Ohio: Department of Taxation issues guidance after case resolution and legislation changes

David M. Kall | Monday, October 24, 2016

Corrigan v. Testa

In early May, the Ohio Supreme Court decided the case *Corrigan v. Testa*, in which it held that the state may not tax a non-resident's capital gain income from the sale of an in-state business, because the tax-generating activity was the non-resident's transfer of intangible property rather than Ohio business activity. As the transfer of the intangible property occurred outside of Ohio, the Court held, the non-resident's connection to the state was merely indirect. As we explained at the time, this was an especially significant holding because Ohio is the first state to hold that such taxation violates Due Process.

This month, in light of the *Corrigan* result, the Ohio Department of Taxation (ODOT) issued income tax - information release IT 2016-01 (release) to provide guidance on an equity investor's apportionment of a gain from the sale of a closely held business. The release notes that the Court found that the statute at issue, R.C. 5747.212, was unconstitutional as applied to the taxpayer in the case, but that the general rule, that a capital gain derived from the sale of an intangible asset is allocable to the taxpayer's state of domicile as nonbusiness income, still stands.

Recognizing that guidance is appropriate for other taxpayers who also applied R.C. 5747.212 to compute their income tax liability, the release provides the following:

- A taxpayer need do nothing more if he has already filed a refund application or petitioned an assessment involving application of R.C. 5747.212, but if after reading *Corrigan*, she has additional information to further support her position, she should send that information to the ODOT as soon as possible.
- If a taxpayer believes that *Corrigan* entitles her to a refund of amounts previously paid, she should file amended returns citing the case, *Corrigan v. Testa*, 2016-Ohio-2805, on the "Reasons and Explanation of Corrections" page, and providing a detailed statement containing the factual and legal reasons why *Corrigan* applies.

The refund request must be for payment of income tax within four years of the refund request date, and may not have been the subject of a previous Settlement Agreement with ODOT.

Legislation changes

Last month, the ODOT updated information release ST 1999-04, intended to “enunciate” the application of Ohio sales and use tax to internet access and on-line services. The update is necessary due to the addition of digital advertising services to the definition of nontaxable "personal and professional services” in legislation that took effect on October 12, 2015, HB 466, which specifically exempts digital advertising services from sales and use tax.

Accordingly, “digital advertising services" now means "providing access, by means of telecommunications equipment, to computer equipment that is used to enter, upload, download, review, manipulate, store, add, or delete data for the purpose of electronically displaying, delivering, placing, or transferring promotional advertisements to potential customers about products or services or about industry or business brands."

To the extent that an internet access provider (IAP) or on-line service provider (OSP) is providing its service to a consumer for the consumer's use in business, the IAP or OSP is providing an electronic information service that is subject to Ohio sales and use tax. ST 1999-04 cautions that if an OSP combines many services together for a single fee, and utilizes a vague description on its invoices or in its contract, ODOT may consider these services to be a mixed transaction, and impose the sales and use tax to the entire amount.

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