax liability is assessed, the statutory interest rate is applied to each tax period. Unless there is tax collected and not remitted, a penalty of 15% is applied to the unpaid tax liability. If tax has been collected and not remitted, the penalty is 50% and criminal charges may be pursued. The incidence of tax collected and not remitted discovered upon audit is rare.

## **RECENT DEVELOPMENTS**

ODT held six meetings with interested parties between April 2014 and October 2014. At these meetings, the interested parties were encouraged and welcomed to share ideas and suggestions as to how QSR compliance with sales tax law could be improved and how ODT's audit process could be made more business-friendly for the more than 11,000 restaurants in Ohio.

Outside the meetings, ODT undertook several actions during this period, with the goal of providing useful information to the QSR industry. ODT conducted a statistical analysis of actual sales tax return data to determine an average taxable percentage for the QSR industry. The data set was selected based on the self-reported North American Industry Classifications System (NAICS) industry code. In July, ODT provided the associations with a concise, two-page document that provides guidance to QSRs by citing the applicable sales tax statutes and answering frequently asked questions. ODT held a QSR webinar on July 23, 2014, which is now posted on the ODT website, and revised an Information Release ST 2012-01 to include additional questions and answers that were raised during the webinar. ODT's Audit Division also implemented an optional survey at the conclusion of the audit, through which the business owner can rate their audit experience.

## **INTERESTED PARTY MEETINGS AND MINUTES**

**April 23, 2014**

Individuals present:

Richard Mason (Director of Government Affairs, the Ohio Restaurant Association)  
Joe Nonnamaker (owner of multiple Subway franchises)  
Lora Miller (Director of Governmental Affairs, the Ohio Council of Retail Merchants)  
Chris Ferruso (Legislative Director, Ohio Chapter, National Federation of Independent Business)  
Dan Navin (Asst. Vice President of Tax & Economic Policy, the Ohio Chamber of Commerce)  
Dean Heyl via phone (Vice President, State Government Relations and Tax Counsel, the International Franchise Association)  
Tony Ehler (tax attorney and partner, Vorys, Sater, Seymour and Pease LLP)  
Tony Fiore (government affairs, of counsel, Kegler, Brown, Hill + Ritter)  
Mark Hamlin (Director of Regulatory Policy, the Common Sense Initiative (CSI))  
Erik Yassenoff (Assistant Policy Director, Office of the Governor)  
Madison Lisotto (Office of the Governor)  
Joe Testa (Ohio Tax Commissioner)  
Marj Kruse (ODT Deputy Commissioner for Audit and Compliance)  
Matt Chafin (ODT Chief Counsel)  
Phyllis Shambaugh (ODT Division Counsel for Sales and Use Tax)  
Joe Hammond (ODT Executive Administrator for the Audit Division)  
Chuck Willis (ODT Administrator for the Audit Division)  
Chad Leon via phone (ODT Audit Manager)  
Tim Lynch (ODT Legislative Liaison)  
Aileen O'Donnell (ODT Legislative Policy Staff)

This was the first interested party meeting hosted by Commissioner Testa for QSRs on the topic of Ohio sales tax collection. After welcoming all the participants, the Commissioner asked each person to introduce themselves. Marj Kruse and Phyllis Shambaugh then reviewed applicable portions of the Ohio Constitution and the Ohio Revised Code for the audience. Following the background information on the Ohio Constitution and Revised Code, participants engaged in a sales tax compliance discussion as viewed by both ODT and the QSR industry. All present agreed that the best solution would be to treat on-premises and off-premises food the same: either make it all taxable (which would take a constitutional amendment) or make it all exempt (which would result in a revenue loss of approximately \$500 million in state sales tax and \$100 million in local sales tax).

**May 12, 2014**

Individuals present:

Richard Mason  
Joe Nonnamaker  
Alan Herzog (McDonald's owner)  
Lora Miller  
Chris Ferruso  
Dan Navin  
Tony Ehler  
Tony Fiore  
Mark Hamlin  
Erik Yassenoff  
Brad Barger (Deputy Legislative Liaison, Office of the Governor)  
Joe Testa  
Marj Kruse  
Matt Chafin  
Phyllis Shambaugh  
Joe Hammond  
Chuck Willis  
Chad Leon via phone  
Tim Lynch  
Aileen O'Donnell

The meeting started with an explanation of the difference between predetermined and prearranged agreements, and how ODT handles prearranged agreements currently including determination of the taxable percentage via test checks. Predetermined agreements are used in situations where it is more practical to include the tax in the price of the item, such as soda pop vending machines and hot dogs sold by vendors inside stadiums. Prearranged agreements establish a set percentage of taxable sales that will be reported by the food service operator every month. The "for here or to go" question is no longer asked, and tax is no longer collected from the customer on taxable transactions. The vendor simply multiplies the monthly gross sales by the set percentage to determine the taxable sales, and then calculates the tax liability using the applicable tax rate. Chad Leon described the test check process used by the Audit Division. ODT introduced the idea of differentiating QSRs into categories so as to calculate benchmark ranges of taxable percentages, and a sample list was distributed. (Note: A copy of the list is included in this report.) Following this, there was discussion over increased education for QSRs on compliance; this led to the idea of webinar specifically for QSRs. The industry also requested a moratorium on audits and/or that warning notices be issued instead of initiating audits.

**May 29, 2014**

Individuals present:

Richard Mason

Joe Nonnamaker

Holly Nagle (Manager of Public Affairs, Ohio Council of Retail Merchants)

Dan Navin

Tony Ehler

Tony Fiore

Mark Hamlin

Brad Barger

Joe Testa

Marj Kruse

Matt Chafin

Phyllis Shambaugh

Joe Hammond

Chuck Willis

Chad Leon via phone

Tim Lynch

Aileen O'Donnell

The meeting started with an explanation of the code change in H.B. 483 allowing for the addition of "other methodology" to be used by ODT in a prearranged agreement for calculation of sales tax liability by QSRs. The industry representatives gave responses to the previous meeting's QSR categories. The industry expressed a concern that the categories were too broad and that there was too much diversity among business models within any category. ODT further discussed the webinar that was pitched during the previous meeting, and set the webinar date as July 23.

**June 25, 2014**

Individuals present:

Joe Nonnamaker

Lora Miller

Chris Ferruso

Tony Ehler

Tony Fiore

Mark Hamlin

Brad Barger

Joe Testa

Marj Kruse

Matt Chafin

Phyllis Shambaugh

Joe Hammond

Chuck Willis

Chad Leon via phone

Ernie Massie (ODT Administrator for the Tax Analysis Division)

Tim Lynch

Aileen O'Donnell

ODT solicited feedback on a draft of a two-page QSR guidance document, and discussed an outline for the webinar. The webinar time was set to begin at 9:30 a.m. and end at 11:00 a.m.. The industry asked ODT to articulate during the webinar that the addition of sugar as a convenience for the customer at the drive-through window will not cause the beverage to be considered as a soft drink, as long as there is no additional charge for this convenience. The industry also requested that ODT emphasize that test check observations are based on what the customer says, not what the customer does, and that the QSR has no responsibility to approach a customer and collect tax if they sit down inside the restaurant to eat food that they ordered as "to-go". ODT presented a preliminary analysis of data from actual QSR sales tax returns. Industry representatives presented a few ideas; among them was a program that could be similar in nature to the voluntary programs offered by the Bureau of Workers Compensation whereby participation in the voluntary program leads to lower risk factors.

## **August 28, 2014**

### Individuals present:

Richard Mason  
Joe Nonnamaker via phone  
Lora Miller  
Tony Ehler  
Tony Fiore  
Brad Barger  
Joe Testa  
Marj Kruse  
Matt Chafin  
Phyllis Shambaugh  
Joe Hammond  
Chuck Willis  
Chad Leon via phone  
Ernie Massie  
Tim Lynch  
Aileen O'Donnell

A recap was given of the webinar held on July 23. Following that, Phyllis Shambaugh explained how ODT handles VDAs, and also announced that the public comment period is open for a proposed sales tax rule change. The rule is posted on ODT's website. Seasonality of QSR was discussed, including a statistical analysis performed by the ODT Tax Analysis Division. The analysis showed that seasonality was not statistically relevant.

Industry representatives submitted the following suggestions to be discussed.

1. POS system programmed to automatically charge sales tax unless overridden by the employee. However, a concern was expressed by another industry representative that a class action lawsuit could result from a customer alleging that they have been overcharged sales tax.
2. A sign in customer-view explaining sales tax collection on dine-in / carry-out transactions. The industry requested that ODT provide a guideline for the language so that:
  - a. Language is appropriate and informative to customers
  - b. Customer would see the same sign in all stores, thereby consistent delivery of the message
3. A system of policies and procedures that a vendor can perform to monitor sales tax collection and steps to take if sales tax collections appear to be out of the norm. Subway is working on formulizing a package which has been tested and proven to increase the accuracy of recording dine-in / carry-out transactions. This could be used as a starting point.
4. Installing a system which will require the customer to physically rather than verbally acknowledge the sale as being either dine-in or carry-out. The customer would be presented the acknowledgement on a computer screen; the screen would be outside of easy access by the employee. Thereby, the customer would control the taxability of the purchase, documented by the sales receipt.
5. Establishing a procedure to develop an appropriate range for taxable sales for a brand, such as has been done for a national chain of coffee shops. This is the same basic premise as a prearranged agreement, and would monitor taxable sales for a control group of stores over a longer period of time than the current test check parameters.

6. Establishing a joint educational program with the ODT to educate vendors on:
  - a. Reviewing the taxability of different products sold and vendor responsibility for tax collection
  - b. Awareness of additional management steps that can be taken to ensure compliance on collecting sales tax correctly on dine-in/ carry out sales
  - c. What can be expected during an audit
  - d. Document attendance at one of these educational sessions
  - e. Perhaps hold annually for new businesses and any updates

**October 22, 2014**

Individuals present

Joe Nonnamaker  
Lora Miller  
Chris Ferruso  
Tony Ehler  
Tony Fiore  
Mark Hamlin  
Erik Yassenoff  
Brad Barger  
Joe Testa  
Marj Kruse  
Matt Chafin  
Phyllis Shambaugh via phone  
Joe Hammond  
Chuck Willis  
Chad Leon via phone  
Ernie Massie  
Tim Lynch  
Aileen O'Donnell

Commissioner Testa thanked everyone for their work in the preceding months. Phyllis Shambaugh gave another overview on the prearranged agreement rule update that is to be filed with the Joint Committee on Agency Rule Review. The rule reflects the statutory changes made by H.B. 483. Marj Kruse outlined the expanded compliance options ODT will offer QSRs, including the Restaurant Compliance Program and the additional approaches for test checks. Industry members appreciated the creation of the Restaurant Compliance Program, commenting that it would serve as a great checklist, which the industry needs. They also appreciated the emphasis on education.

## **SALES TAX RETURN DATA ANALYSIS**

ODT conducted an analysis of the FY2013 sales and use tax returns for businesses that classified themselves under the NAICS code 72, which is the food and accommodation category. The analysis included data for all gross, exempt, and taxable sales as reported on the returns. Businesses that were miscoded or that belonged to the accommodation part of the NAICS code were removed from the analysis. In addition, returns that either showed 100% taxable or 100% exempt sales were removed from the analysis.

The initial data set included 19,000 individual taxpayers, which was reduced further to 16,000 when including only the categories Alcoholic Beverage Drinking Places, Food Service Contractors and Caterers, Full Service Restaurants, and Limited Service Restaurants. To ensure that each member of the group was a food service establishment, ODT physically reviewed the top 50% by gross sales. The sample set was over 500 taxpayers for the five categories in total. ODT reviewed only master accounts, regular county vendor accounts, and transient vendor accounts.

The top 50% in terms of gross sales are represented in Table A for each group. The data extracted includes the gross sales, exempt sales, and taxable sales for each category.

TABLE A

*dollars in millions*

FY2013	Gross Sales	Exempt Sales	Taxable Sales	Exempt Share	Taxable Share
Full Service Restaurant	\$1,497.7	\$232.6	\$1,265.1	16%	84%
Food Service Contractor and Caterers	\$122.8	\$76.7	\$46.1	62%	38%
Alcoholic Beverage Drinking Place	\$173.9	\$36.6	\$137.3	21%	79%
Limited Service Restaurant	\$4,214.2	\$2,457.6	\$1,756.6	58%	42%

ODT then conducted a more exhaustive and detailed analysis of the Limited Service Restaurant category, pulling out 830 sales tax accounts belonging to QSRs. These accounts represent over 1,000 separate locations (a master sales tax account could have multiple locations). Their FY 2013 returns were reviewed and the overall average taxable share of gross receipts that were reported as taxable gross receipts on their returns was 24.8%. In addition, sales were analyzed to identify seasonal patterns. Such patterns were found not to be significant.

TABLE B

*dollars in millions*

Period	Gross Sales	Exempt Sales	Taxable Sales	Exempt Share	Taxable Share
July 2012	\$ 230.0	\$ 174.8	\$ 55.3	76.0%	24.0%
Aug. 2012	\$ 209.2	\$ 154.9	\$ 54.4	74.0%	26.0%
Sept. 2012	\$ 214.0	\$ 161.4	\$ 52.6	75.4%	24.6%
Oct. 2012	\$ 209.2	\$ 158.0	\$ 51.2	75.5%	24.5%
Nov. 2012	\$ 185.7	\$ 137.8	\$ 47.9	74.2%	25.8%
Dec. 2012	\$ 200.7	\$ 150.3	\$ 50.4	74.9%	25.1%
Jan. 2013	\$ 211.9	\$ 164.3	\$ 47.6	77.5%	22.5%
Feb. 2013	\$ 183.0	\$ 139.1	\$ 43.9	76.0%	24.0%
March 2013	\$ 201.1	\$ 150.4	\$ 50.7	74.8%	25.2%
April 2013	\$ 212.0	\$ 159.2	\$ 52.8	75.1%	24.9%
May 2013	\$ 215.7	\$ 161.0	\$ 54.7	74.6%	25.4%
June 2013	\$ 220.2	\$ 163.2	\$ 57.0	74.1%	25.9%
<b>Total</b>	<b>\$2,492.8</b>	<b>\$1,874.4</b>	<b>\$618.4</b>	<b>75.2%</b>	<b>24.8%</b>

## **WEBINAR**

Attached to this report are copies of the ODT guidance developed specifically for QSRs and the PowerPoint presentation from July 23, 2014. The webinar entitled *Sales/Use Tax Basics for Quick Serve Restaurants* was given by Phyllis Shambaugh and Chad Leon. The webinar had 99 participants. A question and answer session was held at the end of the webinar. The webinar can be accessed anytime on ODT's website: [http://www.tax.ohio.gov/sales\\_and\\_use/Webinars.aspx](http://www.tax.ohio.gov/sales_and_use/Webinars.aspx).

## **CONCLUSION**

ODT recognized that holding interested party meetings was an opportunity to educate members of the QSR industry on their duties to collect and remit the Ohio sales tax which should lead to increased sales tax compliance. ODT and the interested parties took a serious look at the issues surrounding sales tax compliance. ODT proactively issued new guidance and created and held a webinar to further educate members of the industry who were not able to be present for the interested party meetings. With 99 participants, ODT believes the webinar was a success.

ODT also took a look internally at audit procedures, and will now offer the following options to the QSR industry. These options are also presented on page 20 of this report, as part of a table comparing and contrasting past procedures with future procedures.

### **ODT Initiated Audit:**

1. Standard Test Check – same as the current test check method employed by ODT.
2. Modified Test Check  
This method would be similar to the Standard Test Check, however, upon mutual agreement between ODT and the restaurant under audit, the test check period can encompass more hours and/or more days, and seasonal consideration may be given.
3. Managed Test Check  
This method allows some or all of the test checks to be conducted by someone other than ODT. The specific procedure for this method is determined by mutual agreement between ODT and the restaurant under audit.
4. Enhanced Statistical Analysis Agreement  
ODT's Tax Analysis Division performs a statistical analysis to determine a taxable sales percentage based on actual historical returns of peer QSRs. As an example, 24.8% from Table B might be used based on the analysis described above. For a QSR located in a mall food court, 24.8% would be too low so a smaller and more specifically comparable peer group would be utilized to develop the taxable percentage.

### **Restaurant Initiated:**

1. Voluntary Disclosure Agreement (VDA)  
A VDA is available to taxpayers who voluntarily come forward in order to comply with Ohio's tax laws. Companies are eligible for a VDA if they submit a written request to ODT prior to an oral or written contact by ODT's Audit Division, Tax Discovery Division, or Enforcement Division. In exchange for entering into a VDA, ODT will agree to waive civil and criminal penalties and limit tax liabilities to the VDA period (except for sales tax collected, but not remitted). The tax liability is calculated and reported by the taxpayer. ODT reserves the right to audit the VDA period.
2. Prearranged Agreement  
The QSR submits an application for ODT's consideration. The prearranged agreement establishes a set percentage to be used when reporting taxable sales. This percentage may be determined through test check or by an alternate method mutually agreed upon by ODT and the applicant QSR. An example of an alternate method would be the use of statistical data gathered from actual historical sales tax returns.

### 3. Restaurant Compliance Program (RCP)

The RCP is a voluntary program and has five requirements:

- Managers and cashiers are required to complete an educational webinar prescribed by ODT; a quiz will be given at the end of the webinar and a certificate issued, which shall be maintained by the QSR in the individual's personnel file.
- The POS system must be properly programmed with the default set to tax all sales, except at a cash register segregated for drive-through sales only.
- The restaurant must be registered for all applicable taxes (typically sales tax, use tax, commercial activity tax and employer withholding).
- All return filings and liability payments must be made accurately and timely.
- The restaurant shall have no certified assessments (consideration will be given for de minimis amounts).

**The benefits to the vendor that participates in the RCP are threefold: a new education program for their employees, a reduced likelihood of being selected for audit, and the waiver of the 15% penalty applied during an audit should one occur.**

## Past Procedures

### ODT Initiated Audit

- Test check
- Agreement using a taxable percentage based on comparable restaurants

### Restaurant Initiated

- Voluntary Disclosure Agreement (VDA)
- Prearranged agreement using test check

## Future Procedures

### ODT Initiated Audit

- Standard test check
- Modified test check
  - Expanded days and hours
  - Seasonality consideration
- Managed test check
  - Involvement of store or third-party
- Enhanced Statistical Analysis Agreement
  - Percentage derived from statistical analysis of actual historical returns for the QSR industry

### Restaurant Initiated

- Voluntary Disclosure Agreement (VDA)
- Prearranged agreement using test check, statistical analysis or other method
- Restaurant Compliance Program (RCP)
  - Education (webinar)
    - Quiz
    - Certificate for managers and cashiers
  - Point of Sale (POS) programmed
    - Default to taxable
    - Drive-thru sales segregated
  - Registered for all applicable taxes
  - Accurate and timely returns and payments
  - No certified assessments  
(consideration for de minimis amounts)

### Benefit for Restaurant

- Compliance leads to a reduced chance of audit, and should there be an audit, the penalty (15%) would be waived

**IMPOSITION OF TAXES.**

§3 Laws may be passed providing for:

(A) The taxation of decedents' estates or of the right to receive or succeed to such estates, and the rates of such taxation may be uniform or may be graduated based on the value of the estate, inheritance, or succession. Such tax may also be levied at different rates upon collateral and direct inheritances, and a portion of each estate may be exempt from such taxation as provided by law.

(B) The taxation of incomes, and the rates of such taxation may be either uniform or graduated, and may be applied to such incomes and with such exemptions as may be provided by law.

(C) Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

(1976)

**REVENUE TO PAY EXPENSES AND RETIRE DEBTS.**

§4 The General Assembly shall provide for raising revenue, sufficient to defray the expenses of the state, for each year, and also a sufficient sum to pay principal and interest as they become due on the state debt.

(1851, am. 1976)

**LEVYING OF TAXES.**

§5 No tax shall be levied, except in pursuance of law; and every law imposing a tax shall state, distinctly, the object of the same, to which only, it shall be applied.

(1851)

**USE OF MOTOR VEHICLE LICENSE AND FUEL TAXES RESTRICTED.**

§5a No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on public highways, or to fuels used for propelling such vehicles, shall be expended for other than costs of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, costs for construction, reconstruction, maintenance and repair of public highways and bridges and other statutory highway purposes, expense of state enforcement of traffic laws, and expenditures authorized for hospitalization of indigent persons injured in motor vehicle accidents on the public highways.

(1947)

**NO DEBT FOR INTERNAL IMPROVEMENT.**

§6 Except as otherwise provided in this constitution the state shall never contract any debt for purposes of internal improvement.

(1851, am. 1912)

**REPEALED. REFERRED TO TAXATION OF INHERITANCES.**

§7

(1912, rep. 1976)

**REPEALED. REFERRED TO TAXATION OF INCOMES.**

§8

(1912, am. 1973, rep. 1976)

**APPORTIONMENT OF INCOME, ESTATE, AND INHERITANCE TAXES.**

§9 Not less than fifty per cent of the income, estate, and inheritance taxes that may be collected by the state shall be returned to the county, school district,

## **5739.01 Sales tax definitions.**

As used in this chapter:

- (A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.
- (B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:
- (1) All transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted;
  - (2) All transactions by which lodging by a hotel is or is to be furnished to transient guests;
  - (3) All transactions by which:
    - (a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code;
    - (b) An item of tangible personal property is or is to be installed, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code or property that is or is to be incorporated into and will become a part of a production, transmission, transportation, or distribution system for the delivery of a public utility service;
    - (c) The service of washing, cleaning, waxing, polishing, or painting a motor vehicle is or is to be furnished;
    - (d) Until August 1, 2003, industrial laundry cleaning services are or are to be provided and, on and after August 1, 2003, laundry and dry cleaning services are or are to be provided;
    - (e) Automatic data processing, computer services, or electronic information services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. Notwithstanding any other provision of this chapter, such transactions that occur between members of an affiliated group are not sales. An "affiliated group" means two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.
    - (f) Telecommunications service, including prepaid calling service, prepaid wireless calling service, or ancillary service, is or is to be provided, but not including coin-operated telephone service;
    - (g) Landscaping and lawn care service is or is to be provided;
    - (h) Private investigation and security service is or is to be provided;

- (i) Information services or tangible personal property is provided or ordered by means of a nine hundred telephone call;
  - (j) Building maintenance and janitorial service is or is to be provided;
  - (k) Employment service is or is to be provided;
  - (l) Employment placement service is or is to be provided;
  - (m) Exterminating service is or is to be provided;
  - (n) Physical fitness facility service is or is to be provided;
  - (o) Recreation and sports club service is or is to be provided;
  - (p) On and after August 1, 2003, satellite broadcasting service is or is to be provided;
  - (q) On and after August 1, 2003, personal care service is or is to be provided to an individual. As used in this division, "personal care service" includes skin care, the application of cosmetics, manicuring, pedicuring, hair removal, tattooing, body piercing, tanning, massage, and other similar services. "Personal care service" does not include a service provided by or on the order of a licensed physician or licensed chiropractor, or the cutting, coloring, or styling of an individual's hair.
  - (r) On and after August 1, 2003, the transportation of persons by motor vehicle or aircraft is or is to be provided, when the transportation is entirely within this state, except for transportation provided by an ambulance service, by a transit bus, as defined in section 5735.01 of the Revised Code, and transportation provided by a citizen of the United States holding a certificate of public convenience and necessity issued under 49 U.S.C. 41102;
  - (s) On and after August 1, 2003, motor vehicle towing service is or is to be provided. As used in this division, "motor vehicle towing service" means the towing or conveyance of a wrecked, disabled, or illegally parked motor vehicle.
  - (t) On and after August 1, 2003, snow removal service is or is to be provided. As used in this division, "snow removal service" means the removal of snow by any mechanized means, but does not include the providing of such service by a person that has less than five thousand dollars in sales of such service during the calendar year.
  - (u) Electronic publishing service is or is to be provided to a consumer for use in business, except that such transactions occurring between members of an affiliated group, as defined in division (B)(3)(e) of this section, are not sales.
- (4) All transactions by which printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter are or are to be furnished or transferred;
- (5) The production or fabrication of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production of fabrication work; and include the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. Except as provided in section 5739.03 of the Revised Code, a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part

of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property, provided that the sale and installation of carpeting, the sale and installation of agricultural land tile, the sale and erection or installation of portable grain bins, or the provision of landscaping and lawn care service and the transfer of property as part of such service is never a construction contract.

As used in division (B)(5) of this section:

(a) "Agricultural land tile" means fired clay or concrete tile, or flexible or rigid perforated plastic pipe or tubing, incorporated or to be incorporated into a subsurface drainage system appurtenant to land used or to be used primarily in production by farming, agriculture, horticulture, or floriculture. The term does not include such materials when they are or are to be incorporated into a drainage system appurtenant to a building or structure even if the building or structure is used or to be used in such production.

(b) "Portable grain bin" means a structure that is used or to be used by a person engaged in farming or agriculture to shelter the person's grain and that is designed to be disassembled without significant damage to its component parts.

(6) All transactions in which all of the shares of stock of a closely held corporation are transferred, or an ownership interest in a pass-through entity, as defined in section 5733.04 of the Revised Code, is transferred, if the corporation or pass-through entity is not engaging in business and its entire assets consist of boats, planes, motor vehicles, or other tangible personal property operated primarily for the use and enjoyment of the shareholders or owners;

(7) All transactions in which a warranty, maintenance or service contract, or similar agreement by which the vendor of the warranty, contract, or agreement agrees to repair or maintain the tangible personal property of the consumer is or is to be provided;

(8) The transfer of copyrighted motion picture films used solely for advertising purposes, except that the transfer of such films for exhibition purposes is not a sale;

(9) On and after August 1, 2003, all transactions by which tangible personal property is or is to be stored, except such property that the consumer of the storage holds for sale in the regular course of business;

(10) All transactions in which "guaranteed auto protection" is provided whereby a person promises to pay to the consumer the difference between the amount the consumer receives from motor vehicle insurance and the amount the consumer owes to a person holding title to or a lien on the consumer's motor vehicle in the event the consumer's motor vehicle suffers a total loss under the terms of the motor vehicle insurance policy or is stolen and not recovered, if the protection and its price are included in the purchase or lease agreement;

(11)

(a) Except as provided in division (B)(11)(b) of this section, on and after October 1, 2009, all transactions by which health care services are paid for, reimbursed, provided, delivered, arranged for, or otherwise made available by a medicaid health insuring corporation pursuant to the corporation's contract with the state.

(b) If the centers for medicare and medicaid services of the United States department of health and human services determines that the taxation of transactions described in division (B)(11)(a) of this section constitutes an impermissible health care-related tax under the "Social Security Act," section 1903(w), 42 U.S.C. 1396b(w), and regulations adopted thereunder, the medicaid director shall notify the tax commissioner of that determination. Beginning with the first day of the month following that notification, the transactions described in division (B)(11)(a) of this section are not sales for the purposes of this chapter or Chapter 5741. of the Revised Code. The tax commissioner shall order that the collection of taxes under sections 5739.02, 5739.021, 5739.023, 5739.026, 5741.02, 5741.021, 5741.022, and 5741.023 of the Revised Code shall cease for transactions occurring on or after that date.

(12) All transactions by which a specified digital product is provided for permanent use or less than permanent use, regardless of whether continued payment is required.

Except as provided in this section, "sale" and "selling" do not include transfers of interest in leased property where the original lessee and the terms of the original lease agreement remain unchanged, or professional, insurance, or personal service transactions that involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

(C) "Vendor" means the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given and, for sales described in division (B)(3)(i) of this section, the telecommunications service vendor that provides the nine hundred telephone service; if two or more persons are engaged in business at the same place of business under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor.

Physicians, dentists, hospitals, and veterinarians who are engaged in selling tangible personal property as received from others, such as eyeglasses, mouthwashes, dentifrices, or similar articles, are vendors. Veterinarians who are engaged in transferring to others for a consideration drugs, the dispensing of which does not require an order of a licensed veterinarian or physician under federal law, are vendors.

(D)

(1) "Consumer" means the person for whom the service is provided, to whom the transfer effected or license given by a sale is or is to be made or given, to whom the service described in division (B)(3)(f) or (i) of this section is charged, or to whom the admission is granted.

(2) Physicians, dentists, hospitals, and blood banks operated by nonprofit institutions and persons licensed to practice veterinary medicine, surgery, and dentistry are consumers of all tangible personal property and services purchased by them in connection with the practice of medicine, dentistry, the rendition of hospital or blood bank service, or the practice of veterinary medicine, surgery, and dentistry. In addition to being consumers of drugs administered by them or by their assistants according to their direction, veterinarians also are consumers of drugs that under federal law may be dispensed only by or upon the order of a licensed veterinarian or physician, when transferred by them to others for a consideration to provide treatment to animals as directed by the veterinarian.

(3) A person who performs a facility management, or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E) (1) of this section.

(iv) Notwithstanding divisions (H)(1)(b)(i) to (iii) of this section, any discount allowed by an automobile manufacturer to its employee, or to the employee of a supplier, on the purchase of a new motor vehicle from a new motor vehicle dealer in this state.

(v) The dollar value of a gift card that is not sold by a vendor or purchased by a consumer and that is redeemed by the consumer in purchasing tangible personal property or services if the vendor is not reimbursed and does not receive compensation from a third party to cover all or part of the gift card value. For the purposes of this division, a gift card is not sold by a vendor or purchased by a consumer if it is distributed pursuant to an awards, loyalty, or promotional program. Past and present purchases of tangible personal property or services by the consumer shall not be treated as consideration exchanged for a gift card.

(2) In the case of a sale of any new motor vehicle by a new motor vehicle dealer, as defined in section 4517.01 of the Revised Code, in which another motor vehicle is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the motor vehicle received in trade.

(3) In the case of a sale of any watercraft or outboard motor by a watercraft dealer licensed in accordance with section 1547.543 of the Revised Code, in which another watercraft, watercraft and trailer, or outboard motor is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the watercraft, watercraft and trailer, or outboard motor received in trade. As used in this division, "watercraft" includes an outdrive unit attached to the watercraft.

(4) In the case of transactions for health care services under division (B)(11) of this section, "price" means the amount of managed care premiums received each month by a medicaid health insuring corporation.

(I) "Receipts" means the total amount of the prices of the sales of vendors, provided that the dollar value of gift cards distributed pursuant to an awards, loyalty, or promotional program, and cash discounts allowed and taken on sales at the time they are consummated are not included, minus any amount deducted as a bad debt pursuant to section 5739.121 of the Revised Code. "Receipts" does not include the sale price of property returned or services rejected by consumers when the full sale price and tax are refunded either in cash or by credit.

(J) "Place of business" means any location at which a person engages in business.

(K) "Premises" includes any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.

(L) "Casual sale" means a sale of an item of tangible personal property that was obtained by the person making the sale, through purchase or otherwise, for the person's own use and was previously subject to any state's taxing jurisdiction on its sale or use, and includes such items acquired for the seller's use that are sold by an auctioneer employed directly by the person for such purpose, provided the location of such sales is not the auctioneer's permanent place of business. As used in this division, "permanent place of business" includes any location where such auctioneer has conducted more than two auctions during the year.

(M) "Hotel" means every establishment kept, used, maintained, advertised, or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether the rooms are in one or several structures, except as otherwise provided in division (G) of section 5739.09 of the Revised Code.

(N) "Transient guests" means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.

(O) "Making retail sales" means the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated to provide a service or to transfer title to or possession of the item sold. "Making retail sales" does not include the preliminary acts of promoting or soliciting the retail sales, other than the distribution of printed matter which displays or describes and prices the item offered for sale, nor does it include delivery of a predetermined quantity of tangible personal property or transportation of property or personnel to or from a place where a service is performed.

(P) "Used directly in the rendition of a public utility service" means that property that is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and that retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system, including only such motor vehicles as are specially designed and equipped for such use. Tangible personal property and services used primarily in providing highway transportation for hire are not used directly in the rendition of a public utility service. In this definition, "public utility" includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102.

(Q) "Refining" means removing or separating a desirable product from raw or contaminated materials by distillation or physical, mechanical, or chemical processes.

(R) "Assembly" and "assembling" mean attaching or fitting together parts to form a product, but do not include packaging a product.

(S) "Manufacturing operation" means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. "Manufacturing operation" does not include packaging.

(T) "Fiscal officer" means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county that is a transit authority, the fiscal officer of the county transit board if one is appointed pursuant to section 306.03 of the Revised Code or the county auditor if the board of county commissioners operates the county transit system.

(U) "Transit authority" means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit system is created pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority that includes territory in more than one county must include all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(4)

(a) In the case of a person who purchases printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of that printed matter, and the purchase of that printed matter for that purpose is a sale.

(b) In the case of a person who produces, rather than purchases, printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of all tangible personal property and services purchased for use or consumption in the production of that printed matter. That person is not entitled to claim exemption under division (B)(42)(f) of section 5739.02 of the Revised Code for any material incorporated into the printed matter or any equipment, supplies, or services primarily used to produce the printed matter.

(c) The distribution of printed matter to the public or to a designated segment of the public, free of charge, is not a sale to the members of the public to whom the printed matter is distributed or to any persons who purchase space in the printed matter for advertising or other purposes.

(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 division (E)(1) of this section.

(6) A person who engages in highway transportation for hire is the consumer of all packaging materials purchased by that person and used in performing the service, except for packaging materials sold by such person in a transaction separate from the service.

(7) In the case of a transaction for health care services under division (B)(11) of this section, a medicaid health insuring corporation is the consumer of such services. The purchase of such services by a medicaid health insuring corporation is not subject to the exception for resale under division (E)(1) of this section or to the exemptions provided under divisions (B)(12), (18), (19), and (22) of section 5739.02 of the Revised Code.

(E) "Retail sale" and "sales at retail" include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person.

(F) "Business" includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. "Business" does not include the activity of a person in managing and investing the person's own funds.

(G) "Engaging in business" means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds itself out to the public as conducting such business. Making a casual sale is not engaging in business.

(H)

(1)

(a) "Price," except as provided in divisions (H)(2), (3), and (4) of this section, 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:

- (i) The vendor's cost of the property sold;
  - (ii) The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the vendor, all taxes imposed on the vendor, including the tax imposed under Chapter 5751. of the Revised Code, and any other expense of the vendor;
  - (iii) Charges by the vendor for any services necessary to complete the sale;
  - (iv) On and after August 1, 2003, delivery charges. As used in this division, "delivery charges" means charges by the vendor for preparation and delivery to a location designated by the consumer of tangible personal property or a service, including transportation, shipping, postage, handling, crating, and packing.
  - (v) Installation charges;
  - (vi) Credit for any trade-in.
- (b) "Price" includes consideration received by the vendor from a third party, if the vendor actually receives the consideration from a party other than the consumer, and the consideration is directly related to a price reduction or discount on the sale; the vendor has an obligation to pass the price reduction or discount through to the consumer; the amount of the consideration attributable to the sale is fixed and determinable by the vendor at the time of the sale of the item to the consumer; and one of the following criteria is met:
- (i) The consumer presents a coupon, certificate, or other document to the vendor to claim a price reduction or discount where the coupon, certificate, or document is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any vendor to whom the coupon, certificate, or document is presented;
  - (ii) The consumer identifies the consumer's self to the seller as a member of a group or organization entitled to a price reduction or discount. A preferred customer card that is available to any patron does not constitute membership in such a group or organization.
  - (iii) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the consumer, or on a coupon, certificate, or other document presented by the consumer.
- (c) "Price" does not include any of the following:
- (i) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a vendor and taken by a consumer on a sale;
  - (ii) Interest, financing, and carrying charges from credit extended on the sale of tangible personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;
  - (iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer. For the purpose of this division, the tax imposed under Chapter 5751. of the Revised Code is not a tax directly on the consumer, even if the tax or a portion thereof is separately stated.

(V) "Legislative authority" means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county that is a transit authority, the board of county commissioners.

(W) "Territory of the transit authority" means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(X) "Providing a service" means providing or furnishing anything described in division (B)(3) of this section for consideration.

(Y)

(1)

(a) "Automatic data processing" means processing of others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data.

(b) "Computer services" means 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.

(c) "Electronic information services" means 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.

For transactions occurring on or after the effective date of the amendment of this section by H.B. 157 of the 127th general assembly, December 21, 2007, "electronic information services" does not include electronic publishing as defined in division (LLL) of this section.

(d) "Automatic data processing, computer services, or electronic information services" shall not include personal or professional services.

(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, "personal and professional services" means all services other than automatic data processing, computer services, or electronic information services, including but not limited to:

(a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

- (d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;
- (e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management;
- (f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;
- (g) Testing of business procedures;
- (h) Training personnel in business procedure applications;
- (i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;
- (j) Providing debt collection services by any oral, written, graphic, or electronic means.

The services listed in divisions (Y)(2)(a) to (j) of this section are not automatic data processing or computer services.

(Z) "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

- (1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;
- (2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;
- (3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

(AA)

(1) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. "Telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether the service is referred to as voice-over internet protocol service or is classified by the federal communications commission as enhanced or value-added. "Telecommunications service" does not include any of the following:

- (a) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a consumer where the consumer's primary purpose for the underlying transaction is the processed data or information;

- (b) Installation or maintenance of wiring or equipment on a customer's premises;
  - (c) Tangible personal property;
  - (d) Advertising, including directory advertising;
  - (e) Billing and collection services provided to third parties;
  - (f) Internet access service;
  - (g) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of such services by the programming service provider. Radio and television audio and video programming services include, but are not limited to, cable service, as defined in 47 U.S.C. 522(6), and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 C.F.R. 20.3;
  - (h) Ancillary service;
  - (i) Digital products delivered electronically, including software, music, video, reading materials, or ring tones.
- (2) "Ancillary service" means a service that is associated with or incidental to the provision of telecommunications service, including conference bridging service, detailed telecommunications billing service, directory assistance, vertical service, and voice mail service. As used in this division:
- (a) "Conference bridging service" means an ancillary service that links two or more participants of an audio or video conference call, including providing a telephone number. "Conference bridging service" does not include telecommunications services used to reach the conference bridge.
  - (b) "Detailed telecommunications billing service" means an ancillary service of separately stating information pertaining to individual calls on a customer's billing statement.
  - (c) "Directory assistance" means an ancillary service of providing telephone number or address information.
  - (d) "Vertical service" means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and manage multiple calls and call connections, including conference bridging service.
  - (e) "Voice mail service" means an ancillary service that enables the customer to store, send, or receive recorded messages. "Voice mail service" does not include any vertical services that the customer may be required to have in order to utilize the voice mail service.
- (3) "900 service" means an inbound toll telecommunications service purchased by a subscriber that allows the subscriber's customers to call in to the subscriber's prerecorded announcement or live service, and which is typically marketed under the name "900 service" and any subsequent numbers designated by the federal communications commission. "900 service" does not include the charge for collection services provided by the seller of the telecommunications service to the subscriber, or services or products sold by the subscriber to the subscriber's customer.
- (4) "Prepaid calling service" means the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or

authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

(5) "Prepaid wireless calling service" means a telecommunications service that provides the right to utilize mobile telecommunications service as well as other non-telecommunications services, including the download of digital products delivered electronically, and content and ancillary services, that must be paid for in advance and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

(6) "Value-added non-voice data service" means a telecommunications service in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance, or routing.

(7) "Coin-operated telephone service" means a telecommunications service paid for by inserting money into a telephone accepting direct deposits of money to operate.

(8) "Customer" has the same meaning as in section 5739.034 of the Revised Code.

(BB) "Laundry and dry cleaning services" means removing soil or dirt from towels, linens, articles of clothing, or other fabric items that belong to others and supplying towels, linens, articles of clothing, or other fabric items. "Laundry and dry cleaning services" does not include the provision of self-service facilities for use by consumers to remove soil or dirt from towels, linens, articles of clothing, or other fabric items.

(CC) "Magazines distributed as controlled circulation publications" means magazines containing at least twenty-four pages, at least twenty-five per cent editorial content, issued at regular intervals four or more times a year, and circulated without charge to the recipient, provided that such magazines are not owned or controlled by individuals or business concerns which conduct such publications as an auxiliary to, and essentially for the advancement of the main business or calling of, those who own or control them.

(DD) "Landscaping and lawn care service" means the services of planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, fertilizing, and providing similar services to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover, and other flora, or otherwise maintaining a lawn or landscape grown or maintained by the owner for ornamentation or other nonagricultural purpose. However, "landscaping and lawn care service" does not include the providing of such services by a person who has less than five thousand dollars in sales of such services during the calendar year.

(EE) "Private investigation and security service" means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749. of the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices. "Private investigation and security service" does not include special duty services provided by off-duty police officers, deputy sheriffs, and other peace officers regularly employed by the state or a political subdivision.

(FF) "Information services" means providing conversation, giving consultation or advice, playing or making a voice or other recording, making or keeping a record of the number of callers, and any other

service provided to a consumer by means of a nine hundred telephone call, except when the nine hundred telephone call is the means by which the consumer makes a contribution to a recognized charity.

(GG) "Research and development" means designing, creating, or formulating new or enhanced products, equipment, or manufacturing processes, and also means conducting scientific or technological inquiry and experimentation in the physical sciences with the goal of increasing scientific knowledge which may reveal the bases for new or enhanced products, equipment, or manufacturing processes.

(HH) "Qualified research and development equipment" means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 of the Revised Code, or used for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

(II) "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, "building maintenance and janitorial service" does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.

(JJ) "Employment service" means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so provided or supplied receive their wages, salary, or other compensation from the provider or supplier of the employment service or from a third party that provided or supplied the personnel to the provider or supplier. "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.

(KK) "Employment placement service" means locating or finding employment for a person or finding or locating an employee to fill an available position.

(LL) "Exterminating service" means eradicating or attempting to eradicate vermin infestations from a building or structure, or the area surrounding a building or structure, and includes activities to inspect, detect, or prevent vermin infestation of a building or structure.

(MM) "Physical fitness facility service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a physical fitness facility such as an athletic club, health spa, or gymnasium, which entitles the member to use the facility for physical exercise.

(NN) "Recreation and sports club service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a recreation and sports club, which entitles the member to use the facilities of the organization. "Recreation and sports club" means an organization that has ownership of, or controls or leases on a continuing, long-term basis, the facilities used by its members and includes an aviation club, gun or shooting club, yacht club, card club, swimming club, tennis club, golf club, country club, riding club, amateur sports club, or similar organization.

(OO) "Livestock" means farm animals commonly raised for food, food production, or other agricultural purposes, including, but not limited to, cattle, sheep, goats, swine, poultry, and captive deer. "Livestock" does not include invertebrates, amphibians, reptiles, domestic pets, animals for use in laboratories or for exhibition, or other animals not commonly raised for food or food production.

(PP) "Livestock structure" means a building or structure used exclusively for the housing, raising, feeding, or sheltering of livestock, and includes feed storage or handling structures and structures for livestock waste handling.

(QQ) "Horticulture" means the growing, cultivation, and production of flowers, fruits, herbs, vegetables, sod, mushrooms, and nursery stock. As used in this division, "nursery stock" has the same meaning as in section 927.51 of the Revised Code.

(RR) "Horticulture structure" means a building or structure used exclusively for the commercial growing, raising, or overwintering of horticultural products, and includes the area used for stocking, storing, and packing horticultural products when done in conjunction with the production of those products.

(SS) "Newspaper" means an unbound publication bearing a title or name that is regularly published, at least as frequently as biweekly, and distributed from a fixed place of business to the public in a specific geographic area, and that contains a substantial amount of news matter of international, national, or local events of interest to the general public.

(TT) "Professional racing team" means a person that employs at least twenty full-time employees for the purpose of conducting a motor vehicle racing business for profit. The person must conduct the business with the purpose of racing one or more motor racing vehicles in at least ten competitive professional racing events each year that comprise all or part of a motor racing series sanctioned by one or more motor racing sanctioning organizations. A "motor racing vehicle" means a vehicle for which the chassis, engine, and parts are designed exclusively for motor racing, and does not include a stock or production model vehicle that may be modified for use in racing. For the purposes of this division:

(1) A "competitive professional racing event" is a motor vehicle racing event sanctioned by one or more motor racing sanctioning organizations, at which aggregate cash prizes in excess of eight hundred thousand dollars are awarded to the competitors.

(2) "Full-time employee" means an individual who is employed for consideration for thirty-five or more hours a week, or who renders any other standard of service generally accepted by custom or specified by contract as full-time employment.

(UU)

(1) "Lease" or "rental" means any transfer of the possession or control of tangible personal property for a fixed or indefinite term, for consideration. "Lease" or "rental" includes future options to purchase or extend, and agreements described in 26 U.S.C. 7701(h)(1) covering motor vehicles and trailers where the amount of consideration may be increased or decreased by reference to the amount realized upon the sale or disposition of the property. "Lease" or "rental" does not include:

(a) A transfer of possession or control of tangible personal property under a security agreement or a deferred payment plan that requires the transfer of title upon completion of the required payments;

(b) A transfer of possession or control of tangible personal property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars or one per cent of the total required payments;

(c) Providing tangible personal property along with an operator for a fixed or indefinite period of time, if the operator is necessary for the property to perform as designed. For purposes of this division, the operator must do more than maintain, inspect, or set up the tangible personal property.

(2) "Lease" and "rental," as defined in division (UU) of this section, shall not apply to leases or rentals that exist before June 26, 2003.

(3) "Lease" and "rental" have the same meaning as in division (UU)(1) of this section regardless of whether a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, Title XIII of the Revised Code, or other federal, state, or local laws.

(VV) "Mobile telecommunications service" has the same meaning as in the "Mobile Telecommunications Sourcing Act," Pub. L. No. 106-252, 114 Stat. 631 (2000), 4 U.S.C.A. 124(7), as amended, and, on and after August 1, 2003, includes related fees and ancillary services, including universal service fees, detailed billing service, directory assistance, service initiation, voice mail service, and vertical services, such as caller ID and three-way calling.

(WW) "Certified service provider" has the same meaning as in section 5740.01 of the Revised Code.

(XX) "Satellite broadcasting service" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite, and includes all service and rental charges, premium channels or other special services, installation and repair service charges, and any other charges having any connection with the provision of the satellite broadcasting service.

(YY) "Tangible personal property" means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. For purposes of this chapter and Chapter 5741. of the Revised Code, "tangible personal property" includes motor vehicles, electricity, water, gas, steam, and prewritten computer software.

(ZZ) "Direct mail" means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the consumer or at the direction of the consumer when the cost of the items are not billed directly to the recipients. "Direct mail" includes tangible personal property supplied directly or indirectly by the consumer to the direct mail vendor for inclusion in the package containing the printed material. "Direct mail" does not include multiple items of printed material delivered to a single address.

(AAA) "Computer" means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(BBB) "Computer software" means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(CCC) "Delivered electronically" means delivery of computer software from the seller to the purchaser by means other than tangible storage media.

(DDD) "Prewritten computer software" means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. "Prewritten computer software" includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. If a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software.

(EEE)

(1) "Food" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

(2) As used in division (EEE)(1) of this section:

(a) "Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one per cent or more of alcohol by volume.

(b) "Dietary supplements" means any product, other than tobacco, that is intended to supplement the diet and that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional food for use as a sole item of a meal or of the diet; that is required to be labeled as a dietary supplement, identifiable by the

"supplement facts" box found on the label, as required by 21 C.F.R. 101.36; and that contains one or more of the following dietary ingredients:

(i) A vitamin;

(ii) A mineral;

(iii) An herb or other botanical;

(iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;

(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(2)(b)(i) to (v) of this section.

(c) "Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

(d) "Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

(FFF) "Drug" means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food, dietary supplements, or alcoholic beverages that is recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplements to them; is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or is intended to affect the structure or any function of the body.

(GGG) "Prescription" means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to issue a prescription.

(HHH) "Durable medical equipment" means equipment, including repair and replacement parts for such equipment, that can withstand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of illness or injury, and is not worn in or on the body. "Durable medical equipment" does not include mobility enhancing equipment.

(III) "Mobility enhancing equipment" means equipment, including repair and replacement parts for such equipment, that is primarily and customarily used to provide or increase the ability to move from one place to another and is appropriate for use either in a home or a motor vehicle, that is not generally used by persons with normal mobility, and that does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer. "Mobility enhancing equipment" does not include durable medical equipment.

(JJJ) "Prosthetic device" means a replacement, corrective, or supportive device, including repair and replacement parts for the device, worn on or in the human body to artificially replace a missing portion of the body, prevent or correct physical deformity or malfunction, or support a weak or deformed portion of the body. As used in this division, "prosthetic device" does not include corrective eyeglasses, contact lenses, or dental prosthesis.

(KKK)

(1) "Fractional aircraft ownership program" means a program in which persons within an affiliated group sell and manage fractional ownership program aircraft, provided that at least one hundred airworthy aircraft are operated in the program and the program meets all of the following criteria:

(a) Management services are provided by at least one program manager within an affiliated group on behalf of the fractional owners.

(b) Each program aircraft is owned or possessed by at least one fractional owner.

(c) Each fractional owner owns or possesses at least a one-sixteenth interest in at least one fixed-wing program aircraft.

(d) A dry-lease aircraft interchange arrangement is in effect among all of the fractional owners.

(e) Multi-year program agreements are in effect regarding the fractional ownership, management services, and dry-lease aircraft interchange arrangement aspects of the program.

(2) As used in division (KKK)(1) of this section:

(a) "Affiliated group" has the same meaning as in division (B)(3)(e) of this section.

(b) "Fractional owner" means a person that owns or possesses at least a one-sixteenth interest in a program aircraft and has entered into the agreements described in division (KKK)(1)(e) of this section.

(c) "Fractional ownership program aircraft" or "program aircraft" means a turbojet aircraft that is owned or possessed by a fractional owner and that has been included in a dry-lease aircraft interchange arrangement and agreement under divisions (KKK)(1)(d) and (e) of this section, or an aircraft a program manager owns or possesses primarily for use in a fractional aircraft ownership program.

(d) "Management services" means administrative and aviation support services furnished under a fractional aircraft ownership program in accordance with a management services agreement under division (KKK)(1)(e) of this section, and offered by the program manager to the fractional owners, including, at a minimum, the establishment and implementation of safety guidelines; the coordination of the scheduling of the program aircraft and crews; program aircraft maintenance; program aircraft insurance; crew training for crews employed, furnished, or contracted by the program manager or the fractional owner; the satisfaction of record-keeping requirements; and the development and use of an operations manual and a maintenance manual for the fractional aircraft ownership program.

(e) "Program manager" means the person that offers management services to fractional owners pursuant to a management services agreement under division (KKK)(1)(e) of this section.

(LLL) "Electronic publishing" means providing access to one or more of the following primarily for business customers, including the federal government or a state government or a political subdivision thereof, to conduct research: news; business, financial, legal, consumer, or credit materials; editorials, columns, reader commentary, or features; photos or images; archival or research material; legal notices, identity verification, or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other similar information which has been gathered and made available by the provider to the consumer in an electronic format. Providing electronic

publishing includes the functions necessary for the acquisition, formatting, editing, storage, and dissemination of data or information that is the subject of a sale.

(MMM) "Medicaid health insuring corporation" means a health insuring corporation that holds a certificate of authority under Chapter 1751. of the Revised Code and is under contract with the department of job and family services pursuant to section 5111.17 of the Revised Code.

(NNN) "Managed care premium" means any premium, capitation, or other payment a medicaid health insuring corporation receives for providing or arranging for the provision of health care services to its members or enrollees residing in this state.

(OOO) "Captive deer" means deer and other cervidae that have been legally acquired, or their offspring, that are privately owned for agricultural or farming purposes.

(PPP) "Gift card" means a document, card, certificate, or other record, whether tangible or intangible, that may be redeemed by a consumer for a dollar value when making a purchase of tangible personal property or services.

(QQQ) "Specified digital product" means an electronically transferred digital audiovisual work, digital audio work, or digital book.

As used in division (QQQ) of this section:

(1) "Digital audiovisual work" means a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

(2) "Digital audio work" means a work that results from the fixation of a series of musical, spoken, or other sounds, including digitized sound files that are downloaded onto a device and that may be used to alert the customer with respect to a communication.

(3) "Digital book" means a work that is generally recognized in the ordinary and usual sense as a book.

(4) "Electronically transferred" means obtained by the purchaser by means other than tangible storage media.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 129th General Assembly File No.127, HB 487, §101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No.117, HB 508, §1, eff. 9/6/2012.

Amended by 129th General Assembly File No.28, HB 153, §101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No.9, HB 1, §101.01, eff. 7/17/2009.

Effective Date: 10-21-2003; 06-02-2005; 01-01-2006; 01-01-2007; 2006 HB699 03-29-2007; 2007 HB157 12-21-2007; 2008 HB562 09-22-2008

**Related Legislative Provision:** See 130th General Assembly File No. 25, HB 59, §803.190.

## **5739.02 Levy of sales tax - purpose - rate - exemptions.**

For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

(A)

(1) The tax shall be collected as provided in section 5739.025 of the Revised Code. The rate of the tax shall be five and three-fourths per cent. The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

(2) In the case of the lease or rental, with a fixed term of more than thirty days or an indefinite term with a minimum period of more than thirty days, of any motor vehicles designed by the manufacturer to carry a load of not more than one ton, watercraft, outboard motor, or aircraft, or of any tangible personal property, other than motor vehicles designed by the manufacturer to carry a load of more than one ton, to be used by the lessee or renter primarily for business purposes, the tax shall be collected by the vendor at the time the lease or rental is consummated and shall be calculated by the vendor on the basis of the total amount to be paid by the lessee or renter under the lease agreement. If the total amount of the consideration for the lease or rental includes amounts that are not calculated at the time the lease or rental is executed, the tax shall be calculated and collected by the vendor at the time such amounts are billed to the lessee or renter. In the case of an open-end lease or rental, the tax shall be calculated by the vendor on the basis of the total amount to be paid during the initial fixed term of the lease or rental, and for each subsequent renewal period as it comes due. As used in this division, "motor vehicle" has the same meaning as in section 4501.01 of the Revised Code, and "watercraft" includes an outdrive unit attached to the watercraft.

A lease with a renewal clause and a termination penalty or similar provision that applies if the renewal clause is not exercised is presumed to be a sham transaction. In such a case, the tax shall be calculated and paid on the basis of the entire length of the lease period, including any renewal periods, until the termination penalty or similar provision no longer applies. The taxpayer shall bear the burden, by a preponderance of the evidence, that the transaction or series of transactions is not a sham transaction.

(3) Except as provided in division (A)(2) of this section, in the case of a sale, the price of which consists in whole or in part of the lease or rental of tangible personal property, the tax shall be measured by the installments of that lease or rental.

(4) In the case of a sale of a physical fitness facility service or recreation and sports club service, the price of which consists in whole or in part of a membership for the receipt of the benefit of the service, the tax applicable to the sale shall be measured by the installments thereof.

(B) The tax does not apply to the following:

(1) Sales to the state or any of its political subdivisions, or to any other state or its political subdivisions if the laws of that state exempt from taxation sales made to this state and its political subdivisions;

- (2) Sales of food for human consumption off the premises where sold;
- (3) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;
- (4) Sales of newspapers and sales or transfers of magazines distributed as controlled circulation publications;
- (5) The furnishing, preparing, or serving of meals without charge by an employer to an employee provided the employer records the meals as part compensation for services performed or work done;
- (6) Sales of motor fuel upon receipt, use, distribution, or sale of which in this state a tax is imposed by the law of this state, but this exemption shall not apply to the sale of motor fuel on which a refund of the tax is allowable under division (A) of section 5735.14 of the Revised Code; and the tax commissioner may deduct the amount of tax levied by this section applicable to the price of motor fuel when granting a refund of motor fuel tax pursuant to division (A) of section 5735.14 of the Revised Code and shall cause the amount deducted to be paid into the general revenue fund of this state;
- (7) Sales of natural gas by a natural gas company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through pipes or conduits, and all sales of communications services by a telegraph company, all terms as defined in section 5727.01 of the Revised Code, and sales of electricity delivered through wires;
- (8) Casual sales by a person, or auctioneer employed directly by the person to conduct such sales, except as to such sales of motor vehicles, watercraft or outboard motors required to be titled under section 1548.06 of the Revised Code, watercraft documented with the United States coast guard, snowmobiles, and all-purpose vehicles as defined in section 4519.01 of the Revised Code;
- (9)
  - (a) Sales of services or tangible personal property, other than motor vehicles, mobile homes, and manufactured homes, by churches, organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, or nonprofit organizations operated exclusively for charitable purposes as defined in division (B)(12) of this section, provided that the number of days on which such tangible personal property or services, other than items never subject to the tax, are sold does not exceed six in any calendar year, except as otherwise provided in division (B)(9)(b) of this section. If the number of days on which such sales are made exceeds six in any calendar year, the church or organization shall be considered to be engaged in business and all subsequent sales by it shall be subject to the tax. In counting the number of days, all sales by groups within a church or within an organization shall be considered to be sales of that church or organization.
  - (b) The limitation on the number of days on which tax-exempt sales may be made by a church or organization under division (B)(9)(a) of this section does not apply to sales made by student clubs and other groups of students of a primary or secondary school, or a parent-teacher association, booster group, or similar organization that raises money to support or fund curricular or extracurricular activities of a primary or secondary school.
  - (c) Divisions (B)(9)(a) and (b) of this section do not apply to sales by a noncommercial educational radio or television broadcasting station.

(10) Sales not within the taxing power of this state under the Constitution or laws of the United States or the Constitution of this state;

(11) Except for transactions that are sales under division (B)(3)(r) of section 5739.01 of the Revised Code, the transportation of persons or property, unless the transportation is by a private investigation and security service;

(12) Sales of tangible personal property or services to churches, to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, and to any other nonprofit organizations operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation; sales to offices administering one or more homes for the aged or one or more hospital facilities exempt under section 140.08 of the Revised Code; and sales to organizations described in division (D) of section 5709.12 of the Revised Code.

"Charitable purposes" means the relief of poverty; the improvement of health through the alleviation of illness, disease, or injury; the operation of an organization exclusively for the provision of professional, laundry, printing, and purchasing services to hospitals or charitable institutions; the operation of a home for the aged, as defined in section 5701.13 of the Revised Code; the operation of a radio or television broadcasting station that is licensed by the federal communications commission as a noncommercial educational radio or television station; the operation of a nonprofit animal adoption service or a county humane society; the promotion of education by an institution of learning that maintains a faculty of qualified instructors, teaches regular continuous courses of study, and confers a recognized diploma upon completion of a specific curriculum; the operation of a parent-teacher association, booster group, or similar organization primarily engaged in the promotion and support of the curricular or extracurricular activities of a primary or secondary school; the operation of a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein; the production of performances in music, dramatics, and the arts; or the promotion of education by an organization engaged in carrying on research in, or the dissemination of, scientific and technological knowledge and information primarily for the public.

Nothing in this division shall be deemed to exempt sales to any organization for use in the operation or carrying on of a trade or business, or sales to a home for the aged for use in the operation of independent living facilities as defined in division (A) of section 5709.12 of the Revised Code.

(13) Building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract with this state or a political subdivision of this state, or with the United States government or any of its agencies; building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property that are accepted for ownership by this state or any of its political subdivisions, or by the United States government or any of its agencies at the time of completion of the structures or improvements; building and construction materials sold to construction contractors for incorporation into a horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock; building materials and services sold to a construction contractor for incorporation into a house of public worship or religious education, or a building used exclusively for charitable purposes under a construction contract with an organization whose purpose is as described in division (B)(12) of this section; building materials and services sold

to a construction contractor for incorporation into a building under a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes; building and construction materials sold for incorporation into the original construction of a sports facility under section 307.696 of the Revised Code; building and construction materials and services sold to a construction contractor for incorporation into real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state; building and construction materials for incorporation into a transportation facility pursuant to a public-private agreement entered into under sections 5501.70 to 5501.83 of the Revised Code; and, until one calendar year after the construction of a convention center that qualifies for property tax exemption under section 5709.084 of the Revised Code is completed, building and construction materials and services sold to a construction contractor for incorporation into the real property comprising that convention center;

(14) Sales of ships or vessels or rail rolling stock used or to be used principally in interstate or foreign commerce, and repairs, alterations, fuel, and lubricants for such ships or vessels or rail rolling stock;

(15) Sales to persons primarily engaged in any of the activities mentioned in division (B)(42)(a), (g), or (h) of this section, to persons engaged in making retail sales, or to persons who purchase for sale from a manufacturer tangible personal property that was produced by the manufacturer in accordance with specific designs provided by the purchaser, of packages, including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail. "Packages" includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, but does not include motor vehicles or bulk tanks, trailers, or similar devices attached to motor vehicles. "Packaging" means placing in a package. Division (B)(15) of this section does not apply to persons engaged in highway transportation for hire.

(16) Sales of food to persons using supplemental nutrition assistance program benefits to purchase the food. As used in this division, "food" has the same meaning as in 7 U.S.C. 2012 and federal regulations adopted pursuant to the Food and Nutrition Act of 2008.

(17) Sales to persons engaged in farming, agriculture, horticulture, or floriculture, of tangible personal property for use or consumption primarily in the production by farming, agriculture, horticulture, or floriculture of other tangible personal property for use or consumption primarily in the production of tangible personal property for sale by farming, agriculture, horticulture, or floriculture; or material and parts for incorporation into any such tangible personal property for use or consumption in production; and of tangible personal property for such use or consumption in the conditioning or holding of products produced by and for such use, consumption, or sale by persons engaged in farming, agriculture, horticulture, or floriculture, except where such property is incorporated into real property;

(18) Sales of drugs for a human being that may be dispensed only pursuant to a prescription; insulin as recognized in the official United States pharmacopoeia; urine and blood testing materials when used by diabetics or persons with hypoglycemia to test for glucose or acetone; hypodermic syringes and needles when used by diabetics for insulin injections; epoetin alfa when purchased for use in the treatment of persons with medical disease; hospital beds when purchased by hospitals, nursing homes,

or other medical facilities; and medical oxygen and medical oxygen-dispensing equipment when purchased by hospitals, nursing homes, or other medical facilities;

(19) Sales of prosthetic devices, durable medical equipment for home use, or mobility enhancing equipment, when made pursuant to a prescription and when such devices or equipment are for use by a human being.

(20) Sales of emergency and fire protection vehicles and equipment to nonprofit organizations for use solely in providing fire protection and emergency services, including trauma care and emergency medical services, for political subdivisions of the state;

(21) Sales of tangible personal property manufactured in this state, if sold by the manufacturer in this state to a retailer for use in the retail business of the retailer outside of this state and if possession is taken from the manufacturer by the purchaser within this state for the sole purpose of immediately removing the same from this state in a vehicle owned by the purchaser;

(22) Sales of services provided by the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities, or by governmental entities of the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities;

(23) Sales of motor vehicles to nonresidents of this state under the circumstances described in division (B) of section 5739.029 of the Revised Code;

(24) Sales to persons engaged in the preparation of eggs for sale of tangible personal property used or consumed directly in such preparation, including such tangible personal property used for cleaning, sanitizing, preserving, grading, sorting, and classifying by size; packages, including material and parts for packages, and machinery, equipment, and material for use in packaging eggs for sale; and handling and transportation equipment and parts therefor, except motor vehicles licensed to operate on public highways, used in intraplant or interplant transfers or shipment of eggs in the process of preparation for sale, when the plant or plants within or between which such transfers or shipments occur are operated by the same person. "Packages" includes containers, cases, baskets, flats, fillers, filler flats, cartons, closure materials, labels, and labeling materials, and "packaging" means placing therein.

(25)

(a) Sales of water to a consumer for residential use;

(b) Sales of water by a nonprofit corporation engaged exclusively in the treatment, distribution, and sale of water to consumers, if such water is delivered to consumers through pipes or tubing.

(26) Fees charged for inspection or reinspection of motor vehicles under section 3704.14 of the Revised Code;

(27) Sales to persons licensed to conduct a food service operation pursuant to section 3717.43 of the Revised Code, of tangible personal property primarily used directly for the following:

(a) To prepare food for human consumption for sale;

(b) To preserve food that has been or will be prepared for human consumption for sale by the food service operator, not including tangible personal property used to display food for selection by the consumer;

- (c) To clean tangible personal property used to prepare or serve food for human consumption for sale.
- (28) Sales of animals by nonprofit animal adoption services or county humane societies;
- (29) Sales of services to a corporation described in division (A) of section 5709.72 of the Revised Code, and sales of tangible personal property that qualifies for exemption from taxation under section 5709.72 of the Revised Code;
- (30) Sales and installation of agricultural land tile, as defined in division (B)(5)(a) of section 5739.01 of the Revised Code;
- (31) Sales and erection or installation of portable grain bins, as defined in division (B)(5)(b) of section 5739.01 of the Revised Code;
- (32) The sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire, except for packages and packaging used for the transportation of tangible personal property;
- (33) Sales to the state headquarters of any veterans' organization in this state that is either incorporated and issued a charter by the congress of the United States or is recognized by the United States veterans administration, for use by the headquarters;
- (34) Sales to a telecommunications service vendor, mobile telecommunications service vendor, or satellite broadcasting service vendor of tangible personal property and services used directly and primarily in transmitting, receiving, switching, or recording any interactive, one- or two-way electromagnetic communications, including voice, image, data, and information, through the use of any medium, including, but not limited to, poles, wires, cables, switching equipment, computers, and record storage devices and media, and component parts for the tangible personal property. The exemption provided in this division shall be in lieu of all other exemptions under division (B)(42)(a) or (n) of this section to which the vendor may otherwise be entitled, based upon the use of the thing purchased in providing the telecommunications, mobile telecommunications, or satellite broadcasting service.
- (35)
- (a) Sales where the purpose of the consumer is to use or consume the things transferred in making retail sales and consisting of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale.
- (b) Sales to direct marketing vendors of preliminary materials such as photographs, artwork, and typesetting that will be used in printing advertising material; and of printed matter that offers free merchandise or chances to win sweepstake prizes and that is mailed to potential customers with advertising material described in division (B)(35)(a) of this section;
- (c) Sales of equipment such as telephones, computers, facsimile machines, and similar tangible personal property primarily used to accept orders for direct marketing retail sales.
- (d) Sales of automatic food vending machines that preserve food with a shelf life of forty-five days or less by refrigeration and dispense it to the consumer.

For purposes of division (B)(35) of this section, "direct marketing" means the method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility by means of the United States mail, delivery service, or common carrier.

(36) Sales to a person engaged in the business of horticulture or producing livestock of materials to be incorporated into a horticulture structure or livestock structure;

(37) Sales of personal computers, computer monitors, computer keyboards, modems, and other peripheral computer equipment to an individual who is licensed or certified to teach in an elementary or a secondary school in this state for use by that individual in preparation for teaching elementary or secondary school students;

(38) Sales to a professional racing team of any of the following:

(a) Motor racing vehicles;

(b) Repair services for motor racing vehicles;

(c) Items of property that are attached to or incorporated in motor racing vehicles, including engines, chassis, and all other components of the vehicles, and all spare, replacement, and rebuilt parts or components of the vehicles; except not including tires, consumable fluids, paint, and accessories consisting of instrumentation sensors and related items added to the vehicle to collect and transmit data by means of telemetry and other forms of communication.

(39) Sales of used manufactured homes and used mobile homes, as defined in section 5739.0210 of the Revised Code, made on or after January 1, 2000;

(40) Sales of tangible personal property and services to a provider of electricity used or consumed directly and primarily in generating, transmitting, or distributing electricity for use by others, including property that is or is to be incorporated into and will become a part of the consumer's production, transmission, or distribution system and that retains its classification as tangible personal property after incorporation; fuel or power used in the production, transmission, or distribution of electricity; energy conversion equipment as defined in section 5727.01 of the Revised Code; and tangible personal property and services used in the repair and maintenance of the production, transmission, or distribution system, including only those motor vehicles as are specially designed and equipped for such use. The exemption provided in this division shall be in lieu of all other exemptions in division (B) (42)(a) or (n) of this section to which a provider of electricity may otherwise be entitled based on the use of the tangible personal property or service purchased in generating, transmitting, or distributing electricity.

(41) Sales to a person providing services under division (B)(3)(r) of section 5739.01 of the Revised Code of tangible personal property and services used directly and primarily in providing taxable services under that section.

(42) Sales where the purpose of the purchaser is to do any of the following:

(a) To incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining; or to use or consume the thing transferred directly in producing tangible personal property for sale by mining, including, without

limitation, the extraction from the earth of all substances that are classed geologically as minerals, production of crude oil and natural gas, or directly in the rendition of a public utility service, except that the sales tax levied by this section shall be collected upon all meals, drinks, and food for human consumption sold when transporting persons. Persons engaged in rendering services in the exploration for, and production of, crude oil and natural gas for others are deemed engaged directly in the exploration for, and production of, crude oil and natural gas. This paragraph does not exempt from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

- (b) To hold the thing transferred as security for the performance of an obligation of the vendor;
- (c) To resell, hold, use, or consume the thing transferred as evidence of a contract of insurance;
- (d) To use or consume the thing directly in commercial fishing;
- (e) To incorporate the thing transferred as a material or a part into, or to use or consume the thing transferred directly in the production of, magazines distributed as controlled circulation publications;
- (f) To use or consume the thing transferred in the production and preparation in suitable condition for market and sale of printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter;
- (g) To use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale;
- (h) To use the benefit of a warranty, maintenance or service contract, or similar agreement, as described in division (B)(7) of section 5739.01 of the Revised Code, to repair or maintain tangible personal property, if all of the property that is the subject of the warranty, contract, or agreement would not be subject to the tax imposed by this section;
- (i) To use the thing transferred as qualified research and development equipment;
- (j) To use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility when the inventory is primarily distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing. This division does not apply to motor vehicles registered for operation on the public highways. As used in this division, "affiliated group" has the same meaning as in division (B)(3)(e) of section 5739.01 of the Revised Code and "direct marketing" has the same meaning as in division (B)(35) of this section.
- (k) To use or consume the thing transferred to fulfill a contractual obligation incurred by a warrantor pursuant to a warranty provided as a part of the price of the tangible personal property sold or by a vendor of a warranty, maintenance or service contract, or similar agreement the provision of which is defined as a sale under division (B)(7) of section 5739.01 of the Revised Code;
- (l) To use or consume the thing transferred in the production of a newspaper for distribution to the public;

(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;

(n) To use or consume the thing transferred primarily in producing tangible personal property for sale by farming, agriculture, horticulture, or floriculture. Persons engaged in rendering farming, agriculture, horticulture, or floriculture services for others are deemed engaged primarily in farming, agriculture, horticulture, or floriculture. This paragraph does not exempt from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

(o) To use or consume the thing transferred in acquiring, formatting, editing, storing, and disseminating data or information by electronic publishing.

As used in division (B)(42) of this section, "thing" includes all transactions included in divisions (B)(3) (a), (b), and (e) of section 5739.01 of the Revised Code.

(43) Sales conducted through a coin operated device that activates vacuum equipment or equipment that dispenses water, whether or not in combination with soap or other cleaning agents or wax, to the consumer for the consumer's use on the premises in washing, cleaning, or waxing a motor vehicle, provided no other personal property or personal service is provided as part of the transaction.

(44) Sales of replacement and modification parts for engines, airframes, instruments, and interiors in, and paint for, aircraft used primarily in a fractional aircraft ownership program, and sales of services for the repair, modification, and maintenance of such aircraft, and machinery, equipment, and supplies primarily used to provide those services.

(45) Sales of telecommunications service that is used directly and primarily to perform the functions of a call center. As used in this division, "call center" means any physical location where telephone calls are placed or received in high volume for the purpose of making sales, marketing, customer service, technical support, or other specialized business activity, and that employs at least fifty individuals that engage in call center activities on a full-time basis, or sufficient individuals to fill fifty full-time equivalent positions.

(46) Sales by a telecommunications service vendor of 900 service to a subscriber. This division does not apply to information services, as defined in division (FF) of section 5739.01 of the Revised Code.

(47) Sales of value-added non-voice data service. This division does not apply to any similar service that is not otherwise a telecommunications service.

(48)

(a) Sales of machinery, equipment, and software to a qualified direct selling entity for use in a warehouse or distribution center primarily for storing, transporting, or otherwise handling inventory that is held for sale to independent salespersons who operate as direct sellers and that is held primarily for distribution outside this state;

(b) As used in division (B)(48)(a) of this section:

(i) "Direct seller" means a person selling consumer products to individuals for personal or household use and not from a fixed retail location, including selling such product at in-home product demonstrations, parties, and other one-on-one selling.

(ii) "Qualified direct selling entity" means an entity selling to direct sellers at the time the entity enters into a tax credit agreement with the tax credit authority pursuant to section 122.17 of the Revised Code, provided that the agreement was entered into on or after January 1, 2007. Neither contingencies relevant to the granting of, nor later developments with respect to, the tax credit shall impair the status of the qualified direct selling entity under division (B)(48) of this section after execution of the tax credit agreement by the tax credit authority.

(c) Division (B)(48) of this section is limited to machinery, equipment, and software first stored, used, or consumed in this state within the period commencing June 24, 2008, and ending on the date that is five years after that date.

(49) Sales of materials, parts, equipment, or engines used in the repair or maintenance of aircraft or avionics systems of such aircraft, and sales of repair, remodeling, replacement, or maintenance services in this state performed on aircraft or on an aircraft's avionics, engine, or component materials or parts. As used in division (B)(49) of this section, "aircraft" means aircraft of more than six thousand pounds maximum certified takeoff weight or used exclusively in general aviation.

(50) Sales of full flight simulators that are used for pilot or flight-crew training, sales of repair or replacement parts or components, and sales of repair or maintenance services for such full flight simulators. "Full flight simulator" means a replica of a specific type, or make, model, and series of aircraft cockpit. It includes the assemblage of equipment and computer programs necessary to represent aircraft operations in ground and flight conditions, a visual system providing an out-of-the-cockpit view, and a system that provides cues at least equivalent to those of a three-degree-of-freedom motion system, and has the full range of capabilities of the systems installed in the device as described in appendices A and B of part 60 of chapter 1 of title 14 of the Code of Federal Regulations.

(51) Any transfer or lease of tangible personal property between the state and JobsOhio in accordance with section 4313.02 of the Revised Code.

(52)

(a) Sales to a qualifying corporation.

(b) As used in division (B)(52) of this section:

(i) "Qualifying corporation" means a nonprofit corporation organized in this state that leases from an eligible county land, buildings, structures, fixtures, and improvements to the land that are part of or used in a public recreational facility used by a major league professional athletic team or a class A to class AAA minor league affiliate of a major league professional athletic team for a significant portion of the team's home schedule, provided the following apply:

(I) The facility is leased from the eligible county pursuant to a lease that requires substantially all of the revenue from the operation of the business or activity conducted by the nonprofit corporation at the facility in excess of operating costs, capital expenditures, and reserves to be paid to the eligible county at least once per calendar year.

(II) Upon dissolution and liquidation of the nonprofit corporation, all of its net assets are distributable to the board of commissioners of the eligible county from which the corporation leases the facility.

(ii) "Eligible county" has the same meaning as in section 307.695 of the Revised Code.

(53) Sales to or by a cable service provider, video service provider, or radio or television broadcast station regulated by the federal government of cable service or programming, video service or programming, audio service or programming, or electronically transferred digital audiovisual or audio work. As used in division (B)(53) of this section, "cable service" and "cable service provider" have the same meanings as in section 1332.01 of the Revised Code, and "video service," "video service provider," and "video programming" have the same meanings as in section 1332.21 of the Revised Code.

(C) For the purpose of the proper administration of this chapter, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established.

(D) The levy of this tax on retail sales of recreation and sports club service shall not prevent a municipal corporation from levying any tax on recreation and sports club dues or on any income generated by recreation and sports club dues.

(E) The tax collected by the vendor from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional sales tax pursuant to section 5739.021 or 5739.026 of the Revised Code and of transit authorities levying an additional sales tax pursuant to section 5739.023 of the Revised Code. Except for the discount authorized under section 5739.12 of the Revised Code and the effects of any rounding pursuant to section 5703.055 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of the tax levied by this section or section 5739.021, 5739.023, or 5739.026 of the Revised Code.

Amended by 130th General Assembly File No. TBD, HB 533, §1, eff. 9/11/2014.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 6/30/2013, and 9/29/2013(Vetoed Provisions).

Amended by 129th General Assembly File No.127, HB 487, §101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No.117, HB 508, §1, eff. 9/6/2012.

Amended by 129th General Assembly File No.28, HB 153, §101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No.48, SB 232, §1, eff. 6/17/2010.

Amended by 128th General Assembly File No.47, SB 181, §1, eff. 9/13/2010.

Amended by 128th General Assembly File No.9, HB 1, §101.01, eff. 10/16/2009.

Effective Date: 10-21-2003; 06-30-2005; 2007 HB119 06-30-2007; 2007 HB157 12-21-2007; 2008 HB562 09-22-2008; 2008 HB420 02-01-2009

**Related Legislative Provision:** See 130th General Assembly File No. 25, HB 59, §803.230.

See 130th General Assembly File No. 25, HB 59, §803.190(D).

## **5739.03 Consumer to pay tax - report of tax - exemption certificates.**

(A) Except as provided in section 5739.05 or section 5739.051 of the Revised Code, the tax imposed by or pursuant to section 5739.02 , 5739.021 , 5739.023 , or 5739.026 of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, in the manner and at the times provided as follows:

(1) If the price is, at or prior to the provision of the service or the delivery of possession of the thing sold to the consumer, paid in currency passed from hand to hand by the consumer or the consumer's agent to the vendor or the vendor's agent, the vendor or the vendor's agent shall collect the tax with and at the same time as the price;

(2) If the price is otherwise paid or to be paid, the vendor or the vendor's agent shall, at or prior to the provision of the service or the delivery of possession of the thing sold to the consumer, charge the tax imposed by or pursuant to section 5739.02 , 5739.021 , 5739.023 , or 5739.026 of the Revised Code to the account of the consumer, which amount shall be collected by the vendor from the consumer in addition to the price. Such sale shall be reported on and the amount of the tax applicable thereto shall be remitted with the return for the period in which the sale is made, and the amount of the tax shall become a legal charge in favor of the vendor and against the consumer.

(B)

(1)

(a) If any sale is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B)(1) to (11) or (28) of section 5739.02 of the Revised Code, the consumer must provide to the vendor, and the vendor must obtain from the consumer, a certificate specifying the reason that the sale is not legally subject to the tax. The certificate shall be in such form, and shall be provided either in a hard copy form or electronic form, as the tax commissioner prescribes.

(b) A vendor that obtains a fully completed exemption certificate from a consumer is relieved of liability for collecting and remitting tax on any sale covered by that certificate. If it is determined the exemption was improperly claimed, the consumer shall be liable for any tax due on that sale under section 5739.02 , 5739.021 , 5739.023 , or 5739.026 or Chapter 5741. of the Revised Code. Relief under this division from liability does not apply to any of the following:

(i) A vendor that fraudulently fails to collect tax;

(ii) A vendor that solicits consumers to participate in the unlawful claim of an exemption;

(iii) A vendor that accepts an exemption certificate from a consumer that claims an exemption based on who purchases or who sells property or a service, when the subject of the transaction sought to be covered by the exemption certificate is actually received by the consumer at a location operated by the vendor in this state, and this state has posted to its web site an exemption certificate form that clearly and affirmatively indicates that the claimed exemption is not available in this state;

(iv) A vendor that accepts an exemption certificate from a consumer who claims a multiple points of use exemption under division (D) of section 5739.033 of the Revised Code, if the item purchased is tangible personal property, other than prewritten computer software.

(2) The vendor shall maintain records, including exemption certificates, of all sales on which a consumer has claimed an exemption, and provide them to the tax commissioner on request.

(3) The tax commissioner may establish an identification system whereby the commissioner issues an identification number to a consumer that is exempt from payment of the tax. The consumer must present the number to the vendor, if any sale is claimed to be exempt as provided in this section.

(4) If no certificate is provided or obtained within ninety days after the date on which such sale is consummated, it shall be presumed that the tax applies. Failure to have so provided or obtained a certificate shall not preclude a vendor, within one hundred twenty days after the tax commissioner gives written notice of intent to levy an assessment, from either establishing that the sale is not subject to the tax, or obtaining, in good faith, a fully completed exemption certificate.

(5) Certificates need not be obtained nor provided where the identity of the consumer is such that the transaction is never subject to the tax imposed or where the item of tangible personal property sold or the service provided is never subject to the tax imposed, regardless of use, or when the sale is in interstate commerce.

(6) If a transaction is claimed to be exempt under division (B)(13) of section 5739.02 of the Revised Code, the contractor shall obtain certification of the claimed exemption from the contractee. This certification shall be in addition to an exemption certificate provided by the contractor to the vendor. A contractee that provides a certification under this division shall be deemed to be the consumer of all items purchased by the contractor under the claim of exemption, if it is subsequently determined that the exemption is not properly claimed. The certification shall be in such form as the tax commissioner prescribes.

(C) As used in this division, "contractee" means a person who seeks to enter or enters into a contract or agreement with a contractor or vendor for the construction of real property or for the sale and installation onto real property of tangible personal property.

Any contractor or vendor may request from any contractee a certification of what portion of the property to be transferred under such contract or agreement is to be incorporated into the realty and what portion will retain its status as tangible personal property after installation is completed. The contractor or vendor shall request the certification by certified mail delivered to the contractee, return receipt requested. Upon receipt of such request and prior to entering into the contract or agreement, the contractee shall provide to the contractor or vendor a certification sufficiently detailed to enable the contractor or vendor to ascertain the resulting classification of all materials purchased or fabricated by the contractor or vendor and transferred to the contractee. This requirement applies to a contractee regardless of whether the contractee holds a direct payment permit under section 5739.031 of the Revised Code or provides to the contractor or vendor an exemption certificate as provided under this section.

For the purposes of the taxes levied by this chapter and Chapter 5741. of the Revised Code, the contractor or vendor may in good faith rely on the contractee's certification. Notwithstanding division (B) of section 5739.01 of the Revised Code, if the tax commissioner determines that certain property certified by the contractee as tangible personal property pursuant to this division is, in fact, real

property, the contractee shall be considered to be the consumer of all materials so incorporated into that real property and shall be liable for the applicable tax, and the contractor or vendor shall be excused from any liability on those materials.

If a contractee fails to provide such certification upon the request of the contractor or vendor, the contractor or vendor shall comply with the provisions of this chapter and Chapter 5741. of the Revised Code without the certification. If the tax commissioner determines that such compliance has been performed in good faith and that certain property treated as tangible personal property by the contractor or vendor is, in fact, real property, the contractee shall be considered to be the consumer of all materials so incorporated into that real property and shall be liable for the applicable tax, and the construction contractor or vendor shall be excused from any liability on those materials.

This division does not apply to any contract or agreement where the tax commissioner determines as a fact that a certification under this division was made solely on the decision or advice of the contractor or vendor.

(D) Notwithstanding division (B) of section 5739.01 of the Revised Code, whenever the total rate of tax imposed under this chapter is increased after the date after a construction contract is entered into, the contractee shall reimburse the construction contractor for any additional tax paid on tangible property consumed or services received pursuant to the contract.

(E) A vendor who files a petition for reassessment contesting the assessment of tax on sales for which the vendor obtained no valid exemption certificates and for which the vendor failed to establish that the sales were properly not subject to the tax during the one-hundred-twenty-day period allowed under division (B) of this section, may present to the tax commissioner additional evidence to prove that the sales were properly subject to a claim of exception or exemption. The vendor shall file such evidence within ninety days of the receipt by the vendor of the notice of assessment, except that, upon application and for reasonable cause, the period for submitting such evidence shall be extended thirty days.

The commissioner shall consider such additional evidence in reaching the final determination on the assessment and petition for reassessment.

(F) Whenever a vendor refunds the price, minus any separately stated delivery charge, of an item of tangible personal property on which the tax imposed under this chapter has been paid, the vendor shall also refund the amount of tax paid, minus the amount of tax attributable to the delivery charge.

Amended by 128th General Assembly File No.9, HB 1, §101.01, eff. 7/17/2009.

Effective Date: 10-21-2003; 01-01-2006; 09-28-2006; 2008 HB429 07-01-2008

## **5739.05 [Effective Until 11/3/2014] Powers and duties of tax commissioner - payment by vendor on predetermined basis.**

(A) The tax commissioner shall enforce and administer sections 5739.01 to 5739.31 of the Revised Code, which are hereby declared to be sections which the commissioner is required to administer within the meaning of sections 5703.17 to 5703.37 , 5703.39 , 5703.41 , and 5703.45 of the Revised Code. The commissioner may adopt and promulgate, in accordance with sections 119.01 to 119.13 of the Revised Code, such rules as the commissioner deems necessary to administer sections 5739.01 to 5739.31 of the Revised Code.

(B) Upon application, the commissioner may authorize a vendor to pay on a predetermined basis the tax levied by or pursuant to section 5739.02 , 5739.021 , 5739.023 , or 5739.026 of the Revised Code upon sales of things produced or distributed or services provided by such vendor, and the commissioner may waive the collection of the tax from the consumer. The commissioner shall not grant such authority unless the commissioner finds that the granting of the authority would improve compliance and increase the efficiency of the administration of the tax. The person to whom such authority is granted shall post a notice, if required by the commissioner, at the location where the product is offered for sale that the tax is included in the selling price. The commissioner may adopt rules to administer this division.

(C) The commissioner may authorize a vendor to pay, on the basis of a prearranged agreement under this division, the tax levied by section 5739.02 or pursuant to section 5739.021 , 5739.023 , or 5739.026 of the Revised Code, and waive the requirement that the vendor maintain the complete and accurate record of individual taxable sales and tax collected thereon required by section 5739.11 of the Revised Code, upon application of the vendor, if the commissioner finds that the conditions of the vendor-applicant's business are such that the maintenance of such records of individual taxable sales and tax collected thereon would impose an unreasonable burden upon the vendor. If the commissioner determines that such unreasonable burden has been imposed, the vendor and the commissioner shall agree to the terms and conditions of a test check to be conducted. If the parties are unable to agree to the terms and conditions of the test check, the application shall be denied. The test check conducted shall determine the proportion that taxable retail sales bear to all of the vendor's retail sales and the ratio which the tax required to be collected under sections 5739.02 , 5739.021 , and 5739.023 of the Revised Code bears to the receipts from the vendor's taxable retail sales.

The vendor shall collect the tax on the vendor's taxable sales and the vendor's liability for collecting or remitting shall be based upon the proportions and ratios established by the test check, and not upon any other basis of determination, until such time as a subsequent test check is made at the request of either the vendor or the commissioner where either party believes that the nature of the vendor's business has so changed as to make the prior or existing test check no longer representative. The commissioner may give notice to the vendor at any time that the authorization is revoked or the vendor may notify the commissioner that the vendor no longer elects to report under the authorization. Such notice shall be delivered to the other party personally or by registered mail. The revocation or cancellation is not effective prior to the date of receipt of such notice.

Effective Date: 09-06-2002

**Note:** *This section is set out twice. See also § 5739.05 , as amended by 130th General Assembly File No. TBD, HB 483, §101.01, eff. 11/3/2014.*

## **5739.05 [Effective 11/3/2014] Powers and duties of tax commissioner - payment by vendor on predetermined basis.**

(A) The tax commissioner shall enforce and administer sections 5739.01 to 5739.31 of the Revised Code, which are hereby declared to be sections which the commissioner is required to administer within the meaning of sections 5703.17 to 5703.37, 5703.39, 5703.41, and 5703.45 of the Revised Code. The commissioner may adopt and promulgate, in accordance with sections 119.01 to 119.13 of the Revised Code, such rules as the commissioner deems necessary to administer sections 5739.01 to 5739.31 of the Revised Code.

(B) Upon application, the commissioner may authorize a vendor to pay on a predetermined basis the tax levied by or pursuant to section 5739.02, 5739.021, 5739.023, or 5739.026 of the Revised Code upon sales of things produced or distributed or services provided by such vendor, and the commissioner may waive the collection of the tax from the consumer. The commissioner shall not grant such authority unless the commissioner finds that the granting of the authority would improve compliance and increase the efficiency of the administration of the tax. The person to whom such authority is granted shall post a notice, if required by the commissioner, at the location where the product is offered for sale that the tax is included in the selling price. The commissioner may adopt rules to administer this division.

(C) Upon application, the commissioner may authorize a vendor to remit, on the basis of a prearranged agreement under this division, the tax levied by section 5739.02 or pursuant to section 5739.021, 5739.023, or 5739.026 of the Revised Code. The proportions and ratios in a prearranged agreement shall be determined either by a test check conducted by the commissioner under terms and conditions agreed to by the commissioner and the vendor or by any other method agreed upon by the vendor and the commissioner. If the parties are unable to agree to the terms and conditions of the test check or other method, the application shall be denied.

If used, the test check shall determine the proportion that taxable retail sales bear to all of the vendor's retail sales and the ratio which the tax required to be collected under sections 5739.02, 5739.021, 5739.023, and 5739.026 of the Revised Code bears to the receipts from the vendor's taxable retail sales.

The vendor's liability for remitting the tax shall be based solely upon the proportions and ratios established in the agreement until such time that the vendor or the commissioner believes that the nature of the vendor's business has so changed as to make the agreement no longer representative. The commissioner may give notice to the vendor at any time that the authorization is revoked or the vendor may notify the commissioner that the vendor no longer elects to report under the authorization. Such notice shall be delivered to the other party personally or by registered mail. The revocation or cancellation is effective the last day of the month in which the vendor or the commissioner receives the notice.

Amended by 130th General Assembly File No. TBD, HB 483, §101.01, eff. 11/3/2014.

Effective Date: 09-06-2002

**Note:** *This section is set out twice. See also § 5739.05 , effective until 11/3/2014.*

## **5739.10 Excise tax on vendor's receipts.**

(A) In addition to the tax levied by section 5739.02 of the Revised Code and any tax levied pursuant to section 5739.021, 5739.023, or 5739.026 of the Revised Code, and to secure the same objectives specified in those sections, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax equal to the tax levied by section 5739.02 of the Revised Code, or, in the case of retail sales subject to a tax levied pursuant to section 5739.021, 5739.023, or 5739.026 of the Revised Code, a percentage equal to the aggregate rate of such taxes and the tax levied by section 5739.02 of the Revised Code of the receipts derived from all retail sales, except those to which the excise tax imposed by section 5739.02 of the Revised Code is made inapplicable by division (B) of that section.

(B) For the purpose of this section, no vendor shall be required to maintain records of sales of food for human consumption off the premises where sold, and no assessment shall be made against any vendor for sales of food for human consumption off the premises where sold, solely because the vendor has no records of, or has inadequate records of, such sales; provided that where a vendor does not have adequate records of receipts from the vendor's sales of food for human consumption on the premises where sold, the tax commissioner may refuse to accept the vendor's return and, upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all of the vendor's retail sales. The tax imposed by this section shall be determined by deducting from the sum representing five and three-fourths per cent, as applicable under division (A) of this section, or, in the case of retail sales subject to a tax levied pursuant to section 5739.021, 5739.023, or 5739.026 of the Revised Code, a percentage equal to the aggregate rate of such taxes and the tax levied by section 5739.02 of the Revised Code of the receipts from such retail sales, the amount of tax paid to the state or to a clerk of a court of common pleas. The section does not affect any duty of the vendor under sections 5739.01 to 5739.19 and 5739.26 to 5739.31 of the Revised Code, nor the liability of any consumer to pay any tax imposed by or pursuant to section 5739.02, 5739.021, 5739.023, or 5739.026 of the Revised Code.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 6/30/2013.

Effective Date: 07-01-2003; 06-30-2005

**Related Legislative Provision:** *See 130th General Assembly File No. 25, HB 59, §803.190.*

## **5739.13 Liability of vendor and consumer - assessment - petition for reassessment - penalties - appeal - judgment - execution.**

(A) If any vendor collects the tax imposed by or pursuant to section 5739.02, 5739.021, 5739.023, or 5739.026 of the Revised Code, and fails to remit the tax to the state as prescribed, or on the sale of a motor vehicle, watercraft, or outboard motor required to be titled, fails to remit payment to a clerk of a court of common pleas as provided in section 1548.06 or 4505.06 of the Revised Code, the vendor shall be personally liable for any tax collected and not remitted. The tax commissioner may make an assessment against such vendor based upon any information in the commissioner's possession.

If any vendor fails to collect the tax or any consumer fails to pay the tax imposed by or pursuant to section 5739.02, 5739.021, 5739.023, or 5739.026 of the Revised Code, on any transaction subject to the tax, the vendor or consumer shall be personally liable for the amount of the tax applicable to the transaction. The commissioner may make an assessment against either the vendor or consumer, as the facts may require, based upon any information in the commissioner's possession.

An assessment against a vendor when the tax imposed by or pursuant to section 5739.02, 5739.021, 5739.023, or 5739.026 of the Revised Code has not been collected or paid, shall not discharge the purchaser's or consumer's liability to reimburse the vendor for the tax applicable to such transaction.

An assessment issued against either, pursuant to this section, shall not be considered an election of remedies, nor a bar to an assessment against the other for the tax applicable to the same transaction, provided that no assessment shall be issued against any person for the tax due on a particular transaction if the tax on that transaction actually has been paid by another.

The commissioner may make an assessment against any vendor who fails to file a return or remit the proper amount of tax required by this chapter, or against any consumer who fails to pay the proper amount of tax required by this chapter. When information in the possession of the commissioner indicates that the amount required to be collected or paid under this chapter is greater than the amount remitted by the vendor or paid by the consumer, the commissioner may audit a sample of the vendor's sales or the consumer's purchases for a representative period, to ascertain the per cent of exempt or taxable transactions or the effective tax rate and may issue an assessment based on the audit. The commissioner shall make a good faith effort to reach agreement with the vendor or consumer in selecting a representative sample.

The commissioner may make an assessment, based on any information in the commissioner's possession, against any person who fails to file a return or remit the proper amount of tax required by section 5739.102 of the Revised Code.

The commissioner may issue an assessment on any transaction for which any tax imposed under this chapter or Chapter 5741. of the Revised Code was due and unpaid on the date the vendor or consumer was informed by an agent of the tax commissioner of an investigation or audit. If the vendor or consumer remits any payment of the tax for the period covered by the assessment after the vendor or consumer was informed of the investigation or audit, the payment shall be credited against the amount of the assessment.

The commissioner shall give the party assessed written notice of the assessment in the manner provided in section 5703.37 of the Revised Code. With the notice, the commissioner shall provide instructions on how to petition for reassessment and request a hearing on the petition.

(B) Unless the party assessed files with the commissioner within sixty days after service of the notice of assessment, either personally or by certified mail, a written petition for reassessment, signed by the party assessed or that party's authorized agent having knowledge of the facts, the assessment becomes final and the amount of the assessment is due from the party assessed and payable to the treasurer of state and remitted to the tax commissioner. The petition shall indicate the objections of the party assessed, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination. If the petition has been properly filed, the commissioner shall proceed under section 5703.60 of the Revised Code.

(C) After an assessment becomes final, if any portion of the assessment remains unpaid, including accrued interest, a certified copy of the commissioner's entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the place of business of the party assessed is located or the county in which the party assessed resides. If the party assessed maintains no place of business in this state and is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

Immediately upon the filing of the entry, the clerk shall enter a judgment for the state against the party assessed in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled "special judgments for state, county, and transit authority retail sales tax" or, if appropriate, "special judgments for resort area excise tax," and shall have the same effect as other judgments. Execution shall issue upon the judgment upon the request of the tax commissioner, and all laws applicable to sales on execution shall apply to sales made under the judgment except as otherwise provided in this chapter.

If the assessment is not paid in its entirety within sixty days after the date the assessment was issued, the portion of the assessment consisting of tax due shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax commissioner issues the assessment until the assessment is paid or until it is certified to the attorney general for collection under section 131.02 of the Revised Code, whichever comes first. If the unpaid portion of the assessment is certified to the attorney general for collection, the entire unpaid portion of the assessment shall bear interest at the rate per annum prescribed by section 5703.47 of the Revised Code from the date of certification until the date it is paid in its entirety. Interest shall be paid in the same manner as the tax and may be collected by issuing an assessment under this section.

(D) All money collected by the tax commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by or pursuant to sections 5739.01 to 5739.31 of the Revised Code.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Effective Date: 09-06-2002

**5739.33 Personal liability for tax.**

If any corporation, limited liability company, or business trust required to file returns and to remit tax due to the state under this chapter, including a holder of a direct payment permit under section 5739.031 of the Revised Code, fails for any reason to make the filing or payment, any of its employees having control or supervision of or charged with the responsibility of filing returns and making payments, or any of its officers, members, managers, or trustees who are responsible for the execution of the corporation's, limited liability company's, or business trust's fiscal responsibilities, shall be personally liable for the failure. The dissolution, termination, or bankruptcy of a corporation, limited liability company, or business trust shall not discharge a responsible officer's, member's, manager's, employee's, or trustee's liability for a failure of the corporation, limited liability company, or business trust to file returns or remit tax due. The sum due for the liability may be collected by assessment in the manner provided in section 5739.13 of the Revised Code.

Effective Date: 09-26-2003

## **5703-9-08 Sales and use tax; authority to prepay (predetermine) or prearrange sales tax.**

(A) Section 5703.05 of the Revised Code covers situations where particular aspects of a business are not compatible with the bracketed tax system or with the record requirements which are specified in other sections of the Revised Code. Depending on the circumstances the tax commissioner may grant a vendor one of two types of authority which relieve the vendor from burdensome compliance costs.

(1) Prepay authority is designed for situations where a lack of primary records exists or where a constriction of sales volume would occur if a separate collection of tax was imposed. For example, vending machines cannot differentiate between taxable and nontaxable food sales, produce a record of individual sales, nor separately collect tax on a taxable sales amount. Likewise, sales of taxable commodities at large spectator events would be negatively affected if each sale had to be recorded and tax was individually computed and collected. Adding tax also contributes to the potential of making small change, a circumstance detrimental to this type of vendor.

(2) Prearranged authority is designed for enterprises that generate large daily quantities of primary records. These records have little or no intrinsic value themselves and often would not be kept except for sales tax purposes. Their volume creates storage concerns and expense. A restaurant with a large number of customers is the type of business eligible for this authority.

The tax commissioner issues prepay and prearranged authorities under the conditions and procedures explained in paragraphs (B) and (C) of this rule.

### **(B) Prepayment (predetermined) authority**

Where the conditions of any business activity are such that collection of the sales tax from the consumer in the manner provided in section 5739.03 of the Revised Code, imposes an unreasonable burden on the vendor, the tax commissioner may authorize the vendor to predetermine the bracketed tax as specified by section 5739.025 of the Revised Code, instead of collecting the tax from the consumer. This privilege is provided for in division (B) of section 5739.05 of the Revised Code and is called a prepayment authority, although no tax is actually paid until sales are made.

Situations particularly suited for prepayment authority are where sales of food are made from vending machines and the taxability of the food is governed by where it is consumed, and situations where a constant need to make small change would hinder a vendor's capacity to make sales.

A qualifying vendor must apply for prepayment authority and agree in writing to the terms and conditions set forth by the commissioner. The agreement will specify the percentage of total sales subject to tax and the effective rate of taxation thereon. These percentages will be derived from a representative sample of the vendor's business activity and other information available to the commissioner.

Compliance with the provisions of the prepayment authority will absolve the vendor from any additional tax liability based on sales other than that which may result from unreported sales, provided the vendor notifies the commissioner in writing of any change in the business activity which would increase the tax liability.

To ensure remittance of the proper amount of tax due, the percentages authorized by a prepayment authority issued to a vendor are subject to review upon written request of the vendor or at the

discretion of the commissioner. An adjustment in the ratio of tax to taxable sales because of a change in a county's combined state and local tax rate may be reflected in an amendment to the prepayment agreement without a complete review of the vendor's business activity and is effective beginning the first day of the change in the combined state and local rate. Any changes in the provisions of an existing authorization which are prescribed by the commissioner as the result of a review of the vendor's business activities will, upon agreement thereto by the vendor, become effective at the beginning of the vendor's next reporting period.

The vendor may cancel the subject authority at the end of a current reporting period by filing a written notice thereof with the commissioner.

Notice that prepayment authority has been issued by the commissioner must be posted in a conspicuous place on the premises of the business location or of a group of vending machines for which such authority has been granted. Where sales from isolated vending machines constitute the business activity, notice is to be posted on each vending machine utilized.

The failure of a vendor to whom the prepayment authority has been granted to comply with the provisions thereof or to report a change in the conditions of the vendor's business activity will constitute sufficient cause for cancellation of such authority and reinstatement of the requirement to collect tax from the consumer.

Nothing in paragraph (B) of this rule is to be construed as a waiver of the requirement provided in rule 5703-9-02 of the Administrative Code pertaining to the maintenance of records.

#### (C) Prearranged authority

Where the maintenance of primary records in the manner specified in section 5739.11 of the Revised Code and rule 5703-9-02 of the Administrative Code imposes an unreasonable burden on a vendor, the commissioner may authorize the vendor to report and pay sales tax based upon established percentages. The privilege, provided for in division (C) of section 5739.05 of the Revised Code is called prearranged authority and allows a vendor, for sales tax purposes, to dispose of primary sales records with impunity.

Eligibility for this authority is limited to food service operators licensed under section 3732.03 of the Revised Code. A qualifying vendor must apply for prearranged authority and agree in writing to the terms and conditions as set forth by the commissioner. The agreement will specify the percentage of total sales subject to tax and the effective rate of taxation thereon, for each vendor's license covered by the authority. These percentages will be computed based on a test check of a representative sample of the vendor's business activity.

Compliance with the provisions of the prearranged authority requires that the vendor continue collecting tax from the consumer on taxable sales and report the tax computed under the terms of the agreement.

The vendor or commissioner may request a recomputation of the percentages specified in the agreement, if either believes the nature of the vendor's business has changed sufficiently to question the continuing validity of the most recent test check. A change in the provisions of an authorization because of a recomputation will, upon the written agreement of the parties, become effective at the beginning of the vendor's next reporting period. An adjustment to the ratio of tax to taxable sales because of a change in the combined state and local sales tax rate may be reflected in an amendment

to the prearranged agreement without performing a new test check and becomes effective beginning the first day of a change in the combined state and local rate.

A prearranged authority may be cancelled by the vendor or commissioner effective at the end of a reporting period by filing, personally or by certified mail, a written notice thereof with the other party. Failure by the vendor to comply with the provisions of the authority is sufficient reason to cancel the authority and to reimpose the responsibility to maintain adequate primary records, as specified in rule 5703-9-02 of the Administrative Code.

Nothing in paragraph (C) of this rule is to be construed as a waiver of the requirement provided in rule 5703-9-02 of the Administrative Code pertaining to the maintenance of secondary records.

Replaces rule 5703-9-08; Eff 7-9-65; 1-1-70; 11-4-91

Rule promulgated under: RC 5703.14

Rule authorized by: RC 5703.05

Rule amplifies: RC 5739.05 , 5741.06

5703-9-08

**Sales and use tax; authority to predetermine (prepay) or prearrange sales tax.**

(A) Section 5739.05 of the Revised Code authorizes the tax commissioner to grant a vendor one of the following types of authority.

(1) Predetermined authority may be available to a vendor if such authority will improve compliance and increase efficiency in administering the tax. For example, vending machines cannot differentiate between taxable and nontaxable food sales, produce a record of individual sales, or separately collect tax on taxable sales. Likewise, the requirement to record and tax each individual sale at large spectator events may negatively the vendor's efficiency in administering the tax.

(2) Prearranged authority is designed to relieve businesses that generate large daily quantities of primary records from the administrative burden and cost associated with record storage. Only food service operators licensed under section 3732.03 of the Revised Code are eligible for this type of authority.

The tax commissioner issues predetermined and prearranged authorities under the conditions and procedures explained in paragraphs (B) through (F) of this rule.

(B) Predetermined authority

A vendor must apply to the commissioner for predetermined authority. Predetermined authority may be granted if the commissioner determines that such authority will improve compliance and increase administrative efficiency. The proportions and ratios in a predetermined agreement shall be determined by either a test check conducted by the commissioner under terms and conditions agreed to by the commissioner and the vendor or by any other method agreed upon by the vendor and the commissioner.

The commissioner may require the vendor to post a notice that the tax is included in the selling price. If sales are from isolated vending machines, notice must be posted on each vending machine.

(C) Prearranged authority

A qualifying vendor must apply to the commissioner for prearranged authority. The proportions and ratios in a prearranged agreement shall be determined by either a test check conducted by the commissioner under terms and conditions agreed to by the commissioner and the vendor or by any other method agreed upon by the vendor and the commissioner.

Compliance with the provisions of the prearranged authority requires that the vendor report and remit the tax as computed under the terms of the agreement.

(D) Vendor's liability under predetermined or prearranged authority

A vendor that complies fully with the provisions of the predetermined or prearranged authority is absolved of any additional tax liability based on sales except liability from unreported sales. This relief from liability does not apply if the vendor has failed to notify the commissioner in writing of any change in business activity that would increase the tax liability.

(E) Vendor's duty to notify commissioner of business changes affecting agreement

A vendor must notify the commissioner in writing, either personally or via certified mail, of any changes in the nature of the vendor's business that may affect the validity of the terms of the predetermined or prearranged agreement. At any time, the commissioner may request a review of the percentages specified in the predetermined or prearranged agreement if the commissioner believes the nature of the vendor's business has so changed that it may affect the validity of the terms of the agreement.

A change in the provisions of an authorization based on a review will, upon the written agreement of the parties, become effective at the beginning of the vendor's next reporting period. An adjustment to the percentage of taxable sales because of a change in the combined state and local sales tax rate may be reflected in an amendment to the predetermined or prearranged agreement without performing a new analysis and becomes effective beginning the first day of a change in the combined state and local rate.

(F) Cancellation of predetermined or prearranged authority

A predetermined or prearranged authority may be cancelled by either the vendor or commissioner effective on the last day of the month in which the vendor or the commissioner receives, personally or via certified mail, a written notice thereof with the other party. Failure by the vendor to comply with the provisions of the authority is sufficient reason to cancel the authority and to reinstate the requirement that the vendor comply with all provisions of Chapter 5739, of the Revised Code.

10 Ohio St.2d 201  
Supreme Court of Ohio.

RUSSO et al., d. b. a. Par-Oak Confectionery,  
Appellees,  
v.  
DONAHUE, Tax Commr., Appellant.

No. 40347. | May 24, 1967.

Proceeding on appeal from the Board of Tax Appeals. The Supreme Court, Paul W. Brown, J., held that retailers who did not keep records were not entitled to have taxes remittable to state limited to 3% of taxable sales but could be required to remit greater percentage in accordance with 'test-check' which indicated that retailers were collecting tax from consumers at higher rate.

Decision reversed.

West Headnotes (3)

[1] **Taxation**  
Accounting, Returns, and Reports

Where retailer does not keep required records, or records are inadequate, tax commissioner may make use of all available information, including information gained as result of "test-check method" to determine rate equivalent to rate at which retailer in fact collected tax from consumers. R.C. §§ 5739.02, 5739.11.

13 Cases that cite this headnote

[2] **Taxation**  
Accounting, Returns, and Reports

Retailers who did not keep records were not entitled to have taxes remittable to state limited to 3% of taxable sales but could be required to remit greater percentage in accordance with "test-check" which indicated that retailers were

collecting tax from consumers at higher rate. R.C. §§ 5739.02, 5739.10, 5739.11, 5739.13.

13 Cases that cite this headnote

[3] **Taxation**  
Collection by Sellers or Others

Retailers who collect amount in excess of 3% on taxable sales are obliged to remit excess along with remittance of amount of tax due under privilege tax statute. R.C. §§ 5739.02, 5739.10, 5739.12.

4 Cases that cite this headnote

**\*\*748** Syllabus by the Court

\*201 1. The 3% rate of tax on retail sales prescribed in Section 5739.10, Revised Code, is not an alternate rate of taxation which permits a vendor, by not keeping the records required by Section 5739.11, Revised Code, to avoid remitting the amount of tax collected under Section 5739.02, Revised Code.

2. A vendor is required by Section 5739.03, Revised Code, to collect the tax imposed by Section 5739.02, Revised Code; to keep complete and adequate records of such collections (Section 5739.11, Revised Code); and to file returns and remit the taxes so collected (Sections 5739.12 and 5739.13, Revised Code). Such vendor shall not 'derive any benefit from the collection or payment of such tax.' (Section 5739.01, Revised Code.)

3. Where the records required by Section 5739.11, Revised Code, are not kept, or are inadequate, the Tax Commissioner may make use of all available information, including information gained as a result of the 'test-check method,' to determine a rate equivalent to the rate at which the vendor in fact collected the tax from consumers under Section 5739.02, Revised Code.

This appeal by the Tax Commissioner from a portion of a

decision of the Board of Tax Appeals, modifying and reducing the basic sales tax assessed against appellee by a final order of \*202 the Tax Commissioner, is before this court under the direct appeal provisions of Section 5717.04, Revised Code.

The vendors in this instance operate a combined confectionery and beer and wine carry-out store and did not maintain the records required to be kept by Section 5739.11, Revised Code, i. e., they kept no records of sales of taxable property and no records of the tax collected thereon.

The business was audited and the Tax Commissioner, on August 23, 1965, issued a final order of assessment in the amount of \$1,005.38. This amount was subject to the 15% penalty prescribed by statute, but 5% of the penalty was conditionally remitted.

The record discloses that the vendors' records consisted only of invoices of purchases and gross receipts.

The Tax Commissioner arrived at the assessment by making a detailed listing of the taxable merchandise shown by invoices for the months of May and June 1964. Selling prices of all listed items were furnished by the vendors and the percentage of markup was computed. The cost of all taxable merchandise purchased during the audit period was multiplied by this percentage figure to obtain the dollar amount of the gross taxable sales. Taxable sales were then computed to be 27.4% of gross sales.

The vendors were asked to make a test check to determine what percentage of \*\*749 sales of taxable merchandise occurring during the test period consisted of sales under 31 cents. This test check was undertaken by the vendors during a 14-day period from November 17 to December 2, 1965. The accuracy of the test figures was certified by one of the vendors who, in connection with the introduction of the test result at the hearing before the board, testified that the tax had actually been collected by the vendors for the entire period covered by the audit in the same manner as during the test-check period.

It appears that of the total sales of taxable merchandise during the test period 19.74% were sales under 31 cents, and that the tax collection which resulted from the application of the bracket tax to all taxable sales was \$5.93, which was 3.292% of taxable sales over 30 cents.

In computing the assessment, the Tax Commissioner subtracted \*203 from gross receipts the tax actually reported during the audit period; multiplied the resulting gross sales amount by 27.4% (the ratio between gross sales and gross taxable sales-otherwise stated as the

percentage of taxable merchandise to gross sales); subtracted from the resulting gross taxable sales (or gross sales of taxable merchandise) the total of individual sales under 31 cents, by applying a percentage (19.74%) determined by the test check, to arrive at the amount of net taxable sales; and multiplied the resulting net taxable sales figure by 3.292%, which was the effective rate of collection of the bracket tax also as shown by the test check.

Upon appeal to the Board of Tax Appeals, this order was modified and reduced. The Board of Tax Appeals based its order so doing upon its conclusion that the test-check method, having been specifically authorized by Section 5739.10, Revised Code, for the purpose of determining the proportion which taxable retail sales bear to all retail sales, may be used only for that purpose, and hence that the test-check evidence could not justify an assessment against the vendors here in excess of the rate of 3% established by Section 5739.10, Revised Code.

The board thus took the position, which is argued to be valid by the brief amicus curiae of the Ohio State Counsel of Retail Merchants, that the retailer, by not keeping adequate and accurate records of taxable sales or of the tax collected thereon as required by Section 5739.11, Revised Code, limits his liability to 3% of taxable sales, even though that same test-check method, combined with other information available to the commissioner, discloses that the tax actually collected by the vendors substantially exceeded 3% of his taxable sales.

#### Attorneys and Law Firms

Joseph D. Karam, Columbus, for appellees.

William B. Saxbe, Atty. Gen., and Edgar L. Lindley, Columbus, for appellant.

#### Opinion

PAUL W. BROWN, Judge.

If we examine the Sales Tax Act as originally drawn, and note the amendments which the General Assembly adopted in reaction to judicial construction, we are assisted in understanding the limited usefulness of Section 5739.10, Revised Code, as it now stands. We may then judge the reasonableness \*204 and lawfulness of the position taken by the commissioner upon the original assessment and by the Board of Tax Appeals in modifying and reducing the commissioner's order.

The sales tax, as originally proposed in 1934 (115 Ohio

Laws, Pt. 2, 306), was intended to be a 3% tax on retail sales of tangible personal property. The law as enacted was a 'bracket tax' which the retailer the required to collect. The brackets and the amount to be collected were specified in Section 5546-2, General Code (Section 5739.02, Revised Code), effective January 1, 1935. The brackets and the tax as there stated were:

'One cent, if the price is forty cents or less;

**\*\*750** 'Two cents, if the price is more than forty cents and not more than seventy cents;

'Three cents, if the price is more than seventy cents and not more than one dollar;

'If the price is in excess of one dollar, three cents on each full dollar thereof; and if, in such case, the price is not an even number of dollars, then, in addition to the said tax on each full dollar thereof, one cent, if the price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents if such excess is more than forty cents and not more than seventy cents; and three cents if such excess is over seventy cents.

'If the price is less than nine cents, no tax shall be imposed.'

It is clear that any vendor who made no sale over eight cents would neither collect nor pay any sales tax, so that his effective rate of tax collection would be zero per cent of his gross retail sales.

It was also clear that any retailer whose taxable sales consisted entirely of individual sales each in the amount of exactly 41 cents would under the law be required to collect the tax at an 'effective' tax rate of almost 5%. This demonstrates that, as with any 'bracket tax,' the effective rate of tax collection will vary depending upon what proportion of a vendor's taxable sales falls into any particular tax bracket.

By the provision of Section 5546-3, General Code (Section 5739.03, Revised Code), that '\* \* \* the tax hereby imposed **\*205** shall be paid by the consumer to the vendor \* \* \*,' the General Assembly clearly indicated that the bracket tax was a tax on the consumer.

The original Ohio Sales Tax Act, enacted to impose a temporary tax, was to have expired on December 31, 1935, but in December 1935 the act was re-enacted with certain amendments, effective on January 1, 1935, and ending on March 31, 1937. (116 Ohio Laws, Pt. 2, 69.) Two important and material changes occurred at this time. Section 5546-12, General Code (Section 5739.11, Revised Code), was amended to require the keeping of

'complete and accurate records of sales and taxable property, together with a record of the tax collected thereon,' and Section 5546-12a, General Code (Section **5739.10**, Revised Code), was enacted to provide that if an examination and audit of the consumer's records disclosed no separate records of the tax collected or that the aggregate collection was less than 3% of the vendors' sales it should then be 'conclusively presumed that the vendor has failed to collect the tax.' In such event, an assessment of 'the amount of the tax \* \* \* which the vendor should have collected' was authorized.

On December 30, 1937, in Seiller v. Dunn, 4 Ohio Supp. 367, 26 Ohio Law Abst. 266, Judge Reynolds of the Franklin County Common Pleas Court considered the presumption created by Section 5546-12a, General Code, and said:

'\* \* \* Let us suppose a case where a vendor's sales were all eight cents or less, which by the statute are exempt from tax, yet, according to the provisions of Section 5546-12a, General Code, the vendor would be liable for an assessment, even though he had complete records of all sales.

'It needs no citation of authority to show that such a provision is invalid since it nullifies the direct provisions of the sales tax law with reference to exempt sales.'

That decision was important in two respects: (1) It decided that, if the tax was collected as specified, the tax actually collected was the limit of liability. That is to say that the effective rate collected was the limit of the vendor's tax liability under that statute and that the statutory presumption was ineffective to change this fact. (2) It also pointed out that the statute as drawn failed to tax sales under nine cents. It is probable that **\*206** the General Assembly **\*\*751** had not intended that such sales be exempt and it is probable that the General Assembly had intended to levy a minimum tax on retail sales other than those specifically exempted. This is demonstrated by the fact that the General Assembly in December 1936, in a bill effective on January 1, 1937, re-enacted Section 5546-12a, General Code (116 Ohio Laws, Pt. 2, 323, 333), as follows:

'In addition to the tax levied in section 5546-2 of the General Code \* \* \* beginning January 1, 1937, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per centum of the receipts derived from all such retail sales, excepting those to which the excise tax imposed by section 5546-2 of the General Code is made inapplicable by subparagraphs 1 to 12, inclusive, of said section. The tax imposed by this section shall be determined by

deducting from the sum representing three per centum of the receipts from such retail sales the amount of tax paid to the state by means of cancelling prepaid tax receipts in accordance with the provisions of section 5546-3 of the General Code. This section shall not be so construed or applied as to affect any duty of the vendor under sections 5546-1 to 5546-17, both inclusive, of the General Code, nor the liability of any consumer to pay any tax imposed by section 5546-2 of the General Code.' (Emphasis added.)

The language of this section, as amended, stated that it levied a 3% tax on the privilege of engaging in the business of making retail sales. The tax applied against sales except those to which the tax imposed by Section 5546-2, General Code, was inapplicable. Hence, this tax on 'all \* \* \* retail sales,' with certain exceptions not here involved, clearly taxed retail sales below nine cents which was the lowest individual sale upon which the bracket collection was made. From the tax thus levied, the act authorized the deduction of the tax paid to the state by means of cancelling prepaid tax receipts in accordance with the provisions of Section 5546-3, General Code.

This, then, was a clear legislative attempt to collect at least 3% tax on all of a vendor's sales, excluding only those to which the statute was specifically inapplicable. This amendment was effective to accomplish the legislative purpose until 1945 \*207 when this court decided Winslow-Spacarb, Inc. v. Evatt, Tax Commr., 144 Ohio St. 471, 59 N.E.2d 924. In that case, the court was again confronted by a factual situation in which all the vendor's sales were under nine cents and not covered by the bracket tax. The sales were of soft drinks and were not otherwise exempt. If Section 5546-12a and Section 5546-2, General Code, were considered to impose separate taxes, this fact situation demonstrated that vendors, all of whose sales were in excess of eight cents, were tax collectors, while the vendors whose business consisted entirely of sales less than nine cents were taxpayers.

If the two sections created different taxes it was arguable that they contained a constitutionally invalid classification of taxpayers or that they violated the equal protection clauses of the state and federal Constitutions.<sup>1</sup> Choosing to construe Section 5546-12a, General Code, so as to avoid the constitutional question, this court there held in the syllabus:

'2. Section 5546-12a, General Code, purporting to levy an excise tax of three per cent on the receipts derived from all retail sales, with described exceptions and less certain credits, is an enactment designed to insure to the state approximately the receipt of the tax imposed by Section

5546-2, General Code, and does not impose an independent tax.

\*\*752 '3. The retail sales of a vendor engaged exclusively in the making of separate sales of a commodity at a price of less than nine cents per unit are not subject to tax under Section 5546-2, General Code, and Section 5546-12a, General Code, does not apply to the sales of such vendor or to him.'

That taxpayers and the Tax Commissioner had thought otherwise is demonstrated by an extract from an article by Tax Commissioner C. Emory Glander, commenting on the Winslow-Spacarb case, which appeared in 118 Ohio Bar in 1945.<sup>2</sup>

\*208 After the Winslow-Spacarb decision, both Section 5546-2 and Section 5546-12a were amended. (122 Ohio Laws 912, 914). The former section was amended so that no bracket tax was to be collected on sales under 41 cents and the latter section was amended by excluding retail sales under 41 cents from the computation so as to meet the constitutional difficulty noted by Judge Zimmerman.

Subsequent to those changes in the Sales Tax Act, effective in 1948, no significant changes have been made in the act which are important to a consideration of the problem which is now before us, except that the lowest bracket upon which the tax is to be collected from the consumer by the vendor was lowered to 31 cents in 1959 (128 Ohio Laws, 421, 426, 431), and in 1962 (129 Ohio Laws 1164, 1167) the stamp cancellation method of obtaining prepayment of the tax by the vendor was eliminated from Section 5739.03, Revised Code.

It now becomes observable that there are three distinct periods in the history of Ohio sales tax law during each of which the sales tax was such an entirely different tax, either by reason of the statutory language in force at the time or by reason of judicial interpretation of that statutory language, that cases \*209 which are referable to any of such periods will contain generalizations which have little applicability to other periods.

The first period includes the original Sales Tax Act, effective from 1935 to 1937, which imposed a straight retail sales tax payable by the purchaser, collectible by the vendor and remittable by the vendor to the state. During this period, the amount of tax payable, and hence the amount for which an assessment could be made, was limited by the amount actually collected.

The second sales tax period includes the period between January 1937 and the decision in Winslow-Spacarb in 1945 and the \*\*753 period thereafter until the amendment of the statute, effective in 1948. During this period, as has been noted (and Winslow-Spacarb to the contrary

notwithstanding), under Section 5546-12a, General Code, there was a sales tax in the nature of an occupation tax on the vendor, as well as a bracket sales tax to be paid by the purchaser under Section 5546-2, General Code.<sup>3</sup>

As has been pointed out, the tax imposed by Section 5546-12a, General Code, on the occupation of being a retailer and engaging in retail business had as its base all the vendor's retail sales, except those sales to which the tax was specifically made inapplicable.

The sales to which the bracket tax of Section 5546-2, General Code, was applicable during this period were entirely different sales. They consisted of all the vendor's retail sales, except sales below the lowest tax bracket and sales to which the tax was specifically made inapplicable. The tax bases were different.

During this period, the occupation tax base could be easily reconstructed by the purchase markup method. The resulting tax would be the maximum tax to which the state was entitled in all cases, except those in which the vendors had an effective rate of tax collection under Section 5546-2, General Code, on the sales to which the provisions of that statute applied and which resulted in a collection from the consumer which exceeded 3% of the sales to which Section 5546-12a applied. During this \*210 period, test checks to show what proportion of the particular vendor's sales consisted of sales below the lowest tax bracket would have had no materiality in computing the occupation tax. After Winslow-Spacarb, and before the amendment effective in 1948, that proportion became important for the first time since January 1937. It actually became more important to some vendors than to others. Vendors, all of whose sales had consisted of individual sales below the lowest bracket, had been collecting no tax from the consumer and paying 3% tax to the state. There would continue to collect no tax and also would now pay none. Those vendors whose sales consisted of mixed individual sales, some below and some within or above the lowest bracket, would continue to collect the bracket tax on those sales which were within the tax brackets and would owe the occupation tax of 3% only on that proportion of their sales which were within the tax brackets.

The taxpayers in each of these two groups were now confronted by the obligation of keeping records in order to carry their burden of proving which of their sales were exempt under the new exemption, and hence should not now be included in the base of their occupation tax. 10 R.C.L. 896, 898; annotation, 39 A.L.R. 273. See, also, subsequent cases of *Obert v. Evatt*, Tax Commr., 144 Ohio St. 492, 59 N.E.2d 931, and *Jones v. Glander*, Tax Commr., 150 Ohio St. 192, 80 N.E.2d 766. Such records,

unless otherwise excused, would also be required to meet the presumption of taxability provided by Section 5546-2, in this language: 'For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state \* \* \* are subject to tax unless the contrary is established.' As to those taxpayers whose sales consisted entirely or in large proportion of individual sales in excess of the lowest bracket, the new tax exemption, which might somewhat reduce the tax base of the 3% tax levied by Section 5546-12a, General Code, would have an extremely minimal effect upon the tax payable to the state because it was mathematically obvious that as to those vendors the effective rate of collection of the bracket tax would exceed 3%.

With all these things in mind, the General Assembly again amended the act, effective on January 1, 1948. The bracket \*211 upon which no tax was to be collected was enlarged to 40 cents, thus enlarging the number of vendors who, by keeping records of \*\*754 sales below that figure, would demonstrate little or no tax liability and also enlarging the middle group which had a large proportion of sales under the lowest bracket and hence would find it extremely advantageous for the first time to keep such records in order to avoid assessment for sales which were now in fact exempt. Under such circumstances, it was understandable that the General Assembly, having abandoned its effort to include sales under the lowest bracket in the tax base of what was left of the occupation tax, would excuse such vendors from keeping records of such sales and would eliminate assessments based solely upon the presumption of taxability of all sales.

In eliminating the keeping of records of individual sales below the lowest tax bracket, the General Assembly had to carefully avoid imposing upon the Tax Commissioner the impossible burden of proving what proportion of the vendor's sales were below that bracket. With that in mind, the following language was included in the amendment of Section 5546-12a, General Code, effective August 1, 1948: '\* \* \* provided, however, that for the purpose of this section no vendor shall be required to maintain records of individual retail sales of tangible personal property under forty-one cents, and no assessment shall be made against any vendor for retail sales of less than forty-one cents made on and after August 1, 1948, solely because the vendor has no records of or has inadequate records of retail sales of less than forty-one cents; and provided further that where a vendor does not have adequate records of receipts from his retail sales in excess of forty cents the tax commissioner may refuse to accept the vendor's return and upon the basis of test checks of the vendor's business for a representative period and other

information relating to the sales made by such vendor determine the proportion that taxable retail sales bear to all his retail sales.'

This language is circumspect. It does not shift to the Tax Commissioner the burden of proving which sales are exempt. It eliminates the possibility that an assessment can be made as to that part of a vendor's sales which are made up of individual sales less than 41 cents, and yet it specifically provides that \*212 the commissioner may refuse to accept the vendor's return and determine the proportion of retail sales that are taxable by the test-check method.

Counsel for appellees argues that the express authorization of the test-check method of determining this proportion bars the use of test-check information by the Tax Commissioner for any other purpose, under the maxim, *expressio unius est exclusio alterius*. We think the contrary is true and that it can be more logically argued that that principle bars the use of test-check information by the vendor for any other purpose. This, in effect, was the holding of this court in *S. S. Kresge Co. v. Bowers, Tax Commr.*, 2 Ohio St.2d 113, 206 N.E.2d 905. This language, making the test-check method available to the vendor and the Tax Commissioner for the purpose of determining this one specific proportion, does not show a legislative intention to bar the Tax Commissioner from the use of this device or method for any other purpose.

The general proposition as to what an administrative body must do where the taxpayer has no records is succinctly stated in *Mitchell Bros. Truck Lines v. Hill, Commr.*, 227 Or. 474, 484, 363 P.2d 49, 53, as follows:

'It appears to be the general rule, and common sense would dictate, that if a taxpayer fails to keep proper records, or for some other reason exact information is unavailable, some formula must be devised to determine the tax established by legislative authority. *Vale v. Du Pont*, 37 Del. 254, 182 A. 668, 103 A.L.R. 946; *W. T. Grant Co. v. Joseph*, 2 N.Y.2d 196, 159 N.Y.S.2d 150, 140 N.E.2d 244; *Mason and Dixon Lines v. Commonwealth*, 185 Va. 877, 41 S.E.2d 16; *Gaspar v. Commissioner of Internal Revenue*, 6 Cir., 225 F.2d 284.'

**\*\*755** The principle of *expressio unius est exclusio alterius* is not applicable to the language of Section 5739.10, Revised Code, to exclude the use of test-check information by the Tax Commissioner. Such evidence may be used alone or in connection with other evidence available to the Tax Commissioner in attempting to determine a rate equivalent to the rate at which the vendor actually collected tax from the consumers under Section 5739.02, Revised Code. It is noticeable that, with the

amendments to Section 5739.10, Revised Code, eliminating from the \*213 tax base of the occupational tax that part of the vendor's sales which consist of individual sales in amounts less than 31 cents or of food for human consumption off the premises, the tax base of Section 5739.10, Revised Code, and the sales upon which it is directed that tax be collected under the bracket tax provided in Section 5739.02, Revised Code, are now identical. Whether we compute the percentage of a vendor's sales to which the tax is applicable by reference to his records or on the basis of test checks, it is apparent that the base of the occupation tax is exactly the same and will consist of the same sales to which the bracket tax applies. Since the tax provided for by Section 5739.10, Revised Code, is 3% and the bracket tax on the same sales cannot amount to less than 3%, we must observe that the re-enactment of Section 5739.10, Revised Code, was of doubtful purpose, except for its language excusing the taxpayer from keeping records of sales below 31 cents and avoiding an assessment upon the vendor as to such sales on a presumptive basis. It cannot tax any sale which Section 5739.02, Revised Code, does not tax at an equal or higher rate.

When the limited usefulness of Section 5739.10, Revised Code, as that statute presently exists in the overall scheme of sales tax collection, is compared to the vast importance of the remittance to the state of Ohio of the tax required by law to be collected under Section 5739.02, Revised Code, the importance of keeping records required by Section 5739.11, Revised Code, and of devising reasonable methods for estimating taxable sales and assessing those vendors at a rate equivalent to the rate at which they effectively collected the bracket tax becomes apparent. This is especially true now that the 1962 amendment of the Sales Tax Act, eliminating the necessity for cancellation by the vendor of prepaid sales tax stamps, has eliminated the device which heretofore aided enforcement of the vendor's duty to collect and remit the bracket tax.

The amendments to Section 5739.10, Revised Code, which were effective August 1, 1948, and thereafter, have so changed that statute and the overall procedure of sales tax collection in the state of Ohio that the generalizations contained in the *Winslow-Spacarb* case have no usefulness in considering the problem before this court at this time under the facts of this case.

**\*214** Neither the Board of Tax Appeals nor this court should observe those generalizations and be blinded to the clear and unequivocal language of the present statute which requires vendors to keep records of the tax collected, to collect the tax as described by Section 5739.02, Revised Code, and to remit it to the state, and

excuses them only from a minimal 3% assessment under Section 5739.10, Revised Code, as to those sales which a test check will show probably occurred in individual sales of less than the lowest bracket amount. This is especially true since Section 5739.10, Revised Code, as re-enacted, specifically provides that no provision therein contained affects any duty of the vendor under Sections 5739.01 to 5739.19, inclusive, Revised Code, and under Sections 5739.26 to 5739.31, inclusive, Revised Code.

<sup>[1]</sup> Section 5739.13, Revised Code, imposes a duty upon the vendor both to collect and remit to the state the bracket tax imposed by Section 5739.02, Revised Code, and makes him subject to assessment and personally liable in the event he fails in either respect. Section 5739.11, Revised Code, imposes upon the vendor the duty to \*\*756 maintain records. The vendor has the burden of providing such records or of being assessed on the basis of test checks or of any other information in the possession of the Tax Commissioner. In the absence of a clear prohibition in any part of the statute against the use of such information as the Tax Commissioner may have in his possession as a result of test checks of representative periods of a particular vendor's business, we see no reason why such test-check information may not be used by the Tax Commissioner alone or together with other information as the basis of an assessment.

The finding of the Tax Commissioner that the vendors had collected the tax at an effective rate of 3.292% of the sales subject to tax and failed to remit the excess above 3% is, under the evidence which resulted from the test check, not unreasonable, especially in view of the fact that the vendor who testified that the tax had been collected throughout the audit period in exactly the same manner and method as was used during the test period and who conducted the test check and introduced its results does not complain that the test period was not representative.

<sup>[2]</sup> The finding of the Board of Tax Appeals that the vendors' \*215 liability was limited by the language of Section 5739.10, Revised Code, to 3% of the sales which were subject to tax irrespective of the rate at which tax

was effectively collected by the vendors is unlawful since the 3% rate described by Section 5739.10, Revised Code, is not an alternate rate which the vendors can elect to pay by the simply expedient of not keeping records.

<sup>[3]</sup> Since it appears that the vendors here have (in the language of Section 5739.12, Revised Code) 'collected in excess of three per cent of his receipts from sales which are taxable under section 5739.02 of the Revised Code as tax from consumers,' their duty as to that excess is that 'such excess shall be remitted along with the remittance of the amount of tax due under section 5739.10 of the Revised Code.'

Assessment in excess of 3% is also required by Section 5739.01, Revised Code, which provides:

'The tax collected by the vendor from the consumer under sections 5739.01 to 5739.31, inclusive, of the Revised Code, is not part of the price, but is a tax collection for the benefit of the state, and except for the discount and credits authorized in section 5739.12 of the Revised Code, no person other than the state shall derive any benefit from the collection or payment of such tax.' (Emphasis added.)

The decision of the Board of Tax Appeals in this matter is, therefore, reversed and the final order of the Tax Commissioner is affirmed.

Decision reversed.

TAFT, C. J., and ZIMMERMAN, MATTHIAS, O'NEILL, HERBERT and SCHNEIDER, JJ., concur.

#### Parallel Citations

226 N.E.2d 747, 39 O.O.2d 310

#### Footnotes

<sup>1</sup> It is interesting to note that other states when confronted by the same problem decided this question otherwise. See *White v. State*, 49 Wash.2d 716, 306 P.2d 230. See, also, 9 *Vanderbilt L.Rev.* 316 at 340.

<sup>2</sup> 'Two recent decisions pertaining to sales and excise taxes are of sufficient general interest to warrant comment. 'The first is *Winslow-Spacarb, Inc., v. Evatt*, 144 Ohio St. 471 \* \* \*. The appellant was engaged exclusively in selling soft drinks at five cents each from automatic cup-vending machines. The Tax Commissioner made an assessment in 1942 in a sum representing 3% of gross sales. In so doing, he relied on Section 5546-12a, General Code, which levies a 3% excise tax for the privilege of engaging in the business of making retail sales. This section was enacted, as you know, after the enactment of the bracket sales tax provided in Section 5546-2. The Supreme Court held that this 3% levy was enacted to insure to the state approximately the receipt of the bracket tax, and does not impose an independent tax. Thus, the court further concluded that where

a vendor is engaged exclusively in making separate sales at less than nine cents per unit, such sales are not subject either to the bracket tax or the 3% excise tax.

'Following the decision, applications for refund of such taxes were filed by a number of vendors under Section 5546-8. We were immediately confronted with two questions: First, whether refunds should be made to vendors who had paid the tax and had not filed a petition for reassessment; and, second, from what date the 90-day period within which refund applications may be filed began to run. We submitted these questions to the Attorney General. In Opinion No. 542, he has ruled that such vendors are entitled to refunds even though a petition for reassessment had not been filed. He also ruled that the ninety-day period in such cases began to run from the date of the Supreme Court's decision, to wit, February 21, 1945. We concur in this ruling and shall follow it.' Recent Developments In State Tax Administration, by C. Emory Glander, 18 Ohio Bar 478, 484.

<sup>3</sup> See 9 Vanderbilt Law Review, Sales Tax Collection Problems, 316, 340.

46 Ohio St.2d 333  
Supreme Court of Ohio.

NATIONAL DELICATESSENS, INC., Appellant,  
v.  
COLLINS, Tax Commr., Appellee.

No. 75-1201. | June 8, 1976.

Tax Commissioner made test check of restaurant taxpayer to determine amount of sales tax due and concluded that taxpayer's ratio of nontaxable sales to total sales was 28.257% and that its effective rate of taxation was 4.16%, and assessed taxpayer accordingly. The Board of Tax Appeals affirmed that assessment, and taxpayer appealed. The Supreme Court held that taxpayer's cash register tapes and guest checks were inadequate based upon statutory requirements, and thus Tax Commissioner was authorized to conduct test check; and that taxpayer failed to carry out burden of proving which of its sales were exempt, and thus decision of Board of Tax Appeals was neither unreasonable nor unlawful.

Affirmed.

West Headnotes (2)

[1]

**Taxation**

Levy and Assessment

**Taxation**

Accounting, Returns, and Reports

In absence of complete set of guest checks which recorded each individual food sale, restaurant's cash register tape which revealed only daily totals for each of three categories of sales, i. e., waitress taxable sales, carryout nontaxable sales, and sales tax, did not contain information sufficiently detailed to allow the Tax Commissioner to determine if sales tax which should have been charged by vendors was actually collected and remitted to State Treasurer, and thus Tax Commissioner was authorized to conduct test check. R.C. §§ 5739.10, 5739.11.

3 Cases that cite this headnote

[2]

**Taxation**

Weight and Sufficiency

Where Tax Commissioner's test check of restaurant for purposes of determining proper amount of sales tax due was conducted on week selected after Tax Commissioner's agent consulted with taxpayer, and where taxpayer did not show that test check was not conducted under conditions which would approximate conditions under which business was operated during audit period, taxpayer failed to carry its burden of proving which of its sales were exempt, and decision of Board of Tax Appeals finding taxpayer's ratio of nontaxable sales to total sales was 28.257% and that its effective rate of taxation was 4.16% was neither unreasonable nor unlawful. R.C. §§ 5739.10, 5739.11.

6 Cases that cite this headnote

**\*\*711 \*333** National Delicatessens, Inc., appellant herein, operates a restaurant and carryout business.

During the audit period of March 1, 1971, to December 31, 1973, appellant employed waitresses who took food orders for both carry-out and on-the-premises consumption. The waitresses would give the customers guest checks which were taken to the cash register and paid. In addition, separate guest checks were made out for other carry-out sales. The cash register had keys which recorded waitress (taxable) sales, carryout (nontaxable) sales, and sales tax. The register did not record each transaction, but only produced a tape which summarized the amounts rung up by each key. Although the practice was to retain the guest checks, they were at times given to customers as receipts.

After the Tax Commissioner's agent determined that the tapes were inadequate, he requested guest checks for a given week. It became apparent that some guest checks were missing. After again requesting and receiving another week's guest checks which were incomplete, the agent found it necessary to conduct a test check.

Based upon that check for the week of May 1, 1974, the Tax Commissioner concluded that appellant's ratio of nontaxable sales to total sales was 28.257 percent and that its effective rate of taxation was 4.16 percent, and assessed appellant accordingly.

\*334 The Board of Tax Appeals affirmed that assessment, and the cause is now before this court as a matter of right.

#### Attorneys and Law Firms

Christy & Stehle Co., L. P. A., and Willan L. Stehle, Columbus, for appellant.

William J. Brown, Atty. Gen., and J. Elaine Bialczak, Columbus, for appellee.

#### Opinion

PER CURIAM.

Appellant contends that its records were 'substantially complete and accurate' and that the Tax Commissioner lacked authority to institute the test check herein. This court finds that contention to be without merit.

[<sup>1</sup>] First, appellant's cash register tapes and guest checks were inadequate based upon statutory requirements and this court's \*\*712 decision in McDonald's v. Kosydar (1975), 43 Ohio St.2d 5, 330 N.E.2d 699. R.C. 5739.10 authorizes the Tax Commissioner to conduct a test check when a vendor fails to comply with the requirements of R.C. 5739.11 that it keep 'complete and accurate records of sales, together with a record of the tax collected thereon.'

In McDonald's supra, this court held, at page 8, 330 N.E.2d at p. 702, that 'the record-keeping requirements within R.C. 5739.11 must be construed in a manner which will allow the Tax Commissioner to determine if sales taxes which should have been charged by vendors were actually collected and remitted to the state Treasurer \* \* \* (and) in order to be 'adequate,' a vendor's records must enable the Tax Commissioner to ascertain if the proper

sales tax was collected according to law.'

As in McDonald's, the cash register tapes here are inadequate. Appellant's tapes reveal only daily totals for each of three categories of sales. Such information is not sufficiently detailed to 'allow the Tax Commissioner to determine if sales taxes which should have been charged \* \* \* were actually collected and remitted \* \* \*.' Further appellant's guest checks were found to be incomplete.

[<sup>2</sup>] Appellant contends further that the test check was not \*335 conducted 'for a representative period,' as required by R.C. 5739.10 and 5739.13.

However, the record indicates that the Tax Commissioner's agent consulted with the taxpayer and, together, they selected the week of May 1, 1974. Appellant has not shown that the test check was not conducted 'under conditions, which approximate, as nearly as possible, the conditions under which the business was operated by the taxpayer during the audit period.' Cherry Street Corp. v. Porterfield (1971), 27 Ohio St.2d 260, 272 N.E.2d 124.

Therefore, appellant, having 'failed to carry out \* \* \* (its) burden of proving which of \* \* \* (its) sales are exempt (Cherry Street Corp., supra), the decision of the Board of Tax Appeals, is neither unreasonable nor unlawful, and is, therefore, affirmed.

Decision affirmed.

C. WILLIAM O'NEILL, C. J., and HERBERT, J. J. P. CORRIGAN, STERN, CELEBREZZE, WILLIAM B. BROWN and PAUL W. BROWN, JJ., concur.

#### Parallel Citations

348 N.E.2d 710, 75 O.O.2d 395

453 N.E.2d 1274  
Court of Appeals of Ohio, Eighth  
District, Cuyahoga County.

PATO FOODS, INC., Appellant,  
v.  
LINDLEY, Tax Commr., Appellee.

June 14, 1982.

Vendor appealed from a decision of the Board of Tax Appeals affirming a sales tax assessment. The Court of Appeals, Cuyahoga County, Markus, J., held that: (1) where a vendor does not have adequate records of receipts from his retail sales after a fire destroys his business establishment, Tax Commissioner may determine proportion of that vendor's taxable retail sales to its total retail sales by means of test checks; (2) test checks of other similarly situated businesses may be a permissible method for assessing sales tax liability; and (3) where vendor failed to introduce any evidence that its business was dissimilar to restaurant at which approved test checks were accomplished, and did not show that more accurate information could have been obtained by some other method, vendor failed to carry burden of proving that Tax Commissioner's sales tax assessment was erroneous.

Affirmed.

West Headnotes (9)

**1 Taxation**

Accounting, Returns, and Reports

Where a vendor does not have adequate records of receipts from his retail sales after a fire destroys his business establishment, Tax Commissioner may determine proportion of vendor's taxable retail sales to its total retail sales by means of test checks as prescribed by statute. R.C. § 5739.10.

1 Cases that cite this headnote

**2 Taxation**

Accounting, Returns, and Reports

Test checks may be used to determine taxable portion of retail sales whenever the vendor does not "have" adequate records, even though vendor has not deliberately failed to maintain those records. R.C. § 5739.10.

1 Cases that cite this headnote

**3 Taxation**

Accounting, Returns, and Reports

Where Tax Commissioner noted that vendor paid sales tax at nominal statutory rate after collecting taxes at a presumably higher tax table rate, test check was warranted because Commissioner concluded that vendor failed to remit proper amount of sales tax. R.C. § 5739.13.

**4 Taxation**

Levy and Assessment

Statutes pertaining to sales tax should be construed to allow Tax Commission reasonable use of meaningful information in assessing sales tax liability. R.C. §§ 5739.10, 5739.13.

**5 Taxation**

Accounting, Returns, and Reports

Statute providing that where a vendor does not have adequate records of receipts from his retail sales, Tax Commissioner may refuse to accept vendor's return and, upon basis of test checks of vendor's business for representative period may determine proportion that taxable retail sales bear to all his retail sales, does not require that a test check may be made only at business for which tax is assessed, as test checks of other similarly situated businesses may be a permissible method for assessing sales tax liability. R.C. § 5739.10.

3 Cases that cite this headnote

**6 Taxation**

Accounting, Returns, and Reports

Whether a test check taken pursuant to statute which provides that test checks may be used to establish sales tax liability in absence of adequate records of receipts from retail sales was representative is a factual question for determination by Board of Tax Appeals. R.C. § 5739.10.

2 Cases that cite this headnote

**7 Taxation**

☞ Administrative Review

**Taxation**

☞ Judicial Review and Relief Against Assessments

Board of Tax Appeals has wide discretion to evaluate weight given to evidence and credibility of witness; a reviewing court is limited by statute to ruling whether decision of the Board is unreasonable or unlawful. R.C. § 5717.04.

**8 Taxation**

☞ Presumptions and Burden of Proof

A vendor has burden of proving that Tax Commissioner's assessment of sales taxes was erroneous.

**9 Taxation**

☞ Weight and Sufficiency

Vendor who failed to introduce any evidence that its business was dissimilar to restaurant at which approved test checks were accomplished, and did not show that more accurate information could have been obtained by some other method, failed to satisfy its burden of proving that Tax Commissioner's assessment of sales tax was erroneous.

2 Cases that cite this headnote

**\*\*1275 Syllabus by the Court**

\*22 1. Where a vendor does not have adequate records of receipts from his retail sales after a fire destroys his business establishment, the Tax Commissioner may determine the proportion of that vendor's taxable retail sales to its total retail sales by methods stated in R.C. 5739.10.

2. Test checks of other similarly situated businesses may be a permissible method for assessing sales tax liability. The applicable statutes should be construed to allow the Tax

Commissioner reasonable use of meaningful information in assessing such liability.

3. The taxpayer carries the burden of proof that the Tax Commissioner erred in his tax liability computations.

**Attorneys and Law Firms**

\*\*1276 Joseph H. Weiss, Jr., and Richard J. Makowski, Chesterland, for appellant.

William J. Brown, Atty. Gen., for appellee.

**Opinion**

MARKUS, Judge.

Vendor appeals from a decision of the Board of Tax Appeals, arguing that the Tax Commissioner should not calculate vendor's sales tax liability with percentage data obtained in a test check of a different business.<sup>1</sup> \*23 Because vendor's own records are not available, we affirm the board's decision allowing that procedure for comparable vendors.

Vendor operated a restaurant and delicatessen which sold food and beverages for consumption both on and off the premises. All sales for consumption on the premises and some sales for consumption off premises were subject to vendor's duty to collect and remit state sales tax. The Tax Commissioner discovered that vendor remitted tax for reported taxable sales at the precise nominal rate prescribed by law. A vendor's effective tax pursuant to the prescribed tax bracket table is seldom the same as the nominal rate,<sup>2</sup> so the Tax Commissioner sent an agent to investigate.

After the agent inspected vendor's premises, he made an appointment to review original sales records which would show the portion of total sales that were taxable. However, when the agent appeared to view those records, vendor's premises and records were engulfed in a fire that destroyed several business establishments.

Without access to original records, the agent sought to calculate vendor's tax liability by using vendor's total reported sales and statistical information obtained from comparable businesses. He needed to determine the portion of vendor's total sales that was taxable, and the effective tax rate experienced for sales of that nature by persons using tax bracket tables. Therefore, he averaged those percentages from data developed in test checks of two other nearby delicatessen restaurants.

Multiplying the average percent of taxable sales by vendor's total sales, he computed vendor's taxable sales. Multiplying the average effective tax rate by vendor's computed taxable sales, he determined the tax that should have been collected and remitted. The Tax Commissioner then assessed vendor the difference between the tax so calculated and the tax actually paid.

Vendor's objections to that assessment were overruled by the Tax Commissioner, so vendor appealed to the board. The board affirmed, but reduced vendor's assessment, after ruling that less favorable data from one of those two restaurants should not have been used to calculate vendor's tax. That restaurant was not sufficiently similar to vendor's business. Vendor appeals to this court from the board's decision pursuant to R.C. 5717.04.

I

1 2 3 Vendor first argues that a test check to verify sales tax returns is proper only where a business deliberately fails to maintain retail sales records. Vendor contends it kept adequate records until they were destroyed under circumstances beyond its control, so no test check was authorized. We disagree.

Test checks are discussed in R.C. 5739.10:

" \* \* \* [W]here a vendor does not have adequate records of receipts from his retail sales in excess of fifteen cents or sales of food for human consumption on the premises \*1277 where sold, the tax commissioner may refuse to accept the vendor's return and, upon the basis of test checks of the vendor's business for a representative period, and other information relating to the sales made by such vendor, determine the proportion that taxable retail sales bear to all his retail sales." (Emphasis added.)

Thus, test checks may be used to determine the taxable portion of retail sales whenever the vendor does not "have" adequate records, even though the vendor has not deliberately failed to maintain those records.

R.C. 5739.13 further provides:

"The commissioner may make an assessment \*24 against any vendor who \* \* \* fails to remit the proper amount of tax in accordance with the provisions of section 5739.12 of the Revised Code. When information in the possession of the commissioner indicates that the amount required to

be collected under the provisions of section 5739.02 of the Revised Code is, or should be, greater than the amount remitted by the vendor, the commissioner may upon the basis of test checks of a vendor's business for a representative period, which are hereby authorized, determine the ratio which the tax required to be collected under section 5739.02 of the Revised Code bears to the receipts from the vendor's taxable retail sales, which determination shall be the basis of an assessment as herein provided in this section. Notice of such assessment shall be made in the manner prescribed in this section." (Emphasis added.)

In the present case, the Tax Commissioner noted that vendor apparently paid sales tax at the nominal statutory rate after collecting them at a presumably higher tax table rate. Cf. *Russo v. Donahue* (1967), 10 Ohio St.2d 201, 226 N.E.2d 747 [39 O.O.2d 10]. Thus, the test check was also warranted because the commissioner concluded that vendor failed to remit the proper amount of sales tax. *Id.*

The first assignment of error is overruled.

II

4 5 Vendor argues that a test check may only be made at the business for which the tax is assessed. We disagree. The applicable statutes should be construed to allow the Tax Commissioner reasonable use of meaningful information in assessing sales tax liability. In *Russo v. Donahue, supra*, at 212, 226 N.E.2d 747, the court stated:

"The general proposition as to what an administrative body must do where the taxpayer has no records is succinctly stated in *Mitchell Bros. Truck Lines v. Hill, Commr.*, 227 Or. 474, 485, 363 P.2d 49, as follows:

" 'It appears to be the general rule, and common sense would dictate, that if a taxpayer fails to keep proper records, or for some other reason exact information is unavailable, some formula must be devised to determine the tax established by legislative authority. *Vale v. Du Pont*, 37 Del. 254, 182 A. 668, 103 A.L.R. 946; *W.T. Grant Co. v. Joseph*, 2 N.Y.2d 196 [159 N.Y.S.2d 150], 140 N.E.2d 244; *Mason and Dixon Lines v. Commonwealth*, 185 Va. 877, 41 S.E.2d 16; *Gasper v. Commissioner of Internal Revenue*, 225 F.2d 284 [6th Cir.1955].' " (Emphasis *sic.*)

Use of information obtained in a test check has been upheld even when the test check was made after the vendor's business was sold to a new owner. See *King Drug Co. v. Bowers*

**Pato Foods, Inc. v. Lindley, 7 Ohio App.3d 22 (1982)**

453 N.E.2d 1274, 7 O.B.R. 24

(1961), 171 Ohio St. 461, 172 N.E.2d 3 [14 O.O.2d 318]; *Staten v. Tax Commr.* (1975), 74 O.O.2d 365.

Vendor's argument was raised in *McDonald's v. Kosydar* (1975), 43 Ohio St.2d 5, 330 N.E.2d 699 [72 O.O.2d 3]. The court stated at pages 9-10, 330 N.E.2d 699:

"Taxpayers contend further that the Tax Commissioner improperly used an average of figures derived from a test check of four of appellees' outlets in the Columbus area to compute the assessment against the outlet in Springfield, Ohio.

"The relevant statutory provisions within R.C. 5739.10 and 5739.13 authorize assessments upon the basis of test checks of a 'vendor's business for a representative period.'

\*\*1278 In the case at bar, the test checks applied to the Springfield outlet were conducted at different locations outside Springfield. Clearly, they were not of the 'vendor's business' as required by the above statutory language. To be valid, a test check must be conducted under conditions which approximate, as nearly as possible, the conditions under which the business was operated by the taxpayer during the audit period. *Cherry Street Corp. v. Porterfield* (1971), 27 Ohio St.2d 260 [56 O.O.2d 156], 272 N.E.2d 124.

\*25 "Here, the commissioner does not assert, nor does the record indicate, that the four outlets used were comparable to the Springfield unit in their physical layouts (which could influence sales for consumption off the premises, depending on inside seating), or were situated in areas of a similar economic makeup (which could affect the volume of business). In light of the above, it is our finding that the Tax Commissioner did not satisfy the statutory requirement that the test check be of a 'vendor's business for a representative period,' and the assessment against the Springfield outlet, based upon those test checks, was improper."

In the last quoted paragraph, the court set forth criteria for comparing a vendor's business with a different business.<sup>3</sup> Those criteria were satisfied in the present case. The Tax Commissioner introduced evidence about the restaurants at which the test checks were made, including the proximity to this vendor and their comparable seating capacity, delicatessen size, and neighborhood characteristics.

Furthermore, R.C. 5739.13 provides that the Tax Commissioner "may make an assessment against \* \* \* the vendor \* \* \* based upon any information in his possession," where a vendor has failed to remit the proper amount of sales

tax. In *Russo v. Donahue, supra*, 10 Ohio St.2d at 214, 226 N.E.2d 747, the court held:

"Section 5739.13, Revised Code, imposes a duty upon the vendor both to collect and remit to the state the bracket tax imposed by Section 5739.02, Revised Code, and makes him subject to assessment and personally liable in the event he fails in either respect. Section 5739.11, Revised Code, imposes upon the vendor the duty to maintain records. The vendor has the burden of providing such records or of being assessed on the basis of test checks or of any other information in the possession of the Tax Commissioner." (Emphasis added.)

Hence, the information obtained from test checks of similar businesses may be used by the Tax Commissioner as "other information" in his possession.

" \* \* \* [I]t is presumed that all sales made in this state are subject to the tax until the contrary is established." R.C. 5739.02. Therefore, vendor would be responsible for tax on all sales, since it no longer has original records to verify the extent of tax-exempt transactions, if some means were not used to estimate the percent of tax-exempt sales.

Therefore, the second assignment of error is overruled.

### III

Finally, vendor argues that the board acted unreasonably and unlawfully by concluding that the test check ultimately used was for a similar business and a representative period. This argument lacks merit.

In *Cherry Street Corp. v. Porterfield* (1971), 27 Ohio St.2d 260, 272 N.E.2d 124 [56 O.O.2d 156], the syllabus states:

"In order for a test check conducted pursuant to R.C. 5739.10 to be valid, it must be conducted under conditions which approximate, as nearly as possible, the conditions under which the business being checked was operated during the audit period."

6 7 Whether the test check was representative is a factual question for determination by the board. *King Drug Co. v. Bowers, supra*, 171 Ohio St. at 463, 172 N.E.2d 3; *Staten v. Tax Commr., supra*, at 368. The board has wide discretion to evaluate the weight given to evidence and the credibility of witnesses. *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St.2d 13, 336 N.E.2d 433 [73 O.O.2d 83], paragraph three of the syllabus. A reviewing

**Pato Foods, Inc. v. Lindley, 7 Ohio App.3d 22 (1982)**

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court is limited by R.C. 5717.04 to ruling whether the decision of the board is unreasonable or unlawful. \*26 3535 *Salem Corp. v. Lindley* (1979), 58 Ohio St.2d 210, 212, 389 N.E.2d 508 [12 O.O.3d 203]; *Staten v. Tax Commr., supra*, at 366.

At the hearing before the board, the Tax Commissioner's agent testified that he computed vendor's assessment from figures obtained in test checks of two other restaurant-delicatessen businesses. He testified that those restaurants were similar to vendor's restaurant, and were located in areas with "similar types of people." The agent admitted that one of the restaurants was much larger, and the figures obtained from that restaurant were subsequently rejected by the board for use in assessing vendor's tax.

The Tax Commissioner did not attempt to develop data from vendor's own business when it was rebuilt after the fire, because vendor eliminated most sales for off premises consumption when it reactivated its business. Data from the next business would have been unfair to vendor for

this analysis, since the tax-exempt sales were no longer a substantial factor.

8 9 A vendor has the burden of proving that the Tax Commissioner's assessment was erroneous. *Ohio Fast Freight v. Porterfield* (1972), 29 Ohio St.2d 69, 71, 278 N.E.2d 361 [58 O.O.2d 116]. Vendor failed to introduce any evidence that its business was dissimilar to the restaurant at which the approved test checks were accomplished, nor did it show that more accurate information could have been obtained by some other method.

For the foregoing reasons, the third assignment of error is overruled, and the decision of the board is affirmed.

*Decision affirmed.*

PRYATEL, C.J., and CORRIGAN, J., concur.

Parallel Citations

453 N.E.2d 1274, 7 O.B.R. 24

**Footnotes**

- 1 Vendor presents the following claimed errors:  
"I. The Board of Tax Appeals erred in affirming the use of test checks against a taxpayer who was not in default of keeping sales records.  
"II. The Board of Tax Appeals erred in affirming a sales tax assessment based upon a test check of the business of a vendor other than the taxpayer being audited.  
"III. The decision of the Board of Tax Appeals to use the test checks of Gottlieb's Restaurant in making a sales tax assessment against the appellant was unreasonable and unlawful."
- 2 See *McDonald's v. Kosydar* (1975), 43 Ohio St.2d 5, 9, 330 N.E.2d 699 [72 O.O.2d 3].
- 3 Cf. *Servomation Corp. v. Kosydar* (1976), 46 Ohio St.2d 67, 70, 346 N.E.2d 290 [75 O.O.2d 147].

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25 Ohio St.3d 107  
Supreme Court of Ohio.

**AKRON HOME MEDICAL SERVICES, INC.,**  
Appellant,  
v.  
**LINDLEY, Tax Commr.,** Appellee.

No. 85-1852. | July 23, 1986.

Taxpayer engaged in business of selling and renting home medical equipment appealed as of right from Board of Tax Appeals decision affirming assessment for uncollected sales taxes and penalties. The Supreme Court, Holmes, J., held that: (1) under prior version of sales tax statutes applicable herein, braces, walkers, crutches, canes, and specialized hospital beds possessing mechanical controls to adjust portions of the bed came within sales tax exemption language, but oxygen, oxygen equipment, commode chairs, nonmechanical commode raisers, and ordinary beds were not exempt; (2) sales of oxygen and oxygen equipment did not come within exemption for sales of prescription drugs; (3) fact that medicare paid for various items purchased did not render the state sales tax a forbidden tax on purchases by the federal government; and (4) Tax Commissioner properly utilized so-called "test check" auditing procedure.

Affirmed in part and reversed in part.

Celebrezze, C.J., and Douglas, J., concurred in judgment only.

West Headnotes (6)

[1] **Taxation**  
↔ Drugs, medicine, and medical devices

Exception from sales taxation for "braces and other similar medical or surgical devices for supporting weakened or useless parts of the human body" obviously encompasses more than merely braces, and included walkers, crutches, and canes, all of which are functionally similar to braces, and, for similar reasons, specialized hospital beds possessing mechanical controls to adjust portions thereof to support specific parts of the anatomy were also within tax exemption;

however, oxygen and oxygen equipment, commode chairs, nonmechanical commode raisers, and ordinary beds did not come within exemption language. R.C. § 5739.02(B)(18).

4 Cases that cite this headnote

[2] **Statutes**  
↔ General and specific terms and provisions; ejusdem generis

Under canon of statutory construction known as ejusdem generis, whenever words of general meaning follow enumeration of particular class, then the general words are to be construed as limited to those things which pertain to the particularly enumerated class.

6 Cases that cite this headnote

[3] **Taxation**  
↔ Drugs, medicine, and medical devices

Sales of oxygen and oxygen equipment were not exempt from taxation under provision relating to sales of prescription drugs, and taxpayer, not being a pharmacist, could not exempt sales of oxygen and oxygen equipment merely by refusing, on private authority, to make such sales without a prescription. R.C. § 5739.02(B)(18).

1 Cases that cite this headnote

[4] **Taxation**  
↔ Transactions involving United States, its agencies, or instrumentalities

State may not levy a direct tax on the federal government or an instrumentality thereof.

1 Cases that cite this headnote

[5]

**Taxation**

☛ Transactions involving United States, its agencies, or instrumentalities

Medicare payment by federal government to provider of services was voluntary payment of obligation incurred by program recipient and was not within tax exemption for "sales not within the taxing power of this state under the constitution of the United States"; as factual matter, purchaser selects the supplier, receives title to and possession of the property, and is the person against whom the sales tax is ultimately levied. R.C. § 5739.02(B)(10).

3 Cases that cite this headnote

[6]

**Taxation**

☛ Levy and Assessment

Tax Commissioner properly employed so-called "test check" auditing procedure, so as to avoid audit of entire sales record, in determining whether sales tax was owed on sales of variety of medical supplies and devices sold or rented by taxpayer; in any event, taxpayer waived any objection by entering into enforceable, written agreement with the Commissioner expressly permitting test check of selected sales records, and that agreement was not shown to have been rescinded. R.C. §§ 5739.11, 5739.13.

5 Cases that cite this headnote

**\*\*418 \*107 Syllabus by the Court**

1. The exception from sales taxation contained within R.C. 5739.02(B)(18) for "braces and other similar medical or surgical devices for supporting weakened or useless parts of the human body" encompasses more than merely braces.

2. Payment made by the federal government pursuant to Section 1395 *et seq.*, Title 42, U.S.Code (Medicare), is a **\*\*419** voluntary payment of an obligation incurred by the program recipient and is not within the tax exemption for sales "not within the taxing power of this state under the Constitution of the United States [R.C. 5739.02(B)(10)]."

Akron Home Medical Services, Inc., appellant, sold and rented home medical equipment. Among the various kinds of equipment sold were walkers, crutches, canes, commode chairs and raisers, hospital beds, oxygen tanks, oxygen regulators and oxygen concentrators.

Pursuant to an audit of appellant's sales, the Tax Commissioner assessed appellant \$139,698.65 for uncollected sales taxes and penalties. Akron Home appealed the assessment to the Board of Tax Appeals which, except for one item, affirmed the assessment.

The cause is now before this court pursuant to an appeal as of right.

**Attorneys and Law Firms**

Buckingham, Doolittle & Burroughs Co., L.P.A., Robert W. Malone and Dana A. Rose, Akron, for appellant.

Anthony J. Celebrezze, Jr., Atty. Gen., and Mark A. Engel, Columbus, for appellee.

**Opinion**

HOLMES, Justice.

The issues raised in this appeal are whether R.C. 5739.02(B)(18) provides an exemption from sales taxation applicable to all or part of the items sold by appellant, and whether appellant's sales to recipients of Medicare are tax-exempt sales to the federal government. For the reasons set forth below, we reverse the decision of the board in part and affirm it in part.

The pertinent provisions governing the imposition of Ohio's sales tax are found in R.C. 5739.01 *et seq.* The subject of such tax is "each retail sale made in this state" (R.C. 5739.02) as well as sales "the price of which consists **\*108** in whole or in part of rentals" (R.C. 5739.02[A]). The transactions which are the subject of the appeal herein involve sales and rentals; thus, appellant is required to comply with R.C. 5739.02(A) unless it can be demonstrated that one of the exceptions to the sales tax

contained within subsection (B) is applicable.

Appellant relies on R.C. 5739.02(B)(18) which exempted: "Sales of drugs dispensed by a registered pharmacist upon the order of a practitioner licensed to prescribe, dispense, and administer drugs to a human being in the course of his professional practice, artificial limbs or portion thereof for humans, braces and other similar medical or surgical devices for supporting weakened or useless parts of the human body, wheel chairs, ostomy appliances and the supplies and accessories for the function and maintenance thereof, insulin as recognized in the official United States pharmacopoeia, urine testing materials when used by diabetics to test for glucose or acetone, and hypodermic syringes and needles when used by diabetics for insulin injections."

*Exceptions* to a particular tax are governed by the oft-stated rules to be found in *Youngstown Metro. Housing Auth. v. Evatt* (1944), 143 Ohio St. 268, 273, 55 N.E.2d 122 [28 O.O. 163]:

"By the decisions it is established in Ohio that exemption statutes are to be strictly construed, it being the settled policy of this state that all property should bear its proportionate share of the cost and expense of government; that our law does not favor exemption of property from taxation; and hence that before particular property can be held exempt, it must fall clearly within the class of property specified \* \* \* to be exempt.

"The foundation upon which that policy rests is that statutes granting exemption of property from taxation are in derogation of the rule of uniformity and equality in matters of taxation. (See 38 Ohio Jurisprudence, 853, section 114.)" See, also, *e.g., id.*, at paragraph two of the syllabus; *Cleveland-Cliffs Iron Co. v. Glander* (1945), 145 Ohio St. 423, 430, 62 N.E.2d 94 [31 O.O. 39]; *National Tube Co. v. Glander* (1952), 157 Ohio St. 407, 105 N.E.2d 648 [47 O.O. 313], paragraph two of the syllabus; \*\*420 *First National Bank of Wilmington v. Kosydar* (1976), 45 Ohio St.2d 101, 341 N.E.2d 579 [74 O.O.2d 206]; *Southwestern Portland Cement Co. v. Lindley* (1981), 67 Ohio St.2d 417, 425, 424 N.E.2d 304 [21 O.O.3d 261]; *National Church Residences v. Lindley* (1985), 18 Ohio St.3d 53, 55, 479 N.E.2d 870.

[1] [2] [3] It is quite apparent that the exception for "braces and other similar medical or surgical devices for supporting weakened or useless parts of the human body" encompasses more than merely braces. The walkers, crutches and canes, although not braces, are easily comprehended within the exception since they are ambulatory supports for "weakened or useless" legs.

Also, one of the uses of such devices is for support of weakened limbs *during movement*, whether walking or otherwise. The above structural supports are therefore functionally similar to braces. They are generally expected to be used for supports for particular parts of the body, as are braces. There was clear, uncontradicted testimony to this \*109 effect before the Board of Tax Appeals. Accordingly, we reverse the finding below which failed to exempt the sale of the above devices.

Appellant's claim that the tanks of oxygen and oxygen equipment are exempt is not sustainable from R.C. 5739.02(B)(18). Appellant argues that oxygen and/or equipment sold under the circumstances herein do support "weakened \* \* \* parts of the human body," *i.e.*, the lungs and heart. The difficulty arises from the controlling phrase "braces and other similar \* \* \* devices \* \* \*."

Under the canon of statutory construction commonly referred to as *ejusdem generis* (literally "of the same kind"), whenever words of general meaning follow the enumeration of a particular class, then the general words are to be construed as limited to those things which pertain to the particularly enumerated class. See, *e.g., Glidden Co. v. Glander* (1949), 151 Ohio St. 344, 350, 86 N.E.2d 1 [39 O.O. 184]; *Smilack v. Bowers* (1958), 167 Ohio St. 216, 218, 147 N.E.2d 499 [4 O.O.2d 271]; *State v. Aspell* (1967), 10 Ohio St.2d 1, 225 N.E.2d 226 [39 O.O.2d 1], at paragraph two of the syllabus. The applicability of this canon in the present case is strengthened by inclusion of the word "similar" which further limits the general term. Accordingly, a device "for supporting weakened or useless parts of the human body" must be in the class of, and "similar" to, "braces" if the sale thereof is to be exempted from taxation.

It becomes clear that braces are of that group which *physically* supports parts of the body, as opposed to a broader type of "support" which could include chemically induced support of particular organs. Nothing about oxygen is similar to braces. The two types of oxygen equipment are mere delivery systems and do not actually support a part of the body in any direct fashion. Nothing sought to be exempted actually inflates the lungs, as might a lung machine.

Appellant has also asserted that the sales of oxygen and oxygen equipment are not taxable under that portion of R.C. 5739.02(B)(18) which exempts sales of prescription drugs. At the hearing, appellant offered proof that the use of oxygen was ordered by a doctor who issued an accompanying prescription and that appellant required such prescription as a condition of its sales of oxygen and oxygen equipment.

The statute relied upon exempts “[s]ales of drugs dispensed by a registered pharmacist upon the order of a practitioner licensed to prescribe \* \* \*.” The plain language of this statute requires that whatever is comprehended by the term “drug” must be “dispensed by a registered pharmacist \* \* \*.” Appellant is not a pharmacist and, consequently, cannot exempt sales of oxygen and oxygen equipment merely by refusing, on private authority, to make such sales without a prescription. Accordingly, appellant’s claim of exemption cannot stand.

Commode chairs, non-mechanical commode raisers, and ordinary beds are supports in the sense that they are said to support one’s body. As such, they can \*\*421 hardly be considered within the class of supports similar to braces. Many non-exempt objects might be said to support the body \*110 generally. However, to come within the class of supports which are exempt, the device must be so designed as to support particular body parts. None of the above devices is in fact designed for specified portions of the human anatomy. Thus, sales of such may not be exempted from sales taxation.

On the other hand, specialized hospital beds which possess mechanical controls to adjust portions of the bed are designed to support specific parts of the anatomy. These beds are sold specifically to provide particular support for the head, neck, back, or legs, by shaping the reposed position of the human body so as to redistribute pressure away from specific body parts. Such function is quite similar to that of a brace. Accordingly, we reverse the Board of Tax Appeals’ determination as to the hospital beds.

Appellant points to later amendments to R.C. 5739.02(B)(18) which clearly exempt the transactions at issue from sales taxes.<sup>1</sup> Appellant’s argument is that the later amendments merely codify the common law applicable under the earlier statute. This argument, without more, cannot overcome the requirement that courts of review must apply the statute in effect at the time of the audit. See R.C. 1.58 and Section 28, Article II of the Ohio Constitution; see, also, *Giant Tiger Drugs v. Kosydar* (1975), 43 Ohio St.2d 103, 107, 330 N.E.2d 917 [72 O.O.2d 58].

<sup>141</sup> <sup>151</sup> Appellant also points to the fact that payments for many of its sales were made by Medicare pursuant to Section 1395 *et seq.*, Title 42, U.S.Code, and therefore ought to be exempted from sales taxation. This contention is based upon the exemption for “[s]ales not within the taxing power of this state under the constitution of the

United States,” as provided by R.C. 5739.02(B)(10). Appellant reasons that since Medicare pays for the items purchased, pursuant to an agreement between the government and the supplier, that the sales tax is a forbidden tax on purchases by the federal government. See, *e.g.*, *United States v. Tax Comm. of Mississippi* (1975), 421 U.S. 599, 95 S.Ct. 1872, 44 L.Ed.2d 404.

It is, of course, axiomatic that a state may not levy a direct tax on the federal government or an instrumentality thereof. *McCulloch v. Maryland* (1819), 17 U.S. (4 Wheat.) 316, 4 L.Ed.2d 579. However, the mere voluntary payment by the federal government of an obligation incurred by a Medicare recipient hardly rises to the level of a direct tax. As a factual matter, the purchaser \*111 selects the supplier of medical devices, receives title to as well as possession of the personal property sold, and is the person against whom the sales tax is ultimately levied. The federal government, after the fact of the taxable sale, determines how much of the purchase price is reimbursable. No portion of the sales tax is owed by or collectible from anyone not the consumer. See R.C. 5739.03. Accordingly, R.C. 5739.02(B)(10) is inapplicable to the sales transactions herein.

<sup>161</sup> Appellant has also objected to the method used by the Tax Commissioner to arrive at the tax assessment. The method used is referred to as a “test check” and allows the commissioner to avoid an audit of the entire sales record which, in the present case, was quite substantial. Appellant \*\*422 asserts that under R.C. 5739.11 and applicable case law the authority of the commissioner to use the test check auditing procedure is severely circumscribed to instances where the taxpayer failed to maintain proper records. We need not decide upon the scope of authority permitted the commissioner under R.C. 5739.11 since there is authority to conduct such test checks in R.C. 5739.13. R.C. 5739.13 stated: “The commissioner may make an assessment against any vendor who fails to file a return required by section 5739.12 of the Revised Code or fails to remit the proper amount of tax in accordance with the provisions of section 5739.12 of the Revised Code. When information in the possession of the commissioner indicates that the amount required to be collected under the provisions of section 5739.02 of the Revised Code is, or should be, greater than the amount remitted by the vendor, the commissioner may upon the basis of test checks of a vendor’s business for a representative period, which are hereby authorized, determine the ratio which the tax required to be collected \* \* \* bears to the receipts from the vendor’s taxable retail sales, which determination shall be the basis of an assessment as herein provided in this section.”

Appellant waived any objection by entering into an enforceable, written agreement with the commissioner expressly permitting a test check of selected sales records. The assertion that appellant rescinded such agreement is not supported by the record before this court. We therefore affirm the findings of the Board of Tax Appeals on this issue.

The decision of the board is reversed in part in conformance with this opinion and is, in all other respects, affirmed.

*Decision affirmed in part and reversed in part.*

#### Footnotes

- <sup>1</sup> R.C. 5739.02(B) was amended effective January 16, 1981 to exempt the following:  
“(18) \* \* \* hospital beds when purchased for use by persons with medical problems for medical purposes; and oxygen and oxygen dispensing equipment when purchased for use by persons with medical problems for medical purposes;  
“(19) Sales of artificial limbs or portion thereof, breast prostheses, and other prosthetic devices for humans; braces or other devices for supporting weakened or nonfunctioning parts of the human body; wheelchairs; devices used to lift wheelchairs into motor vehicles and parts and accessories to such devices; crutches or other devices to aid human perambulation; and items of tangible personal property used to supplement impaired functions of the human body such as respiration, hearing, or elimination.  
\* \* \*” (138 Ohio Laws, Part II, 3380, 3384.)

SWEENEY, LOCHER, CLIFFORD F. BROWN and WOLFF, JJ., concur.

CELEBREZZE, C.J., and DOUGLAS, J., concur in judgment only.

WOLFF, J., of the Second Appellate District, sitting for WRIGHT, J.

#### Parallel Citations

495 N.E.2d 417, 25 O.B.R. 155



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## **INFORMATION RELEASE \* ST 2004-1**

### **Food Definition Change Effective July 1, 2004 – Issued May, 2004**

The purpose of this information release is to address the new definition of "food" in Ohio Revised Code ("R.C.") section 5739.01(EEE) that takes effect July 1, 2004. This change in the definition of "food" is one of several changes made in Am. Sub. H.B. 95 of the 125<sup>th</sup> Ohio General Assembly to bring Ohio statutes in compliance with the terms of the Streamlined Sales and Use Tax Agreement. What constitutes food is important because food consumed off the premises is not subject to Ohio sales tax.

#### **Definition of "Food" Expiring June 30, 2004**

For periods prior to July 1, 2004, vendors should continue to apply the current definition found in R.C. 5739.01(EEE)(1).

"Food" means cereals and cereal products, milk and milk products including ice cream, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruits, fruit products, and pure fruit juices, condiments, sugar and sugar products, coffee and coffee substitutes, tea, and cocoa and cocoa products. "Food" does not include spirituous liquors, wine, mixed beverages, or beer; soft drinks; sodas and beverages that are ordinarily dispensed at or in connection with bars and soda fountains, other than coffee, tea, and cocoa; root beer and root beer extracts; malt and malt extracts; mineral oils, cod liver oils, and halibut liver oil; medicines, including tonics, vitamin preparations, and other products sold primarily for their medicinal properties; and water, including mineral, bottled, and carbonated waters, and ice.

#### **New Definition of "Food" Effective July 1, 2004**

For periods on and after July 1, 2004, vendors need to apply the definition of food found in R.C. 5739.01 (EEE)(2) that provides the following:

On and after July 1, 2004, "food" means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

Generally, if a substance, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form is consumed by humans for nutritional value or taste, then it is "food." In some ways, this represents a broadening of the definition of "food." For example, items such as bottled water, chewing gum, and breath mints, which have been considered as non-food items, will be included in the new definition of "food."

The statute specifically excludes alcoholic beverages, dietary supplements, soft drinks, and tobacco from the definition of "food." These exceptions are discussed below.

### **Alcoholic Beverages**

R.C. 5739.01(EEE)(3)(a) provides:

"Alcoholic beverages" means beverages that are suitable for human consumption and contain one-half of one per cent or more of alcohol by volume.

Beer, wine, and liquor are not considered food and are subject to sales tax. This represents no substantive change in Ohio sales tax law. The term "alcoholic beverages" does not include non-alcoholic beers that contain less than one-half (0.5%) of one per cent of alcohol by volume. Also, "alcoholic beverages" do not include nonalcoholic mixers, whether in liquid, powdered or frozen form. However, some of these items may be considered "soft drinks" as discussed below. Additionally, items that contain alcohol but are not used as beverages, such as vanilla extract and cooking wines, are not considered alcoholic beverages.

### **Dietary Supplements**

R.C. 5739.01(EEE)(3)(b) provides:

"Dietary supplements" means any product, other than tobacco, that is intended to supplement the diet and that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional for use as a sole item of a meal or of the diet; that is required to be labeled as a dietary supplement, identifiable by the "supplement facts" box found on the label, as required by 21 C.F.R. 101.36; and that contains one or more of the following dietary ingredients:

- (i) A vitamin;

- (ii) A mineral;
- (iii) An herb or other botanical;
- (iv) An amino acid;
- (v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;
- (vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(3)(b)(i) to (v) of this section.

The simplest method to determine whether a particular product is a dietary supplement, as that term is defined above, is to look for the "Supplement Facts" label on the product. If that box appears on the label, the product is a dietary supplement and not a food. Tax would apply to sales of dietary supplements.

Nutritional products and diet foods such as Ensure® or Slimfast® that contain a "Nutrition Facts" box on the label are food products, not dietary supplements.

### **Soft Drinks**

R.C. 5739.01(EEE)(3)(c) provides:

"Soft drinks" means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

It is important to note that the definition of a "soft drink" is not controlled by whether or not the beverage is carbonated. Any sweetened nonalcoholic beverage, whether sweetened naturally or artificially, is a soft drink unless it either contains milk products or a milk substitute or it contains greater than fifty percent (50%) fruit or vegetable juice by volume. Tax applies to the sale of soft drinks.

Soft drinks include traditional soda pop beverages, but also include many fruit drinks or fruit punches that are less than fifty percent (50%) juice by volume. Bottled tea and coffee drinks, which have been considered food items, will be considered soft drinks and taxable if they contain sweeteners, unless they also contain milk or milk substitutes.

### **Tobacco**

R.C. 5739.01(EEE)(3)(d) provides:

"Tobacco" means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

This represents no change in Ohio sales tax law as tobacco and tobacco products have never been considered "food." Tax applies to sales of tobacco and tobacco products.

#### **Exemption for Off-premise Consumption**

The sale of food and food ingredients for human consumption off the premises where sold is exempt from sales tax under R.C. 5739.02 (B)(2). **The new definition of "food" does not change this exemption.** Food consumed on the premises remains taxable.

#### **Noteworthy Items Changed from Taxable to Non-taxable Effective July 1, 2004**

Prior to July 1, 2004, bottled water is taxable. Beginning July 1, 2004, bottled drinking water (including mineral, carbonated, and distilled water) is considered food. However, if the water contains natural or artificial sweeteners then it is considered a "soft drink" under R.C. 5739.01 (EEE)(3)(c) and excluded from the definition of food. Flavored water would be a food unless it also includes sweetener (natural or artificial).

Generally, ice will be considered food and not taxable. However, ice that is sold for cooling purposes is not food and therefore taxable. For administrative purposes, ice sold by grocery, convenience, and similar stores will be presumed to be food and no tax should be charged. Ice used for dual purposes, such as to cool beverages before being dispensed and also being placed in a container for consumption, will be considered food and not subject to tax.

Another change in the definition of "food" pertains to fruit juices. Prior to July 1, 2004, only 100% fruit juices were food. Under the new law, sweetened beverages with less than fifty percent (50%) fruit or vegetable juice are soft drinks and taxable. If the fruit or vegetable juice content is greater than fifty percent (50%) by volume then the beverage is a food. In the case of a beverage concentrate, the fifty percent (50%) test by volume is based upon the reconstituted beverage.

Additionally, items such as chewing gum and breath mints are food.

Due to the new definition of "food," there may be some confusion on what qualifies as a soft drink under the new law. As stated above, carbonation is no longer the determinative factor on whether a beverage is considered to be a soft drink or not. In general, the determinative factor is whether the beverage is sweetened or not. If beverages are sweetened naturally or artificially, then they are taxable soft drinks unless they also contain milk, a milk products, or similar substitute for milk such as soy or rice.

## **Questions and Answers**

The following is a summary of typical questions being asked along with the Department's responses based on the provisions of the Ohio Revised Code. The responses should be used as a guide to understanding the application of the law. For purposes of these questions, the use of "non-taxable" presumes the food is consumed off-premises.

### **A) When is food taxable?**

Food consumed on the premises remains taxable. Only food that is consumed off the premises is non-taxable. For example, food consumed in restaurants remains taxable.

### **B) Is bottled water, flavored water, carbonated water, or flavored carbonated water "food" under the new definition?**

Since water is a liquid substance ingested by humans for taste or nutritional value, these items would generally be considered food. Food, if purchased for consumption off the premises where sold, is not subject to Ohio sales tax. Water that contains natural or artificial sweeteners is a "soft drink" under R.C. 5739.01(EEE)(3)(c) and excluded from the definition of food.

### **C) Are bottled teas and coffees considered food?**

As of July 1, 2004, any beverages that are artificially or naturally sweetened will be considered a "soft drink" and taxable under R.C. 5739.01(EEE)(3)(c). Bottled teas and coffees that are flavored but not sweetened are food. Sweetened tea and coffee will be taxable as a "soft drink" unless they contain milk, milk products or similar substitute for milk such as soy or rice.

### **D) I sell coffee, tea, hot chocolate and other beverages. In some beverages, I will add a flavored syrup. Other times I will add steamed milk or whipped cream. Are these products food?**

A cup of plain coffee or tea is a food. If the vendor sells plain coffee or tea and provides consumers with sugar or other sweeteners or flavorings that the consumer can add to the beverage at no charge, the coffee or tea will still be considered a food. In either case, the beverage will not be taxable if it is sold for off-premises consumption.

If the vendor adds a sweetener, or a flavored syrup that contains a sweetener, the beverage becomes a soft drink and would be taxable regardless of where it is consumed. If the vendor adds milk or a milk product, such as whipped cream, or a milk substitute, the beverage would be a food and not taxable if it is sold for off-premises consumption. If the vendor adds both a flavored syrup and a milk product or milk substitute, the beverage would still be food.

Hot chocolate that contains milk or a milk substitute would be a food and would not be taxable if sold for off-premises consumption.

**E) Are powdered drinks taxable?**

If the resulting beverage would be considered a soft drink then the drink mix is taxable. If milk or a milk substitute would normally be added, the powdered mix is considered a food.

**F) Are drink concentrates taxable?**

If the reconstituted form of the beverage would be considered a soft drink then the drink concentrate is taxable.

**G) Is non-alcoholic beer food?**

If it contains less than one-half (0.5%) of one percent alcohol per volume then it is considered to be food under the new definition and it is not taxable. But if the non-alcoholic beer contains one-half percent or more of alcohol per volume then it is taxable as an alcoholic beverage. However, non-alcoholic beer like all other foods is still taxable if consumed on the premises.

**H) Are protein drinks considered to be food or a dietary supplement?**

Most protein drinks have a "Supplement Facts" box on their label therefore they would be a dietary supplement and not food. However, the taxability of protein drinks depends on how they are labeled. If the label has a "Supplement Facts" box, the product is not a food but a dietary supplement and taxable. If the label contains a "Nutrition Facts" box then the product is food and not taxable.

**I) Are diet products food or nutritional supplements?**

If the diet product is a capsule, tablet, or any other item that contains a "Supplement Facts" box on its label then the product is not a food. A beverage or nutrition bar that contains a "Nutrition Facts" box on its label is a food.

**J) Are over-the-counter drugs taxable?**

Yes. Over-the-counter drugs such as nicotine gum, other tobacco cessation products, pain relievers, cough medicine, cough drops, and antacids are taxable. Products with a "Drug Facts" box on the label are taxable as an over-the-counter drug.

**K) Will tax still be imposed on breath mints but not candy?**

No. Breath mints that are ingested by humans for taste or nutritional value are considered to be food beginning July 1, 2004. Candy is still food. Therefore, candy and breath mints are not taxable.

**L) Are ingredients used in baking taxable?**

Ingredients used in baking goods that are consumed by humans for taste or nutritional value are not taxable as food. Ingredients such as vanilla extract, food coloring, sugar, sweetener, flour, gelatin, pectin, chocolate, peanut butter, cake mixes, marshmallows, nuts, spices, and similar items are not taxable.

**M) Is baking soda taxable?**

If baking soda is sold for use in baking or cooking then it is considered food and not taxable. However, baking soda that is sold for any other purpose, such as a deodorizer, is taxable since it is not being purchased to be ingested by humans for taste or nutritional value. Since vendors may not know how the consumer will use the product, the taxability will be determined based primarily on the marketing materials placed on the packaging. For example, if the packaging primarily markets the product for washing clothes or as a deodorizer, the product is taxable.

**N) Are cooking wines and extracts taxable or exempt?**

Although cooking wines and extracts contain alcohol, they are not meant for drinking. They are used in food preparation and are an ingredient that is within the definition of a food and not taxable.

**O) Are condiments such as ketchup and mustard considered food?**

Since condiments are substances ingested by humans for taste or nutritional value, these items would be considered food and not taxable. Ketchup, mustard, mayonnaise, salad dressing, barbecue sauce, cocktail sauce, and hot sauce are just a few examples of condiments.

**P) Are vegetable and herb plants taxable?**

Yes. If it is sold in potted form (e.g. in potting soil) then it is taxable as a plant. But, if an herb is cut and packaged for consumption then it is food and not taxable.

**Q) Fruit, vegetable, and flower seeds are sometimes eaten. How do we differentiate between these types of seeds and seeds sold for gardening?**

If the seeds are sold for eating, they are food and not taxable. Seeds sold for gardening are not food and taxable.

**R) How does the new definition of "food" change the taxability of products sold in vending machines?**

Vendors who have predetermined rate agreements (R.C. 5739.05) prior to July 1, 2004 need to contact the Ohio Department of Taxation since the change in the definition of "food" may have an effect on their agreement. Please contact the Audit Division at 614-644-1701.

**S) Some items, such as salt, have multiple uses. How will they be taxed?**

Since vendors may not know how the consumer will use the product, the taxability will be determined based primarily on the marketing materials placed on the packaging. For example, table salt, including such things as Kosher salt, canning salt, and sea salt, are food products. Salt marketed to be used primarily for ice cream freezers or to melt snow is not food and is taxable.

**T) Is dog and cat food taxable?**

Yes. Only food that is consumed by humans is not taxable. Food purchased for household pets is taxable.

**U) Does the new definition of food change what items can be purchased with food stamps?**

No. The new definition does not change the eligibility of items that can be purchased with food stamps. Individuals can still purchase the same items with food stamps as they did before. Federal law governs what items may be purchased by food stamps and that determination is independent of Ohio's definition of "food." If you have any further questions regarding food stamps, please contact a Food and Nutrition Service (United States Department of Agriculture) regional office (Columbus: 614-469-6864; Cleveland: 216-522-4990; or Cincinnati: 513-684-3568) or visit their website at [www.fns.usda.gov](http://www.fns.usda.gov).

Note that under R.C. 5739.02(B)(16), any purchase of "food" as defined by the Food Stamp Act of 1977, 91 Stat. 958, 7 U.S.C. 2012, that is made using food stamps is

exempt from Ohio sales tax regardless of whether the item meets the Ohio definition of "food."

**Reference Chart**

Below is a list of items that have been categorized according to whether they are food or not under R.C. 5739.01(EEE)(2). This list is not all-inclusive but is intended as a guideline.

<b>Food</b>	<b>Non-food</b>
Bottled Water (including carbonated, distilled, and mineral)	Water-Sweetened (including artificially)
Tea-Unsweetened	Tea-Sweetened (including artificially)
Coffee-Unsweetened	Coffee-Sweetened (including artificially)
Coffee (with milk or milk product)	Soda Pop
Fruit Juice (greater than 50% juice content)	Fruit Juice (less than 50% juice content)
Vegetable Juice (greater than 50% juice content)	Vegetable Juice (less than 50% juice content)
Ice (sold at a grocery, convenience, or similar stores)	Ice (used as a refrigerant and not sold at a grocery, convenience, or similar stores)
Milk and milk products (including ice cream)	Sweetened beverages without milk or milk substitutes
Non-alcoholic beer (less than 0.5% alcohol content per volume)	Alcoholic beverages (with 0.5% or more alcohol per volume)
Soy products	Sports/Energy Drinks (e.g. Gatorade®, Powerade®)
Bakery Items (e.g. cake, cookies, pastry, etc.)	Vitamins
Cocoa, tea bags, coffee beans	Pet food
Nuts (All types)	Cough drops
Popcorn	Cod Liver Oil
Chips and other snacks	Antacids
Pudding/gelatin	Over-the-counter-drugs
Condiments (ketchup, mustard, etc)	Nicotine Gum
Baking ingredients	Gelatin Capsules
Cereals and cereal products	Diet drugs and supplements
Sugar and sugar substitutes	Mineral Oil
Popsicles/Sno-Cones	Powdered Drinks (Tang®, Kool-Aid® etc.)
Cooking oils (vegetable, canola, olive, etc.)	Lemonade
Extracts (vanilla, peppermint, almond, etc.)	Protein Drinks (with Supplemental Facts box)
Candy, chewing gum, breath mints	Toothpaste and Mouthwash

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If you have any questions regarding this information release, contact Taxpayer Services at 1-888-405-4039, or e-mail us through our web site: [www.tax.ohio.gov](http://www.tax.ohio.gov).

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## **ST 2012-01 – Restaurants and Other Food Vendors—Issued December 2012, Revised August 2014**

This Information Release discusses the application of Ohio sales tax to food sold by restaurants and other food vendors for consumption on the premises and all sales of soft drinks. Its intent is to give guidance in these areas and to answer frequently asked questions. The August 2014 revision addresses four additional questions, N, O, P and Q. For an in-depth discussion of the taxability of beverages based on their ingredients, please see Information Release ST 2004-1 Food Definition.

### **Applicable Law**

Ohio imposes sales tax “on each retail sale made in this state.” R.C. 5739.02.

R.C. 5739.01 (EEE)(1) defines food as follows:

“Food” means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. “Food” does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

R.C. 5739.01 (EEE)(2)(c) defines soft drink as:

...nonalcoholic beverages that contain natural or artificial sweeteners. “Soft drinks” does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

All retail sales of food are presumed to be taxable, unless the vendor establishes that the sale is exempt. Sales tax “does not apply to sales of food for human consumption off premises where sold.” R.C. 5739.02 (B)(2).

R.C. 5739.01 (K) defines premises as follows:

...any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.

### **Questions and Answers**

Below are some typical questions asked by taxpayers regarding sales of food and soft drinks followed by the Department's responses based on the applicable provisions in the Ohio Revised Code. These Q&As are provided to help you understand how the law applies to your business.

**A) What sales of food and other items are taxable?**

Answer: All food sold for consumption on the premises of your restaurant is taxable. Food sold to be consumed off the premises is not taxable. All other sales (i.e., soft drinks, toys, memorabilia, etc.) are always taxable.

**B) Does the food have to constitute a meal to be considered taxable?**

Answer: No. Cookies, pastries, baked goods, ice cream and frozen yogurt are food and are taxable if consumed on the premises.

**C) What if my business operates as part of a food court?**

Answer: The common seating area is considered “on premises” and taxability applies.

**D) What if my business operates as a food truck?**

Answer: If you provide a seating area for your customers, “on premises” taxability applies.

**E) How do I determine if my customer’s food purchase is taxable?**

Answer: The best way to determine the taxability of a food purchase is to ask your customer if their purchase is “for here” or “to go.”

**F) When are soft drinks taxable?**

Answer: The retail sale of soft drinks is always taxable, whether they are consumed on or off the premises.

**G) What other beverages are considered a soft drink for sales tax purposes?**

Answer: All beverages that are sweetened naturally or artificially and do not contain fifty percent (50%) or more pure fruit juice are soft drinks unless they contain dairy products and/or dairy substitutes (i.e., milk, cream, whey, soy milk, almond milk, etc.).

**H) If my restaurant only has two (2) tables with chairs, am I required to ask my customers if their purchase is “for here” or “to go?”**

Answer: Yes. The taxability of food is determined by whether or not the customer chooses to consume the food on the premises or take it with them off the premises. The only way to determine the customer’s intent is to ask the customer “for here” or “to go.”

**I) If my restaurant is located in a food court and seating is provided by the mall for my customers to sit down and eat, is that considered premises even though I don’t own the tables, chairs and/or booths?**

Answer: Yes.

**J) If my restaurant is located in a food court with its own designated seating, but there is also seating outside of the restaurant provided by the mall for customers to sit down and eat, is the seating provided by the mall also considered premises for my restaurant?**

Answer: Yes.

**K) Is the parking lot considered premises if I own or lease the building and the surrounding real estate?**

Answer: Yes.

**L) If I fail to collect the proper amount of sales tax from my customers am I responsible for the deficiency?**

Answer: Yes. If you fail to properly collect sales tax from your customers and/or fail to remit the proper sales tax to the State of Ohio, your business is liable for the sales tax deficiency. Further, owners, officers and other responsible parties of the business are personally liable for the failure to collect and remit the proper sales tax.

**M) Is there a way that I can voluntarily come forward and pay additional sales tax owed?**

Answer: Yes, through the Department's voluntary disclosure program. The Department's voluntary disclosure program allows taxpayers with unpaid sales tax liability to voluntarily come forward and pay the tax due. In exchange for voluntarily coming forward, the Department agrees to waive civil and criminal penalties and limits the look back to 36 months, except for tax collected, but not remitted. All sales tax collected from customers, but not remitted, must be paid. For more information regarding voluntary disclosure please visit the Department's website at: [http://tax.ohio.gov/channels/other/documents/ST\\_VDA\\_Q&A.pdf](http://tax.ohio.gov/channels/other/documents/ST_VDA_Q&A.pdf).

**N) If a customer states that his or her order is "to go" but sits at a table and eats it on-premises, am I required to approach the customer and collect sales tax?**

Answer: No.

**O) Am I required to ask the customer at a drive-through window if the order is "for here" or "to go"?**

Answer: No. However, your recordkeeping system must clearly separate the drive-through sales from other sales.

**P) Why can't a QSR charge sales tax on everything it sells?**

Answer: Ohio is unique in that the Ohio Constitution article XII, Section 3 prohibits the state from imposing sales tax on sales of food for consumption off the premises. This law can only be changed through voter passage of a state-wide referendum.

**Q) Is it okay to post a sign or signs in my restaurant letting my customers know that the law requires me to collect sales tax on food consumed on the premises?**

Answer: Yes.

If you have any questions regarding this information release, please contact our Taxpayer Service Center at 1-888-405-4039, or e-mail us through our web site: [tax.ohio.gov](http://tax.ohio.gov).

OHIO RELAY SERVICES FOR  
THE HEARING OR SPEECH IMPAIRED  
Phone: 1-800-750-0750

## Sales and Use Tax Voluntary Disclosure

Companies and tax practitioners frequently contact the Sales and Use Tax Division of the Ohio Department of Taxation ("division") regarding unpaid sales and use tax liabilities and ask if the company can voluntarily come forward to resolve the liabilities without incurring penalties. The department is committed to promoting taxpayer compliance. In an effort to accomplish this objective, a voluntary disclosure agreement (VDA) is available to taxpayers who voluntarily come forward in order to comply with Ohio's tax laws. Companies are eligible for voluntary disclosure if they submit a written voluntary disclosure request to the division prior to any oral or written contact by the Audit Division, Tax Discovery Division, or Investigation and Enforcement Division of the Ohio Department of Taxation.

### Am I Eligible for Voluntary Disclosure if I Have No Past Tax Liability?

No. If the company has no sales or use tax liability for prior periods, the division will not enter into a voluntary disclosure agreement. If in the future the company is required to collect and remit sales tax or incurs use tax liability, the company must register with the department at that time.

### Am I Required to Pay Tax for Past Periods?

If tax has been collected from customers but not remitted, there is no limitation to the lookback period. All tax collected must be paid. Tax collected, but not remitted, is subject to a 10% penalty. If the company should have collected tax on its Ohio sales but did not, or if Ohio tax is due on purchases, generally the tax and interest must be paid for the 36 months prior to submission of the voluntary disclosure request. However, the lookback period may vary depending upon the date when the company began nexus-creating activities in Ohio or began making untaxed purchases in Ohio.

### What Are the Advantages of Voluntary Disclosure?

In exchange for the company entering into voluntary disclosure, the division will agree to:

- Waive civil and criminal penalties (except for tax collected, but not remitted).
- Limit liabilities for sales and use tax to the voluntary disclosure period (except for sales tax collected, but not remitted).<sup>1</sup>
- Not disclose the company's identity to other parties.<sup>2</sup>

<sup>1</sup> This limitation does not apply to amounts assessed prior to the date the taxpayer requests the voluntary disclosure.

<sup>2</sup> The department may be required to disclose information regarding the company pursuant to its information sharing agreement with other states, the federal government and Canada, or as otherwise provided by law. Ohio Rev. Code 5703.21 and 5703.40.

- Allow the company to remain anonymous, if desired, until the signed agreement is returned.

The department reserves the right to examine records for the disclosure period. The department also reserves the right to void the agreement if the taxpayer fails to comply with the requirements of the voluntary disclosure program.

### How Do I Request Voluntary Disclosure?

To initiate a voluntary disclosure, the company or tax practitioner must complete a Request for Sales and Use Tax Voluntary Disclosure, Ohio form ST VDA. The form is available on the department's Web site at [tax.ohio.gov](http://tax.ohio.gov). The request can be submitted to the division via U.S. mail or via e-mail at [SalesVDA@tax.state.oh.us](mailto:SalesVDA@tax.state.oh.us). Upon receipt of the request, the division will assign a voluntary disclosure file number for tracking purposes. The division will also send the company or tax practitioner the voluntary disclosure agreement and a letter with instructions on how to complete the voluntary disclosure process. At this point, any audit action by the Audit Division is deferred until the voluntary disclosure process is complete or terminated. If the voluntary disclosure process is terminated without an agreement, the Audit Division may initiate audit contact.

### How Do I Complete the Voluntary Disclosure Process?

A company must, within 60 days from receipt of the voluntary disclosure agreement, do the following to complete the voluntary disclosure process:

- Complete, sign and return the voluntary disclosure agreement.
- Register with the department via the Ohio Business Gateway at [business.ohio.gov](http://business.ohio.gov) and begin complying with the Ohio sales and use tax law beginning on the day following the last day of the disclosure period.
- Submit a spreadsheet showing Ohio sales and use tax due by county and the total interest due under the voluntary disclosure. Using the appropriate spreadsheet, form ST CLC or ST BLC, that is available on the department's Web site at [tax.ohio.gov](http://tax.ohio.gov) will expedite completion of the voluntary disclosure process. The Web site provides an explanation that will assist you in choosing the appropriate spreadsheet.
- Send a check for the total amount of tax and interest due.

Once the division has reviewed the documentation provided and verified there has been no prior contact by the department, a signed copy of the agreement will be returned.

Any questions should be directed to the division at:

Ohio Department of Taxation  
Sales and Use Tax Division  
P.O. Box 530  
Columbus, OH 43216-0530  
OR

E-mail: [SalesVDA@tax.state.oh.us](mailto:SalesVDA@tax.state.oh.us)



### Request for Sales or Use Tax Voluntary Disclosure Agreement (VDA)

A taxpayer is not required to reveal its identity in order to request a VDA. A representative may submit an anonymous request on the taxpayer's behalf. Alternately, a taxpayer may initiate its own request and provide the company name and other information on the appropriate lines.

Representative name \_\_\_\_\_

Representative address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ ZIP code \_\_\_\_\_

Email \_\_\_\_\_ Telephone \_\_\_\_\_ Fax \_\_\_\_\_

Company name \_\_\_\_\_

Company address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ ZIP code \_\_\_\_\_

Email \_\_\_\_\_ Telephone \_\_\_\_\_ Fax \_\_\_\_\_

Type of VDA requested (check all that apply):

- Sales tax
- Consumer's use tax
- Seller's use tax (out-of-state sellers only)

Type of business \_\_\_\_\_

Type of products or services sold in Ohio \_\_\_\_\_

Method of marketing products or services in Ohio \_\_\_\_\_

Any other nexus-creating activities in Ohio \_\_\_\_\_

Date activities began in Ohio \_\_\_\_\_ Has sales tax been collected?  Yes  No

If already registered for sales or use tax, provide registration number \_\_\_\_\_

Estimated sales tax liability \_\_\_\_\_ Estimated use tax liability \_\_\_\_\_

Has the company been contacted by the Ohio Department of Taxation regarding a sales or use tax audit, enforcement action or otherwise?  Yes  No

If yes, please describe nature of contact by the department \_\_\_\_\_

Signature \_\_\_\_\_ Date \_\_\_\_\_

**Submit completed application to:**  
 Ohio Department of Taxation  
 Sales & Use Tax Division  
 P.O. Box 530  
 Columbus, Ohio 43216-0530  
 OR  
 E-mail: SalesVDA@tax.state.oh.us



www.state.oh.us/tax

STATE OF OHIO
DEPARTMENT OF TAXATION
AUDIT DIVISION
PO BOX 530, COLUMBUS, OHIO 43216-0530

ST 161 -A
(Rev. 10/14)

APPLICATION FOR PREARRANGED AUTHORITY

The undersigned vendor states it is a food service operator licensed under R.C. 3732.03 and that prearranged authority will relieve it from the administrative burden and cost of maintaining large quantities of daily primary records. Therefore, the vendor hereby makes application to remit the sales tax on the basis of a prearranged agreement as provided in R.C. 5739.05 (C) and Ohio Admin. Code 5703-9-08.

Vendor's Name \_\_\_\_\_

DBA \_\_\_\_\_

Street Address \_\_\_\_\_

City \_\_\_\_\_ State \_\_\_\_\_ Zip Code \_\_\_\_\_

Vendor's License No. \_\_\_\_\_ NAICS Code \_\_\_\_\_

Number of locations with the same entity ID \_\_\_\_\_ If this application is for more than one location with the same entity, use reverse side to list license numbers and location addresses.

State principal type of business activity and product sold \_\_\_\_\_

If business is seasonal, list the months the business is in operation

R.C. 5739.05(C) allows the tax commissioner to determine the proportions and ratios in a prearranged agreement by either a test check conducted by the commissioner under terms and conditions agreed to by the commissioner and the vendor or by any other method agreed upon by the vendor and the commissioner. Please detail below the methodology requested as the basis for the agreement.

The individual signing on behalf of the vendor hereby attests that he or she has the authority to legally sign this application on behalf of the vendor.

Date

Signature

Title

Telephone Number

Email Address



The parties to this Prearranged Agreement (“Agreement”) are \_\_\_\_\_ (hereinafter “Vendor”) and the Ohio Department of Taxation (“ODT”) (collectively “Parties”). This Agreement is authorized by R.C. 5739.05(C) and sets forth the proportions and ratios the Vendor will use to remit sales tax. This Agreement is valid only for the filing periods \_\_\_\_\_ through \_\_\_\_\_ (“Agreement Term”).

1. The Parties agree that the proportions and ratios to be used as the basis for this Agreement shall be determined using the following methodology:
2. The Parties further agree that Vendor shall remit sales tax on all taxable retail sales based upon the following taxable sales percentage(s).

Location	Vendor’s License No.	Taxable Sales Percentage	Tax Rate

3. The Parties agree that as long as the Vendor complies fully with the provisions of this Agreement that the Vendor is absolved of any additional tax liability based on sales made during the Agreement Term except liability from unreported sales. This relief from liability does not apply if the Vendor has failed to notify ODT in writing of any change in business activity that would increase the Vendor’s tax liability.
4. The Vendor agrees that during the Agreement Term, it will not collect sales tax from the consumer.
5. The Vendor agrees to notify ODT, either personally or via certified mail, of any changes in the nature of the Vendor’s business that may affect the validity of the terms of this Agreement. Further, the Vendor agrees that at any time, ODT may request a review of the percentages specified in this Agreement if ODT believes the nature of the Vendor’s business has so changed that it may affect the validity of the terms of the Agreement.
6. The Parties agree that a change in the provisions of the Agreement based on a review will become effective at the beginning of the Vendor’s next reporting period. An adjustment to the percentage of taxable sales because of a change in the combined state and local sales tax rate may be reflected in an amendment to this Agreement without performing a new analysis



and becomes effective beginning the first day of a change in the combined state and local rate.

- 7. This Agreement may be cancelled by either the Vendor or ODT effective on the last day of the month in which the Vendor or ODT receives, personally or via certified mail, a written notice thereof with the other party. Failure by the Vendor to comply with the provisions of this Agreement is sufficient reason to cancel this Agreement and to reinstate the requirement that the Vendor comply with all provisions of Chapter 5739 of the Ohio Revised Code.
- 8. Any notice required by this Agreement shall be provided in writing to the appropriate party as follows:

Ohio Department of Taxation	Vendor
Audit Division ATTN: Executive Administrator 4485 Northland Ridge Blvd., 3 <sup>rd</sup> Floor Columbus, Ohio 43229	

This Agreement shall be considered confidential and not subject to disclosure except as required by law, or as otherwise provided in this Agreement.

The individual signing on behalf of Vendor hereby attests that he or she has the authority to legally bind Vendor to this Agreement.

Ohio Department of Taxation	Vendor
By: _____	By: _____
Printed Name: _____	Printed Name: _____
Title: _____	Title: _____
Date: _____	Date: _____

## **“Is that for here or to go?”**

The Ohio Department of Taxation’s sales tax audits of foodservice operations

Starting early last year, the Ohio Department of Taxation (DOT) began auditing sales tax collections of selected foodservice operations. The audits may be random or initiated due to a suspicion developed from research of existing sales data maintained by the DOT.

DOT sends agents into restaurants without announcing their presence. The agent typically will make a purchase to determine if the sales person asks “Is that for here or to go?” The agent may locate himself/herself within listening distance of the sales counter to observe and make note of the frequency that the sales person asks the same question of other customers.

Under Ohio law, all sales are presumed to be subject to the sales tax unless the vendor can document otherwise.

If the sales person does not ask this question and does not charge sales tax (because they assumed the sale was to go), DOT holds the position that the business has violated the law. DOT may conclude that the observed practice was in place for the preceding 3 years (although the statute of limitations is 4 years). DOT can require the business to pay the shortfall in sales tax collection that this represents. One QSR franchisee reported to the Ohio Restaurant Association (ORA) that this amounted to \$30,000.

The Department of Taxation notes that failure to collect sales taxes can include a penalty in addition to the requirement to pay taxes owed but not collected. They report to the ORA that this option is not often enforced because their goal is to encourage vendors to comply with the sales tax laws, not penalize those that don't.

ORA members are encouraged to take heed of the sales tax laws and especially to train sales persons on its proper implementation. The Department’s Notice describing the law is attached.



## Quick Service Restaurants

July, 2014

This document provides guidance to quick service restaurants (QSRs) by citing the applicable sales tax statutes in the Ohio Revised Code (R.C.) and answering frequently asked questions. Information Releases containing more detailed guidance can be found on ODT's website: ST 2012-01 – Restaurants and Other Food Vendors and ST 2004-01 – Food Definition. In general, food consumed on premises ("for here" or "dine in") is subject to sales tax paid by the customer. Food not consumed on premises ("to go" or "take out") is exempt from sales tax. A soft drink is always taxable, no matter where the beverage is consumed.

To properly comply with sales tax law, restaurateurs need to consider the following:

- What is considered food?
- Are certain beverages considered food?
- What is considered premises?
- What if the transaction mixes taxable and non-taxable items?

### Applicable Law

#### Food:

"...means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. "Food" does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco." R.C. 5739.01(EEE)(1)

All retail sales of food are presumed to be taxable, unless the vendor establishes that the sale is exempt. Sales tax does not apply to "sales of food for human consumption off the premises where sold". R.C. 5739.02(B)(2); also refer to the Ohio Constitution, Article 12, Section 3(C).

#### Soft drinks:

"...means nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume." R.C. 5739.01(EEE)(2)(c)

#### Premises:

"...any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person." R.C. 5739.01(K)

---

## **Questions and Answers**

### **1) What sales are taxable?**

All food sold for consumption on the premises of your restaurant is taxable. Food sold to be consumed off the premises is not taxable. All other sales (e.g., soft drinks, toys, memorabilia) are always taxable.

### **2) Does the food have to constitute a meal to be considered taxable?**

No. Cookies, pastries, baked goods, ice cream and frozen yogurt are food and are taxable if consumed on the premises.

### **3) What beverages are considered a soft drink for sales tax purposes?**

All beverages that are sweetened naturally or artificially and do not contain more than 50% pure fruit or vegetable juice are soft drinks unless they contain dairy products and/or dairy substitutes. NOTE: If sugar or sweetener is added to an unsweetened beverage at the request of a customer at the drive-through window, the Department would not consider the beverage to be a soft drink.

### **4) When are soft drinks taxable?**

The retail sale of soft drinks is always taxable, whether consumed on or off the premises.

### **5) What beverages are considered food for sales tax purposes?**

These beverages are considered food for sales tax purposes:

- unsweetened, such as black coffee or tea
- contain dairy products and/or dairy substitutes (e.g., milk, cream, soy milk)
- contain more than 50% fruit or vegetable juice

### **6) How do I determine if my customer's food purchase is taxable?**

Ask your customer if their purchase is "for here" (taxable) or "to go" (exempt).

### **7) If my restaurant is located in a food court and seating is provided by the mall for my customers to sit down and eat, is that considered on-premises even though I don't own the tables, chairs and/or booths?**

Yes. The common seating area is considered on-premises and taxability applies.

### **8) If I fail to collect the proper amount of sales tax from my customers, am I responsible for the deficiency?**

Yes; sales tax is a "trust" tax. The State of Ohio, the counties, and the transit districts trust the vendor to collect and remit the sales tax. If the proper sales tax is not collected from your customers and/or remitted to the State of Ohio, your business is liable for the sales tax deficiency. Further, owners, officers and other responsible parties of the business are personally liable for the failure to collect and remit the proper sales tax. R.C.5739.33

# **Sales/Use Tax Basics for a Quick Serve Restaurant (QSR)**

Phyllis Shambaugh, Division Counsel, Sales & Use Tax  
Chad Leon, Audit Manager  
July 23, 2014



## Applicable Law

### GENERALLY



- Ohio imposes sales tax “*on each retail sale made in this state.*” R.C. 5739.02.

Therefore, all retail sales of food are presumed to be taxable, unless the vendor establishes that the sale is exempt.



## Applicable Law

### VENDOR DUTIES

- *“Each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of tax payable on each retail sale.” R.C. 5739.03.*
- *“If any vendor fails to collect the tax...on any transaction subject to the tax, the vendor shall be personally liable for the amount of the tax applicable to the transaction.” R.C. 5739.13.*



## Applicable Law

### FOOD FOR HUMAN CONSUMPTION

- *“...no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.”*  
Ohio Const. Article XII, Section 3(C). See also R.C. 5739.02(B)(2).

Sales tax does apply to food consumed on-premises. See R.C. 5739.01.



## Food Defined

- R.C. 5739.01 (EEE)(1) defines food as follows:  
*“Food” means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. “Food” does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.*



## Soft Drink Defined

- R.C. 5739.01 (EEE)(2)(c) defines soft drink as:  
*...nonalcoholic beverages that contain natural or artificial sweeteners. "Soft drinks" do not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contain greater than fifty per cent vegetable or fruit juice by volume.*

## Premises Defined



- R.C. 5739.01 (K) defines premises as follows:  
*...any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.*

## QSR Basics

### OVERVIEW

- When is the sale of food taxable?
- When are soft drinks taxable?
- What beverages are considered a soft drink for sales tax purposes?
- What is considered premises?

## When Is the Sale of Food Taxable?

- ALL food sold for consumption on-premises is taxable.
- Food sold for consumption off-premises is not taxable.



## When Are Soft Drinks Taxable?

- Soft drinks are not food and are ALWAYS taxable.
- Does not matter where consumed.





## What Beverages Are Considered Soft Drinks?

- Sweetened naturally or artificially
- Contains 50% or less pure fruit or vegetable juice



HOWEVER, if it contains dairy products and/or dairy substitutes, the beverage is FOOD and not taxable.

## What Beverages Are Considered Food?

- Unsweetened, such as black coffee or tea
- Contains dairy products and/or dairy substitutes (e.g., milk, cream, soy milk)

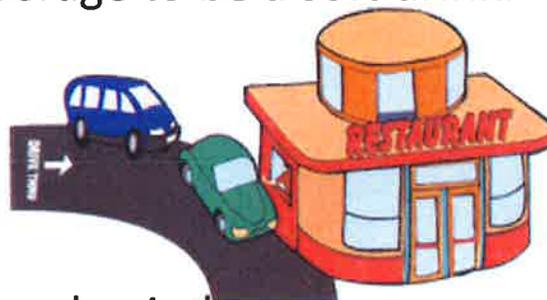


- Contains more than 50% fruit or vegetable juice

## What Beverages Are Considered Food?

NOTE: If sugar or sweetener is added to an unsweetened beverage at the request of a customer at the drive-through window, ODT **does not** consider the beverage to be a soft drink.

The addition of the sugar is a convenience for the customer at the drive-through window.



## Beverage Examples

Coffee – black

FOOD

Coffee with sugar

SOFT DRINK

Coffee with cream and sugar

FOOD



## What Is Considered Premises?

- Any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person

- Food court seating

The common area adjacent to the food court is considered on-premises.



- Big box store seating

- Seating located at your restaurant (inside and outside)

## How to Achieve Sales Tax Compliance



### PEOPLE



- Training and monitoring of employees
- The “For Here or To Go” question must be asked to determine if the sale is exempt.
- All drive-through window sales are presumed to be “To Go”. Therefore, the “For Here or To Go” question does not need to be asked.

## How to Achieve Sales Tax Compliance

### SYSTEMS



- Verify that your POS is programmed to charge tax on **all taxable items**.
- All retail sales are taxable until proven **otherwise** per O.R.C. 5739.02; consider programming the POS to make “taxable” the default for every item purchased at the counter, with an override for take-out food.
- Ensure that sales at the drive-through window can be segregated.

## How to Achieve Sales Tax Compliance



### OTHER

- File complete, accurate and timely returns and remit the tax due timely.
- Sign up to receive Tax Alerts.
  
- Consider a pre-arranged agreement.  
(R.C. 5739.05(C))
  - Taxable % based on test check
  - Taxable % based on other methodology acceptable to both the vendor and ODT

## QSR Guidance



Department of  
Taxation

[www.tax.ohio.gov](http://www.tax.ohio.gov)

- Guidelines
- Information Release ST 2004-1  
Food Definition Change Effective July 1, 2004  
(issued May 2004 and revised June 2007)
- Information Release ST 2012-01  
Restaurants and Other Food Vendors  
(issued December 2012)
- "Tax Alert" for Quarterly Record Retention Notice

## Common Ohio Business Tax Registrations for QSRs

- Vendor License for every location  
(including those related to a master cumulative license)
- Consumer's Use Tax Account
- Commercial Activity Tax (CAT)
- Employer Withholding



## Ohio Universal Sales Tax Return (UST 1) Completion

Must file electronically using the Ohio Business Gateway or Telefile (single location only)

- Line 1 – Gross Sales – Enter total sales.
- Line 2 – Exempt Sales – For a QSR, enter “to go” sales.
- Line 3 – Net Taxable Sales – Subtract Line 2 from Line 1.

# Ohio Business Gateway

Electronic Filing Services Login



## Existing Users

Username :

Password :

By logging in, I agree to the [terms of service](#)

## New Users

[Create an OBG Username](#)

If you are starting a new business in Ohio, you may need more than just an OBG Username. [Please click here to learn more.](#)

[Forgot your username or password?](#) [Having trouble logging in?](#) [Review System Requirements](#)

[For additional topics, please visit our Help and Support Page.](#)



[For more information about the services available through the Ohio Business Gateway, please visit our home page.](#)

## Ohio Universal Sales Tax Return (UST 1) Completion

- Line 6 – Tax Liability – Enter the greater of the tax collected or that which should have been collected. (Should equal total tax liability reported in county section of return.)
- Line 7 – Discount – Enter .75 of 1% (.0075) of Line 6 IF UST-1 AND full payment are received on or before due date. (23<sup>rd</sup> of each month)
- Line 8 – Additional Charge – If UST-1 is received after the due date or without full payment
- Line 9 – Net Amount Due – Line 6 minus Line 7 OR Line 6 plus Line 8

## Ohio Universal Sales Tax Return (UST 1) Completion

Payment options include:

- Credit card
- ACH debit
- ACH credit
- Paper check
- Money order



## Cumulative Filers

- Required to obtain and maintain an active vendor license for each fixed place of business.
- **Must report** taxable sales and tax liability on a county-by-county basis, **not** on a location-by-location basis.
- Required to maintain in your records a location-by-location breakdown of your sales and tax collected for audit purposes.

## What Constitutes a Properly Completed Return?

- Gross sales entered on Line 1
- Exempt sales entered on Line 2
- Taxable sales entered on Line 3
- Net amount due on Line 9

Each line of the return should be supported by documentation from your books and records.



## “Why” Does a Sales/Use Tax Audit Occur

A vendor can be selected for audit for a variety of reasons.

- Vendor’s filing history (or lack thereof)
- Observed or reported non-compliance
- Data analytics



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## “What” Is a Sales Tax Audit

Sales tax audit: formal review of a vendor's sales and sales tax returns to confirm:

- Gross sales have been properly reported.
- Exempt sales have been properly reported.
- Taxable sales have been properly reported.
- Tax liability has been remitted to the State of Ohio, including the county and transit piggyback taxes.



## “What” Is a Use Tax Audit

Use tax audit: formal review of vendor's purchases and use tax returns to confirm:

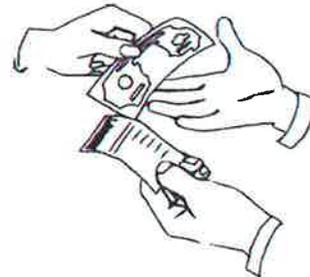
- Equipment purchases and consumable goods have been properly classified as taxable or exempt.
- Taxable purchases have been reported.
- Use tax has been remitted for taxable purchases.



## What to Expect During an Audit

Sales tax audits normally encompass the most current 3 years UNLESS the audit finds failure to remit collected sales tax. In that case, the audit will include ALL periods not remitted.

- Sales tax is a trust tax and the money belongs to the taxpayers of Ohio the moment it is collected.
- Key individuals will be held personally responsible for any liability that exists (tax that was not collected or not remitted).



## “Who” Is Involved in the Audit

- Representing ODT
  - Lead tax auditor
  - Auditor’s manager
  - Additional staff if needed
  
- Representing the vendor
  - Business owner
  - Outside representation

**Ohio Department of TAXATION**  
FD-287 (Rev. 06/2013)

**DECLARATION OF TAX REPRESENTATIVE**

**Taxpayer's Name** \_\_\_\_\_

**DEA** \_\_\_\_\_

**Address** \_\_\_\_\_

**City** \_\_\_\_\_ **State** \_\_\_\_\_ **Zip** \_\_\_\_\_

**FED. or Social Security Number** \_\_\_\_\_

**Representative Information**

**Representative's Name & Firm** \_\_\_\_\_

**Address** \_\_\_\_\_

**City** \_\_\_\_\_ **State** \_\_\_\_\_ **Zip Code** \_\_\_\_\_

**Telephone Number** \_\_\_\_\_ **Fax Number** \_\_\_\_\_

**E-mail Address** \_\_\_\_\_

**Authorized Signature**

The taxpayer hereby authorizes the representative identified above to represent the taxpayer to the Ohio Department of Taxation. This authorization includes the authority to view and receive copies of returns, reports of other taxpayer information, and the Department of Taxation concerning the business, property, or transactions and related matters of the taxpayer. It is the intent of this declaration to authorize the representative to act in all matters of the Department of Taxation in which the taxpayer is involved. The taxpayer understands that the acts of the authorized representative may be binding on the taxpayer and legal rights. The taxpayer must indicate all restrictions, if any, to this authorization below.

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## “When” – Audit Timeline

- 1st Contact
  - Telephone call
  - Audit Commencement Letter
- Entrance meeting
  - Explain the audit in detail
- Review of business records
- Other audit procedures
- Preliminary results
- Final review meeting, including
  - Recommended assessment
  - Letter of confirmation
- Payment or Assessment



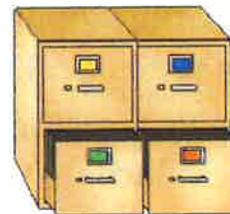
## “Where” Does the Audit Take Place

- Entrance meeting
  - Conducted at the restaurant, perhaps with a tour
- Review of business records
  - At vendor’s facility, or
  - At tax representative’s office, or
  - If records are available electronically, remote review work
- Test check (if conducted)
  - At selected location(s)
- Review of findings
  - In person at either vendor’s facility, or
  - At tax representative’s office



## “How” – Review of Records

- Monthly reports to tie out to tax filings
- Cash register Z-tapes, daily cash register summaries and/or control sheets
- Individual receipts showing the tax has been separately stated
- POS system to ensure proper items are being taxed
- Other records to determine that tax collected was remitted



## “How” – Determining Taxable Sales

- We establish a ratio between taxable sales and gross sales (taxable percentage).
- We apply the taxable percentage to the monthly (or semi-annual) gross sales for the audit period.
- We multiply that by the state + local tax rate.
- We subtract the tax already paid to arrive at the unpaid tax liability.
- Interest is statutory; penalty may be added.
- If unpaid tax liability is de minimis, then returns may be accepted as filed with no assessment.

## “How” – Determining Taxable Sales

- Settlement agreement based on filing history, similar audits and other factors
- Sampling through test check (R.C. 5739.13)

What happens if the vendor won't agree to either the settlement agreement or the test check observation agreement?

## “How” – Determining Taxable Sales

# 10 DAYS

- Ten Day Letter is issued.
- During that 10 day period, the vendor has an opportunity to present an alternate method.
- If an alternate method is not determined or acceptable to ODT, the original methodology will be used OR the assessment **must** be estimated by ODT.



## Methodology for Test Checks

Test Check Observation Agreement Elements:

- The location(s) for test check observations
- The test check schedule
- Observations are based on **what the customer says, not what the customer does**
- Requires vendor to ask EVERY customer whether the transaction is for here or to go (except at the drive-through window)

# Methodology for Test Checks

## Determining the Test Check Schedule



- Representative time period

The vendor and ODT work together to determine a representative time period.

- Selection of dates/times

The vendor and ODT work together to determine the dates and times for the test check.

## Sample Test Check Schedule

	Monday	Tuesday	Wednesday	Thursday	Friday	Saturday	Sunday
Date	1/21/2013	1/22/2013	1/23/2013	1/24/2013	1/25/2013	1/26/2013	1/27/2013
Store #							
Address							
Time	7 am – 10 am	1 pm – 4 pm	10 am – 1 pm	7 pm – 10 pm	4 pm – 7 pm	2 pm – 5 pm	10 am – 1 pm

## What to Expect During a Test Check

- Observations are typically 3-hour blocks over 7 days.
- The auditor notes each transaction on a count sheet, based on how the customer answers the question “For Here or To Go”.
- If the customer says the order is “to go” but then eats it on-premises, the transaction is counted as “to go”.
- If the question is not asked, then the action of the customer is used.
- At the end of the 3-hour period, the auditor’s count sheet is matched with the register tapes.



## Tips for a Smooth Audit

- Ask for and adhere to the audit plan



- Maintain open lines of communication



## Sales/Use Tax Basics for a QSR

### Questions?

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