Ohio Tax Talk: One Company's Trash Is Another's Tax Exemption

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One company's garbage is another company's…sales tax exemption?

On April 22, 2021, the Supreme Court of Ohio issued an opinion in *N.A.T. Transportation, Inc. v. McClain*, 2021-Ohio-1374, a case in which the court meaningfully analyzed a waste hauler's eligibility for the highway transportation for hire exemption under Ohio Revised Code (ORC) § 5739.02(B)(32) ("Transportation for Hire Exemption").

Like many other states, Ohio broadly imposes sales and use tax on the transfer of tangible personal property. *See* Ohio Revised Code (ORC) § 5739.01(B)(1). Accompanying this broad tax, however, is a laundry list of exemptions that taxpayers can utilize—assuming the taxpayer is able to satisfy the often-confusing requirements of the exemption.

The Transportation for Hire Exemption provides a sales and use tax exemption for taxpayers who purchase vehicles that are "primarily used for transporting tangible personal property belonging to others" for hire. Satisfying the exemption's requirements means a tax savings of approximately 6 to 8% on *each* purchased vehicle, certain accompanying equipment, and maintenance services.

The Supreme Court of Ohio's *N.A.T. Transportation* case provides a taxpayer-friendly analysis of the Transportation for Hire Exemption. Importantly, the court's decision departs in certain respects from a previous decision rendered by the court in 2002 that the Ohio Tax Commissioner has commonly relied on to reject waster haulers' eligibility for the exemption. The court's opinion can provide waste haulers operating in Ohio a foundation for claiming the Transportation for Hire Exemption and, therefore, should be considered carefully by taxpayers with vehicle fleets in Ohio.

Ohio's Transportation for Hire Exemption

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The Transportation for Hire Exemption exempts the following transactions from Ohio sales and use tax:

The sale, lease, repair, and maintenance of . . . motor vehicles that are **primarily** used for transporting **tangible personal property belonging to others** by a person engaged in **highway transportation for hire**[.]

(Emphasis added). The phrase "transportation for hire" is defined in ORC § 5739.01(Z)(1) as

the transportation of personal property belonging to others for consideration by . . . [t]he holder of a . . . certificate issued by this state . . . authorizing the holder to engage in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare.

In other words, a taxpayer is engaged in "transportation for hire" if "(1) it holds a permit or certificate described in R.C. 5739.01(Z) and (2) the vehicles are primarily used to (i) transport personal property (ii) belonging to others (iii) for consideration." *See N.A.T. Transportation, Inc.*, 2021-Ohio-1374, ¶ 17.

While the certificate requirement of the "transportation for hire" definition may appear simple, it has defeated taxpayers' arguments for exemption under the Transportation for Hire Exemption. For example, in *Rumpke Container Serv., Inc. v. Zaino* 2002-Ohio-792, 94 Ohio St.3d 304, 762 N.E.2d 995 the Supreme Court of Ohio denied Rumpke's argument for exemption under the Transportation for Hire Exemption because its identification number from the United States Department of Transportation ("USDOT") was not a proper certificate. The court reasoned that Rumpke's USDOT number was *not* a certificate that satisfied the requirement of R.C. § 5739.01(Z) for several reasons.

First, the USDOT number is assigned to Rumpke as a "private motor carrier of property,"[1] not as a for-hire motor carrier as defined in ORC § 5739.01(Z). Second, the regulations promulgated under the Motor Carrier Safety Act of 1984 (which created the USDOT number) provide that the USDOT number provided to Rumpke is an "*administrative identification number* and not a permit or certificate that authorizes the holder to engage in the transportation of

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personal property belonging to others for consideration." *Rumpke*, 2002-Ohio-792, 94 Ohio St.3d 304, 307, 762 N.E.2d 995, 999.

As used in the "transportation for hire" definition within ORC § 5739.01(Z), "personal property" includes "every tangible thing that is the subject of ownership." ORC § 5701.03(A). In Ohio's sales and use tax statutes more generally, the phrase "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[.]" ORC § 5739.01(YY).

The "belonging to others" requirement of the "transportation for hire" definition within ORC § 5739.01(Z), however, is not as clear. In fact, this requirement was the core question presented in *N.A.T. Transportation*.

A taxpayer that establishes each of these requirements of the Transportation for Hire Exemption will be entitled to a meaningful tax savings throughout its business life.

The N.A.T. Transportation Case

N.A.T. Transportation, Inc. ("N.A.T.") is a for-hire motor carrier operating in Northwest Ohio. N.A.T. holds a certificate from the Public Utilities Commission of Ohio ("PUCO") that authorizes it to haul waste items such as iron and steel products, machinery, recyclables, and trash. N.A.T.'s CEO testified before the Ohio Board of Tax Appeals ("BTA") that N.A.T. serves approximately 7,000 residential clients, 700 commercial or industrial clients, and 10 institutional clients. The residential clients are served under two forms of contractual arrangements.

One is a contractual agreement with the political subdivision in which the resident lives (*e.g.*, Wood County) that designate where the waste should be hauled. The other is a less formal contractual agreement, referred to as a "subscription," that does not designate where the waste should be hauled. Roughly 1,000 residential clients are served under the former style of agreement and the balance is served under the latter. All commercial, industrial, and institutional customers were served under formal agreements that designate a landfill to which the waste should be hauled. Each formal agreement labels N.A.T. as a "For Hire Carrier."

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N.A.T. is compensated by its clients via a combination of three variables: (1) a fee for transporting the waste to a designated landfill; (2) a weight-based fee charged by the specific landfill; and (3) a fee charged by the landfill to cover solid-waste-district fees and other fees imposed by the Ohio Environmental Protection Agency ("EPA"). The charge for the transportation of the waste itself depends on the volume of waste for residential clients and by container volume for commercial, industrial, and institutional customers.

N.A.T. uses various types of trucks in its operations, including a 2015 Peterbilt truck, a 2013 Peterbilt truck, and a 2013 Lodal truck. These three trucks were at issue in this particular case. Following the evidence presented at the BTA, the Supreme Court of Ohio noted that "[t]he Lodal truck is designed to pick up and haul residential waste from the curb and is limited to that function. The two Peterbilt trucks are more versatile vehicles that are suited for picking up and hauling trash containers maintained at commercial, industrial, and institutional sites, such as schools." *N.A.T. Transportation, Inc.*, 2021-Ohio-1374, ¶ 2 (internal quotations omitted).

Upon the purchase of these three trucks, N.A.T. sought use-tax exemptions under the Transportation for Hire Exemption. Both the Tax Commissioner and the BTA rejected the applicability of the Transportation for Hire Exemption as to each truck; the Supreme Court of Ohio subsequently affirmed in part and reversed in part. There was no dispute as to whether N.A.T.'s PUCO certificate satisfied the first prong of the transportation for hire requirement set forth in ORC § 5739.01(Z)(1) or whether N.A.T. was compensated for hauling personal property. The outstanding question was whether N.A.T. was hauling personal property belonging to another.

The BTA and the Tax Commissioner held that, under *Rumpke*, hauling waste is *not* considered hauling personal property belonging to others. Once physical possession and control of waste are relinquished, so is ownership. The Supreme Court of Ohio, however, differentiated *Rumpke*, holding that unlike in *Rumpke* where the taxpayer hauled the waste to a landfill it and its affiliates owned, N.A.T.'s final destination is a landfill owned by a third-party. The distinction is crucial because, unlike N.A.T., Rumpke's act of

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transporting the waste to its own landfills was "transporting the waste in furtherance of its business of waste disposal, not as a person engaged in highway transportation of other's property for hire." *N.A.T. Transportation, Inc.*, 2021-Ohio-1374, ¶ 20 (citing *Rumpke*, 94 Ohio St.3d at 309, 762 N.E.2d 995).

The Supreme Court further rejected the Commissioner's theory that waste cannot be the personal property of another because it had been abandoned and, thus, cannot be the subject of ownership. Instead, the court concluded that waste *does* constitute personal property of another for purposes of the Transportation for Hire Exemption when the individual or entity that creates the waste "has an agreement with the hauler that specifies where [the waste] is to be taken for disposal." *Id*. at ¶ 31.

In analyzing the applicability of the Transportation for Hire Exemption, the Supreme Court diverged from the BTA's analysis by analyzing the primary use of *each truck separately* rather than all together. Since the Lodal truck serviced only residential properties and the 6,000 residential customers contracting with N.A.T. via subscription agreements do not designate a specific destination for the waste, the Lodal truck's primary purpose did not satisfy the transporting personal property of another requirement and thus was not eligible for the Transportation for Hire Exemption. In contrast, the two Peterbilt trucks primarily served commercial, industrial, and institutional customers that do designate a specific destination for the waste they produce. Therefore, the two Peterbilt trucks were eligible for the Transportation for Hire Exemption.

Securing the Transportation for Hire Exemption

Ohio courts heavily scrutinize taxpayers' eligibility for tax exemptions, especially at the Tax Commissioner and BTA levels. Therefore, when a taxpayer-friendly decision from the Supreme Court of Ohio provides some guidance for taxpayers, businesses should take note.

N.A.T. Transportation teaches that the operative question when determining whether the waste being hauled is "property of another" as required in ORC § 5739.01(Z) is which party owns the waste during transit. Ultimately, the most favorable fact for the

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taxpayer was that its agreements with commercial, industrial, and institutional customers specifically designated a destination for their waste. Had the agreements with the commercial, industrial, and institutional customers been silent as to that point like the subscription agreement with the residential customers were, the two Peterbilt trucks would have likely been denied exemption just like the Lodal truck.

Additionally, *N.A.T. Transportation* provides taxpayers with relief from the 2002 *Rumpke* decision that the Tax Commissioner cited as a death knell to N.A.T.'s eligibility for the Transportation for Hire Exemption. The distinction drawn between Rumpke and N.A.T.'s business provides taxpayers some direction in determining their own eligibility for the Transportation for Hire Exemption and how to combat the Commissioner's use of *Rumpke* to deny exemptions in the future.

Further, while it may seem like a small detail, the Court shedding light on what a proper certificate is for purposes of ORC § 5739.01(Z) will aid taxpayers in their eligibility analyses.

Pulling from the lessons learned in *N.A.T. Transportation*, taxpayers engaged in waste hauling activities in Ohio should ask themselves:

- Do my contracts with customers designate a final destination for the waste? If the answer is no, consider adding a provision designated a final destination.
- Who owns the waste center to which the waste is transported?
- Am I able to track each truck's usage to support a Transportation for Hire Exemption claim?
- Do I have a proper certificate for my hauling activities?

Conclusion

Taxpayers engaged in transportation activities in Ohio should evaluate the decision in *N.A.T. Transportation* and the discussion in this article to ensure that proper measures are taken to ensure that their purchases are eligible for ORC § 5739.02(B)(32)'s Transportation for Hire Exemption.

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For more information, contact any member of Frost Brown Todd's Tax Practice.

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[1] A "private motor carrier of property" is defined as "a person who transports, by motor vehicle, property of which that person is the owner, lessee or bailee." *See Rumpke*, 2002-Ohio-792, 94 Ohio St.3d 304, 306, 762 N.E.2d 995, 998 (*citing* 53 F.R. 18042, 18054, May 19, 1988).

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