

Cincinnati Reds score Ohio tax break



David M. Kall | Thursday, November 29, 2018

The Ohio Supreme Court recently issued a [divided ruling](#) in *Cincinnati Reds, LLC v. Testa* allowing a use tax break for the Cincinnati Reds baseball team for bobblehead dolls and other promotional items given to some attendees at their home games. Though the Court split 5-2 in the ruling, the majority opinion that Justice Patrick Fischer authored quoted longtime Reds radio announcer Marty Brennaman to hold that “[T]his one belongs to the Reds.”

BACKGROUND

The dispute between the Reds and the state of Ohio centered around whether the Reds purchased bobbleheads for their own use or if, instead, they “resold” the bobbleheads to game attendees. The Ohio Tax Commissioner assessed use tax on the Reds for the promotional items because he ruled that they were the consumer of the items and therefore owed use tax on their purchase.

The Reds countered that they did not use the items themselves, but instead resold them to their patrons who attended their home baseball games. Under Ohio law, the sale of tickets are not “sales” subject to Ohio sales tax. Still, the Reds claimed that the promotional items are sold to the Reds and resold independently from ticket to the game attendees.

Items that are purchased for resale are not subject to sales tax in Ohio. Thus, if the promotional items are resold, then the Reds are not liable as consumers for use tax on their purchase of the items. However, the necessary implication from their argument is that they are required to collect retail sales tax from the

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game attendees on the fair market value of the promotional items. The Reds did not pay tax when they purchased the bobbleheads or collect sales tax from the attendees receiving the items.

TAX BOARD RULES AGAINST REDS

The Ohio Board of Tax Appeals (BTA) initially ruled in favor of the state before the court reversed. The Reds' Chief Financial Officer, Doug Healy, testified before the BTA that the Reds distributed promotional items such as bobbleheads to drive ticket revenue at games that may otherwise be lightly attended. Healy further testified that the Reds advertise through several mediums including radio and television that the items will be given away at the games. According to Healy, fans purchase tickets with the expectation that they will receive the items.

The cost of the promotional items is not separately stated from the ticket prices and the ticket prices do not vary from game to game depending on whether a promotional item is given away to fans or not. Nonetheless, Healy explained to the BTA that the Reds "smooth ticket prices throughout the year" to take into account the cost of the promotional items when setting ticket prices.

Ticket holders are not entitled to promotional items by virtue of holding their ticket. Rather, bobbleheads and other items are purchased on a limited basis and distributed to fans on a first come, first serve basis to the ball game. Healy testified before the BTA that even if fans do not receive an item because the supply runs out, the Reds will "make it right" with another promotional item or complimentary tickets if they complain.

The BTA rejected the Reds' argument because they found that there was no "sale" of the items to the game attendees under Ohio tax law. The BTA ruled that there was no "sale" or "resale" of the items because the game attendees did not pay consideration for the bobbleheads. The BTA found that the cost of the items was not included in the ticket price and further found that many attendees to the games would not receive the bobbleheads or other promotional items. The Reds subsequently appealed to the Ohio Supreme Court.

HIGH COURT REVERSES

The Supreme Court of Ohio ultimately ruled that the Reds did purchase the bobbleheads and other promotional items for resale and therefore were not required to pay use tax on the items.

The court's majority first held that ticket purchasers did pay consideration for the promotional items such that the items were "resold" to them. Even though the ticket prices were the same for all games, the court relied upon Healy's testimony to find that fans paid consideration because they were aware of the promotional items and purchased tickets with the expectation to receive the items. The court further found that the Reds provide replacement items of equivalent value to fans who do not receive the promotional item advertised.

Next, the court held that the promotional items could be "resold" even though the sale of the tickets (i.e., admissions to entertainment) is not a "sale" subject to Ohio sales tax law. Rather, the promotional items are sold independently from the tickets themselves according to the court.

Finally, the court rejected the Tax Commissioner's argument that another, narrower sales tax exemption necessarily meant that the Reds' promotional items are not resold. Under Ohio law, "newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale" are exempt from sales and use taxation. The Tax

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Commissioner argued that other promotional items not listed under this exemption language, such as bobbleheads, are therefore taxable. There would be no need for this exemption, the Tax Commissioner argued, if promotional items and advertising materials were exempt as sales for resale. The Court found the argument unpersuasive.

The dissent authored by Justice Mary DeGenaro and joined by Judge Christine Mayle disagreed with the majority on all three of these points. Most notably, the dissenting opinion found that the evidentiary record supported the BTA's factual findings relating to its finding that attendees did not pay consideration for the promotional items. They therefore would not have reversed the BTA's factual findings in this regard or found that there was an exempt "resale" of the items.

IMPLICATIONS

Going forward, there could be interesting implications for the decision in the *Reds* case. The court's majority failed to address whether or how the Reds should have collected retail sales tax from the attendees to their games who received the bobbleheads. If the items are resold, tax is still due on the resale of the promotional items under Ohio law. Whether and how other sports teams and entertainment venues in Ohio will benefit from this ruling remains to be seen.



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[Team member bio](#)