Ohio Administrative Code

Rule 5703-29-13 Commercial activity tax definition of "agent".

Effective: July 17, 2020

(A) An "agent" is defined in division (P) of section 5751.01 of the Revised Code to include a person authorized by another to act on its behalf to undertake a transaction for the other. In certain circumstances, portions of the amounts received by a person defined as an "agent" are excluded from the definition of "gross receipts" under division (F) of section 5751.01 of the Revised Code. The agent is only required to report as a "gross receipt" the portion of the amount received that it retains as a commission or fee rather than the entire amount.

(B)

(1) The supreme court of Ohio has held that an agency relationship "exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks." See Hanson v. Kynast (1986), 24 Ohio St.3d 171, 173, citing Baird v. Sickler (1982), 69 Ohio St.2d 652, 654, Councell v. Douglas (1955), 163 Ohio St. 292, and Bobik v. Indus. Comm. (1946), 146 Ohio St. 187, 191-192. Also see Memorial Park Golf Club, Inc. v. Lawrence, 2000 Ohio Tax LEXIS 471 (BTA No. 99-K-633). An agency relationship is defined as a "consensual fiduciary relationship between two persons where the agent has the power to bind the principal by his actions, and the principal has the right to control the actions of the agent." See Evans v. Ohio State Univ. (1996), 112 Ohio App.3d 724, 744, citing Funk v. Hancock (1985), 26 Ohio App. 3d 107, 110, in turn citing Haluka v. Baker (1941), 66 Ohio App. 308, 312. In a principal-agent relationship, the agent has the legal authority to act on behalf of the principal, and generally the principal is bound by and is liable for those actions. See N&G Construction, Inc. v. Lindley (1978), 56 Ohio St.2d 415, 418, citing Gulf Oil Corp. v. Kosydar (1975), 44 Ohio St.2d 208 (paragraph two of the syllabus) and Canton v. Imperial Bowling Lanes, Inc. (1968), 16 Ohio St.2d 47 (paragraph four of the syllabus). The party asserting the existence of an agency relationship bears the burden of proof in that regard. See Gardner Plumbing, Inc. v. Cottrill (1975), 44 Ohio St.2d 111, 115, citing Union Mutual Life Ins. Co. v. McMillen (1873), 24 Ohio St. 67. Also see Memorial Park Golf Club, Inc, supra. In determining whether an agency relationship exists, the rules of statutory construction applicable to exemptions from taxation must be followed.

Ohio law in this regard is well-established; exemptions from taxation are strictly construed against the claim of exemption and in favor of the taxing authorities. See Natl. Tube Co. v. Glander (1952), 157 Ohio St. 407, 409; Beckwith & Assoc. v. Kosydar (1977), 49 Ohio St.2d 277, 279, and Canton Malleable Iron Co. v. Porterfield (1972), 30 Ohio St. 2d 163, 166. Also see Memorial Park Golf Club, Inc., supra. Thus, in determining whether an agency relationship exists, the facts must be determined under a strict, narrow reading of the definition. Absent proof of an agency relationship, the entire gross receipt must be reported by the person receiving the gross receipt for purposes of the commercial activity tax.

(2) The commissioner will look beyond the wording of the contract to the actual facts and circumstances of the situation to determine whether an agency relationship actually exists. See H.R. Options, Inc. v. Zaino (2004), 100 Ohio St.3d 373.

(C) Division (P) of section 5751.01 of the Revised Code defines "agent" to include certain individuals acting on behalf of another. Each of the following individuals is included in the list in that division and qualifies as an "agent" for purposes of this rule:

(1)

(a) In the case of a person enumerated in division (P)(1) of section 5751.01 of the Revised Code who receives a fee to sell financial instruments, only the fee received to perform this service shall be a gross receipt of the agent pursuant to division (F)(2)(l) of section 5751.01 of the Revised Code.

(b) For example, an out-of-state dealer (i.e., a person without an office or other place of business in Ohio) orchestrates the sale of a bond on behalf of Franklin county, Ohio. The dealer contracts with the county to purchase bonds at a discount to sell them on the county's behalf. The cost of the bond is one thousand dollars; the dealer sells the bond to the client for one thousand fifty dollars. The dealer remits the full purchase price of one thousand dollars to Franklin county, Ohio and retains fifty dollars as an administrative fee. Even though the dealer actually received one thousand fifty dollars from the client, the dealer would be required to include only the client's fifty dollar fee in calculating the dealer's total taxable gross receipts for purposes of the commercial activity tax.

(2)

(a) In the case of a person enumerated in division (P)(2) of section 5751.01 of the Revised Code who retains a commission or fee from a transaction performed on behalf of another person, only the fee retained by the agent shall be a gross receipt of the agent pursuant to division (F)(2)(l) of section 5751.01 of the Revised Code. For purposes of this paragraph and paragraph (B) of this rule, the agency relationship should be explicitly stated in a contract that is available to the tax commissioner to inspect. Absent such proof, it will be presumed that no agency relationship exists and the person claiming the agency relationship will include the total amount received in its gross receipts.

(b) For example, a general contractor enters into a lump sum contract with a property owner for the general contractor to construct an office building. The general contractor agrees to provide specified services for a fixed price of five hundred thousand dollars, and the general contractor bears all risk involved in completing the project in a cost-effective manner. The general contractor may perform the necessary services itself, or it may bid out some or all of the work to subcontractors. Because the general contractor is not required to act in the owner's best interests with respect to cost issues, and because the general contractor does not have to disclose cost details with the owner, the general contractor does not qualify as an agent for purposes of the agency exclusion. For this reason, the entire contract price is includable in the general contractor's gross receipts.

(c) Alternatively, for example, a general contractor enters into a costs-plus contract with a property owner for the general contractor to construct an office building. Under the terms of the contract, the owner agrees to pay the general contractor for work completed by the subcontractors at cost plus a five per cent fee. The general contractor is required to act in the owner's best interests with respect to cost issues. The general contractor, when bidding out the work to subcontractors, has an agreement in writing with the subcontractors that states that the general contractor is acting as the owner's agent and not as an agent of the subcontractor. The general contractor acts as a conduit with regard to any payments made to the subcontractors, in that the general contractor remits monies received from the owner to the subcontractors, provided that certain conditions are met. Accordingly, the general contractor may exclude the money that the general contractor receives from the owner to pay the subcontractors from its gross receipts. However, the five per cent fee retained by the general contractor would be included in its calculation of gross receipts for purposes of the commercial activity tax.

(3)

(a) In the case of a person enumerated in division (P)(3) of section 5751.01 of the Revised Code who issues licenses and permits under section 1533.13 of the Revised Code, only the portion of a fee retained by the issuer shall be included in the gross receipts of the agent pursuant to division (F)(2)(l) of section 5751.01 of the Revised Code.

(b) For example, an independent agent at a bait and tackle shop is authorized under section 1533.13 of the Revised Code to issue hunting and fishing licenses to Hocking county residents. The agent collects a fee of twenty-five dollars for issuing a license and later remits this amount to the chief of the wildlife division of the Ohio department of natural resources. The independent agent will not be subject to the commercial activity tax. If, however, the agent retained a five dollar fee for administering the license, this amount would be included in the agent's calculation of its gross receipts for purposes of the commercial activity tax.

(4)

(a) In the case of a lottery sales agent enumerated in division (P)(4) of section 5751.01 of the Revised Code who holds a valid license issued under section 3770.05 of the Revised Code, only the portion of the fee retained by the lottery sales agent shall be included in the gross receipts of the agent pursuant to division (F)(2)(l) of section 5751.01 of the Revised Code.

(b) For example, a convenience store clerk is licensed under section 3770.05 of the Revised Code to sell lottery tickets as part of its store operations. As part of an agreement with the director of the state lottery commission, the convenience store may retain one per cent of the gross receipts received from the sale of lottery tickets as an administrative fee. The convenience store clerk sells a ticket to a customer for two dollars and remits one dollar and ninety-eight cents (or ninety-nine per cent) to the director of the state lottery commission. The convenience store will include the two cent (or one per cent) administrative fee it retains in its gross receipts, in addition to its other receipts from store operations to the extent required by Chapter 5751. of the Revised Code.

(5)

(a) In the case of a person enumerated in division (P)(5) of section 5751.01 of the Revised Code who acts as an agent of the division of liquor control under section 4301.17 of the Revised Code, only the portion of the fee retained by the agent shall be included in the gross receipts of the agent pursuant to division (F)(2)(l) of section 5751.01 of the Revised Code.

(b) For example, the owner of a state liquor agency in Sandusky, Ohio is a statutory agent of the division of liquor control and is granted the authority to sell spirituous liquor to its customers. In the contract and as compensation for this relationship, the division agrees that the agent may keep five per cent of its annual sales of these beverages as its commission. The state liquor agency sells five hundred thousand dollars worth of spirituous liquor in one year and remits a payment of four hundred seventy-five thousand dollars to the division of liquor control. The market owner is only required to include the remaining twenty-five thousand dollars (or five per cent of the market owner's total sales of spirituous liquor) in calculating its gross receipts with regard to the agent relationship. The provisions of division (P)(5) of section 5751.01 of the Revised Code only apply to state liquor stores or agencies and do not apply to local markets selling beer, wine, or other types of alcoholic beverages.

(D)

(1) In the case of a restaurant or other establishment that collects gratuity on behalf of another, the portion of the amount received that is considered "tips" or "gratuity" is not included in the establishment's gross receipts pursuant to division (F)(2)(l) of section 5751.01 of the Revised Code. This portion of the gross receipts may be a gross receipt of the person ultimately receiving the tip if the other requisite requirements under section 5751.01 of the Revised Code are met.

(2) For example, a restaurant in Columbus, Ohio employs a server to assist in serving its customers. The restaurant collects a total of one thousand two hundred dollars, including a twenty per cent gratuity of two hundred dollars. The restaurant only passes one hundred eighty dollars of the gratuity on to the server and retains the remaining twenty dollars. The restaurant is considered an agent for the one hundred eighty dollar portion of the gratuity that it passes on to the server. The twenty dollar portion retained is a gross receipt of the restaurant. (The server does not have any gross receipts for the one hundred eighty dollar portion of the gratuity it receives from the restaurant, as such amount is considered compensation and is specifically excluded under division (F)(2)(g) of section 5751.01

of the Revised Code.)

(E)

(1) In the case of a person who advances fees on behalf of a client, the person may exclude the reimbursement of these fees from the person's gross receipts when the reimbursement is received from the client.

(2) For example, an individual retains an attorney to represent the individual in a personal injury suit against a company. The attorney advances a filing fee to the court in order to allow the client to file a complaint against the company. In addition to the attorney's hourly rate, the attorney charges the client the filing fee, as well as copying charges for copies made and telephone charges for calls made all on the client's behalf. When calculating the attorney's commercial activity tax liability, the attorney may exclude the court fees that were advanced on the client's behalf from the attorney's gross receipts pursuant to division (F)(2)(l) of section 5751.01 of the Revised Code but may not exclude the copying fees or the telephone charges for calls made on the client's case.

(F)

(1) In the case of a property owner who charges common area maintenance fees to its tenants or another third party or bases the fees on the square footage contained within a particular portion of the building, an agency relationship does not typically exist. Therefore, when the property owner collects these fees, they are considered gross receipts for purposes of the commercial activity tax. These fees reimburse the property owner for expenses to the property owner and expenses may not be deducted from the taxpayer's gross receipts.

(2) For example, a property owner leases a commercial building to a tenant for one thousand dollars and charges the lessee an additional one hundred dollars per month for common area maintenance, including snow plowing, landscaping, trash removal, and heating and cooling services. The property owner collects one thousand dollars in rent and one hundred dollars for the tenant's common area maintenance fee. The property owner is required to report the entire one thousand one hundred dollars as a gross receipt for purposes of the commercial activity tax.