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State and Local Tax Alert: Ohio Sales Tax on Janitorial Services Clarified: All Cleaning Services Are Not the Same (Especially When the Services Relate to Beer)

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CLIENT ALERT | 12.28.2018

The Ohio Supreme Court has done it again. It announced a sales and use tax decision two days after Christmas and a few days before New Year's Eve. *Great Lakes Bar Control, Inc. v. Testa* (12-27-18), Slip Op. No. 2018-Ohio-5207. (The Court released its [sales and use tax decision involving bobblehead dolls](#) and the resale exemption the day before Thanksgiving.) Thus, in the spirit of holiday celebration, I again take pen in hand to write this alert.

The facts in *Great Lakes* are unremarkable. The legal reasoning, however, is sublime in its simplicity. In that way, the Court's opinion is remarkable.

The taxpayer provided beer line maintenance services to restaurants and bars to remove buildup of unwanted sediments such as bacteria and yeast. Naturally occurring contaminants clogged its customers' beer lines and taps and gave the beer a bad taste.^[1] The taxpayer deployed technicians to inspect the lines, agitate its contents and inject compressed gas to remove sediments. The lines sometimes were flushed with an acid or potassium rinse to inhibit bacteria growth.

The Ohio Department of Taxation determined that these services were taxable building maintenance and janitorial service under R.C. 5739.01 (B)(3)(j). The taxpayer challenged this determination.

Ohio sales tax applies to building maintenance and janitorial services. "Building maintenance and janitorial service" is defined as "cleaning the interior or exterior of a building and any tangible personal property located therein or thereon * * *." R.C. 5739.01(II). The Court focused its legal analysis on whether the beer-line services qualified as "cleaning" as that term is used in the tax statute.

However, the term "cleaning" is not defined in the Ohio tax code. What to do? Every lawyer remembers reading cases and taking exams in law school when the same type of questions were presented: What does a word in a statute mean when the word itself is not defined? What

rationale is most persuasive to support the chosen meaning? Such an exercise requires application of sharp definitions to give meaning and boundaries to words that are themselves more blunt^[2] and soft edged. This is what lawyers, judges and courts are called to do. They rely on words to give meaning to statutes that serve as directional signposts for future conduct and the consequences that follow.

Fortunately, there are “rules of the road” that show us the best or at least a better path to follow in reading and applying the law. These rules are not new. They have been around for centuries and help provide consistency and continuity. The majority relied on these tested axioms to reach its conclusion in *Great Lakes*. They include:

1. When a term is undefined, the term is given its plain and ordinary meaning.
2. When interpreting the language of a statute, words and phrases shall be read in context and construed according to the rules of grammar and common usage.
3. Evaluating the context in which a word is written is essential to a fair reading of the text. The words of a governing text are of paramount concern, and what they convey, in their context is what the text means.
4. Instead of limiting analysis to the hyperliteral meaning of each word, consideration must be given to the ordinary meaning of the word as it is used within the surrounding text.

The Court looked at the common meaning of the word “cleaning” in the context of janitorial services (*i.e.*, services that encompass activity such as washing floors or windows, removing garbage, vacuuming, dusting and the like). In the context of its surrounding words and the actual service being defined, namely “janitorial service,” the Court rejected the argument advanced by the Tax Commissioner to zero in only on the phrase “cleaning” in isolation because it would disregard the importance of the text as a whole. The Court called such an approach a “hyperliteral reading” that falls flat because it disregards the natural connotation of “cleaning” that becomes most apparent when considered in the context of “janitorial services.” That is, the meaning of “cleaning” should not be divided and separated from the term it is itself defining (*i.e.*, janitorial services). This simple, common sense approach got lost when the Tax Commissioner and the Attorney General argued for more tax.

Our tax laws are written by women and men to be read, understood and followed by women and men. The Court understood this and approached the issue rationally. The Court was transparent and clear in its explanation. The terms “cleaning” and “janitorial services” are intertwined in this tax statute, and the Court’s holding abides in that result. The Court concluded that beer-line service does not fit the plain meaning of “cleaning” in the context of “janitorial services.” The Tax Commissioner’s tax assessment was reversed.

Over the years, the Department’s audit policy on taxable janitorial services has been aggressive. That policy was based on the misplaced notion that “cleaning” could mean any decontamination, debugging or waste/dirt removal activity. Virtually anything unwanted and removed has been considered taxable janitorial services by the Department. There was no connection in Department audit policy between cleaning services and concepts normally understood as janitorial services. This result has become financially painful, especially to businesses that manufacture, refine, process or assemble products for sale.

Businesses should evaluate the taxability of transactions (buying and selling) with the decision in *Great Lakes* as a guide. Future sales taxes might be saved and tax refunds might be had. In any event, *Great Lakes* is the contextual signpost that allows for better navigation and selection of a tax path to follow.

If you have any questions about application of *Great Lakes* to your business, please contact us.

[1] “A quart of ale is a dish for a king.” Attributed to William Shakespeare. “If given the truth, the people can be depended upon to meet any national crisis. The great point is to bring them the real facts, and beer.” Attributed to Abraham Lincoln.

[2] In its song, *Jigsaw Falling Into Place*, the band Radiohead writes, “words are blunt instruments, words are sawn-off shotguns.” In his book, *Emperor of Thrones*, author Mark Edwards writes, “words are blunt instruments, better suited to murder than making sense of the world.”