

Ohio Sales Tax for Construction Contractors

Alexander Fant

November 17, 2022

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Overview

- **Construction Contracts in Ohio – Basic Framework**
- **Classification of Property**
 - Definitions
 - Temporary Components
- **Impact of Recent Court Decisions**
 - Karvo Paving Co. v. Testa
 - Nationwide Mutual Insurance Company v. McClain
- **Best Practices**
 - Bidding and Estimating
 - Invoicing
 - Purchasing and Accounts Payable
 - Use Tax Accrual Process
 - Contracts with Non-Profits



Basic Framework



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Basic Framework in Ohio

- **Sales Tax**

- Tax on the sale of taxable tangible personal property or services
- Collected from customers on invoices
- Taxes collected are remitted to the Ohio Department of Taxation
- Separately stated

- **Use Tax**

- Incurred by “consumer” of taxable tangible personal property or services
- Vendor did not charge tax on invoice
- Tax accrued and paid by the consumer
- Separate sales and use tax returns and registrations - (Unique to Ohio)

Basic Framework in Ohio

- **Tangible personal property – Taxable**
 - Includes contracts for “business fixtures”
- **Services – Generally Exempt**
 - Enumerated Services – Taxable

Basic Framework in Ohio

- **Real Property Construction Contracts - Contractor Taxed on Materials**
 - Repairs, construction, or additions to real property
 - Contractor liable for Ohio sales or use tax on cost of materials incorporated into real property
- **Contracts to Install Tangible Personal Property/Business fixtures – Contractee Taxed on All Materials and Labor**
 - Installation of tangible personal property (including temporary components) or business fixtures
 - Contractor should charge and collect Ohio sales tax on invoice to customer calculated on materials, labor/installation, profit, mark-up and overhead
 - Contractor will not pay Ohio sales tax or Ohio use tax when purchasing materials (purchases are for resale)

Basic Framework in Ohio

- **Job Classified as Real Property**
 - Contractor is consumer of materials incorporated into job
 - Owner's direct payment permit authority does not extend through contractor
 - Following exemptions would not apply to contract:
 - Manufacturing
 - Packaging
 - Research and development

Basic Framework in Ohio

- **Job Classified as Personal Property/Business Fixture/Temporary**
 - Contractor purchases materials for resale
 - Contractor may accept manufacturer's direct payment permit and not charge Ohio sales tax
 - If work performed by contractor is related to process performed by manufacturer and qualifies for manufacturing exemption and obtains an exemption certificate:
 - Contractor does not charge Ohio sales tax
 - If work performed benefits business conducted on premises but does not qualify for manufacturing exemption or is temporary in nature:
 - Contractor charges, collects, and remits Ohio sales tax

Basic Framework in Ohio

- **Leases and Rentals**
 - Leases of tangible property used in construction contract are taxable
 - Tax due for duration of lease at start of lease
 - Lease defined as transfer of possession or control of tangible personal property for fixed or indefinite period of time for consideration

Classification of Property



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Classification of Property

Always Treat as Business Fixture/Tangible Personal Property

- Gas station canopies
- Security cameras to monitor inventory or interior rooms
- HVAC and special purpose flooring for computer rooms
- Lighting for parking lots at car dealerships
- **Certain computer cabling**
- Specialty indoor and outdoor lighting
- Special security door locking mechanisms for interior doors
- Window treatments
- Specialty cabinetry
- Sale and installation of carpeting
- Sale and installation of agricultural land tiles
- Sale and installation of portable grain bins
- Sale of landscaping services – including tree plantings and shrubs
- Signage
- Golf course irrigation systems
- Foundations and pits for machinery
- Amusement park rides
- Indoor pool

Classification of Property – Additional Examples

- **Real Property**

- Amphitheaters
- General parking lot lighting
- Tile, wood, and laminate flooring
- Refinished flooring
- Outdoor pool
- Dock doors/levelers
- Permanent Fencing
- Alarm systems to prevent entry from exterior
- Card reader on exterior door
- Security cameras on exterior
- Elevators

Classification of Property

- **Contractee Certification**

- Document furnished by contractee to contractor informing contractor of real property versus tangible personal property/ business fixture classification of contract
- Contractor may rely on contractee's certification – if taken in “good-faith”
 - If subsequently determined that certain portion of contract certified by contractee is tangible personal property / business fixture, contractor will not be held liable for tax

Classification of Property

- **Temporary Components - Ohio Admin. Code 5703-9-14**
 - **Definition**
 - Tangible personal property “temporarily” affixed or used during construction
 - Applies even if items remain/become permanently affixed after construction because of inadvertence, convenience, or economic preference
 - **Examples**
 - Electricity/lighting (e.g., temporary tradeshow electric)
 - Water service
 - Protective fencing
 - Construction elevators
 - Shoring lumber
 - Concrete forms
 - Scaffolding
 - Stop lights/signage not incorporated into real property

Classification of Property

- **Temporary Components General vs. Subcontractor**
 - **Subcontractor to General Contractor**
 - General contractor deemed consumer and subcontractor invoices general contractor Ohio sales tax on entire amount including labor, materials, overhead, etc.
 - **Contractor to Contractee**
 - Contractee deemed consumer and contractor invoices contractee Ohio sales tax on entire amount invoiced including labor, materials, overhead, etc.
 - **Who is deemed the consumer?**

Impact of Recent Court Decisions



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Karvo Paving Co. v. Testa

- **Court of Appeals – 9th District - 2019-Ohio-3974 (ODT dismissed its appeal at Supreme Court)**
- Resale
 - Application of the resale exemption in construction contractor context
 - Karvo audited for Ohio Consumer's Use Tax
 - Performed contracts with Ohio Department of Transportation
 - Utilized leased traffic control equipment
 - Karvo argued equipment leased for resale to ODOT
 - Previously, any and all equipment used by the contractor in performance of contract was considered used/consumed by the taxpayer
 - Court considered the following:
 - ODOT responsible for traffic maintenance and placed the equipment
 - Equipment continually used during off hours
 - If given a choice, Karvo would have used different equipment in a different manner
 - Court found in favor of Karvo and upheld resale exemption

Karvo Paving Co. v. Testa

- **Resale**

- Practical application of case
 - What really qualifies? ODT will construe narrowly to equipment mentioned in case
 - Taxpayers may argue broader interpretation of equipment that qualifies
 - Applicability to temporary lane markings
 - Contracts with other political subdivisions (counties, townships, etc.)
 - Impact of separate line items in bid submitted to ODOT or other political subdivision
 - What if paving and related traffic control equipment is sub-contracted?

Karvo Paving Co. v. Testa

- **Casual Sale**

- Examined exemption for casual sale (or lease) of equipment between affiliated entities
- Affiliate purchased paving equipment for its own use, then stopped doing paving contracts
- Karvo leased the equipment from affiliate
- Court agreed that affiliate's leases to Karvo did not prevent use of casual sales exemption
- Case remanded to BTA to analyze applicability of the casual sale exemption
- Practical application:
 - This portion of the case is on remand to BTA
 - Consider equipment used by or shared between legal entities
 - Analyze intercompany leasing agreements and sales tax being charged

Nationwide Mutual Insurance Company v. McClain

- BTA Cases: 2018-313, 2018-315, 2018-316, 2018-317, 2018-318
- Examined applicability of business fixture concept to computer cabling
- Standard CAT-5 or CAT-6 VoIP and Internet cabling
- Nationwide argued cabling is common to buildings and is a real property contract
- ODT previously relied on 1998 BTA case, *Newcome Corp. v. Tracy*
 - Computer cabling always treated as business fixture
 - Telephone (communication) lines were real property
- Court considered the following:
 - Cabling was not designed to meet the specific business requirements of Nationwide
 - “As common to commercial property as telephone lines and coaxial cables were in the past”
- Court determined cabling was real property

Nationwide Mutual Insurance Company v. McClain

- **Practical application of case**

- ODT did not appeal to the Supreme Court of Ohio
- ODT's position is applicability limited to specific types of cabling in case – CAT-5 and CAT-6
- Does not apply to fiber optic cable, even if used for VoIP/internet in the same installation as CAT-5 or CAT-6
- If not subject to sales tax, contractor should have paid sales tax on purchase of cabling
- Impact to contractors for refund claims filed by building owners
- Work with cabling contractor to determine taxability of projects
- Potential use of contractee certification

Best Practices



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Bidding and Estimating

- Fully understand nature of job/contract from beginning to end – before bidding
 - Certain projects may carry additional exemptions:
 - Manufacturing
 - Port Authority contracts
 - Government contracts
- Understand treatment of the particular contract in the state where work will be performed
- Understand sales tax and use tax paid to vendors and reimbursed by contractee vs. sales tax “collected” from contractee and remitted by contractor
- Does job include any temporary components, business fixtures, or tangible personal property?
- Identify sales tax collection requirements, temporary components, business fixtures, or tangible personal property and include applicable sales tax in bid
- Create job aid for bidders and estimators to ensure tax included correctly in bid

Invoicing

- Sales tax licenses required if selling tangible personal property or business fixtures
- Collection and remittance vs. reimbursement of cost incurred
- If billing sales tax, separately state sales tax on invoice
- May be a difficult concept for contractees
- Use supporting information with AIA documentation

Purchasing and Accounts Payable

- Purchase orders issued indicating taxable or non-taxable
- Separate taxable and non-taxable accounts with vendors
- Know when to issue exemption certificate to vendor
- Review invoices carefully for sales tax included or not included
- In Ohio, materials purchased for temporary, or business fixture components of job are purchases for resale and Ohio sales tax should be collected from contractee
- “Short-pay” invoice if warranted

General Best Practices

- Enter sales tax paid to vendor separately, if possible
 - Helps on audit and to better understand actual costs
- **Document, Document, Document!!!**
- Create sales tax payable and use tax accrual accounts by state
- Have “**audit ready**” files
- Let computer do work where possible
- Use flow charts/matrices to create a repeatable process

Questions?

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Common Vehicle Exemptions

Michael Reef

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Exemption General Overview

- Exemption General Law
- Exemptions are handled by the Compliance Business Division
 - Vehicle Exemption Billing Process
 - Timeframes and what to expect on notices
 - Payment Instructions
- Common exemptions
 - Transportation for Hire
 - Direct Use Farming
 - Direct Use Public Utility
 - Direct Manufacturing



Exemptions: General Law

- It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. O.R.C. 5739.02(C) and O.R.C. 5741.02(G).
- However, the Revised Code provides multiple exemptions to the sales tax. O.R.C. 5739.02(B).
- “Tax-exemption statutes ‘must be strictly construed, because exemptions are in derogation of the rights of all other taxpayers.’” *Cincinnati v. Testa*, 143 Ohio St.3d 371, 2015-Ohio-1775, 38 N.E.3d 847, ¶ 16, further citations omitted.
- Further, the well-established rule in tax-exemption cases places the burden on the taxpayer to show that the exemption statute's language clearly expresses the exemption in relation to the claim. *Id.* at ¶ 14, further citations omitted.

Vehicle Exemption Billing Process

Questionnaire Inquiry

- ODT receives information exemption was claimed
- Inquiry with Questionnaire mailed to Business or Individual
- Will give an amount due if exemption is being audited

Tax Due, Billing Notice

- Based on questionnaire or inquiry, vehicle is determined to be taxable

Assessment

- If no response to questionnaire, assessment will be issued
- Tax Due notice issued and failure to pay timely will result in an assessment notice being issued



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Timeframe to Respond and What to Expect

Questionnaire/ Inquiry	Tax Due/ Billing Notice	Assessment
<ul style="list-style-type: none">• 14 Days to Respond• Sent via USPS• No response to questionnaire or inquiry will result in notice becoming assessed	<ul style="list-style-type: none">• Tax due plus interest• 14 Days to Respond• Sent via USPS• Failure to remit payment timely will result in bill becoming assessment	<ul style="list-style-type: none">• Tax Due, interest, penalty• 60 days to pay or appeal the assessment• Sent certified mail• Unresolved tax due assessment will certify for collection to the Attorney General of Ohio once the appeal period has expired



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Payment for Exemptions

- Must pay via check or money order
- Payment instructions included on all notices
- Payment voucher included with Tax Due and Assessment notices



Transportation for Hire

- Transportation for Hire Defined
 - O.R.C. 5739.01 (Z)
 - "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:
 - (1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;
 - (2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;
 - (3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.



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What is Needed to Qualify



- Submitted Questionnaire showing majority exempt usage
- Valid Operating Number
 - PUCO Number
 - Motor Carrier Number
 - DOT number alone does not qualify

Titling Vehicle Reminders



- When claiming Transportation for Hire Exemption
 - Provide Federal Employer Identification Number (FEIN) or Social Security Number (SSN)
 - Use TH exemption code
 - Unless titled to a leasing company
 - Consistent name of business
 - Make
 - Model

Questionnaire

- Questionnaire will be located **on the back** of the original notice

TRANSPORTATION FOR HIRE QUESTIONNAIRE	
Type of Vehicle (ex: tractor, pickup, van, passenger car, etc):	_____
Commodity or product hauled:	_____
PUCO or Federal Operating Authority number:	_____
If you are a Broker or Courier, for whom do you haul?	_____
Please indicate the percentage of use for each activity that applies to the vehicle: Your total must equal 100%.	
Hauling Goods/Products/Supplies/Equipment for Others	_____ %
Hauling Goods/Products/Supplies/Equipment for Yourself	_____ %
Hauling Products Sold by Your Business to Customers	_____ %
Hauling Construction Debris or Demolition Debris	_____ %
Who will own the debris once it is hauled?	_____
Hauling Trash or Garbage	_____ %
Who will own the trash or garbage once it is hauled?	_____
Company Car (Transporting Personnel) or Repair Vehicle	_____ %
Taxi or Limousine (Vendor's License required below)	_____ %
Towing Services (Vendor's License required below)	_____ %
Other (Be specific)	_____ %
Total %	(Must Equal 100%) _____ %
I certify that the information I have given on this questionnaire is correct.	
Signature:	_____ Date: _____
Social Security Number (SSN) or Federal Employer Identification Number (FEIN): _____	
Phone:	_____ Vendor's License (if applicable): _____
Email Address: _____	

Questionnaire Filed Incorrectly

- In response to Tax Due or Assessment Notice
- Can submit corrected questionnaire
- Must provide supporting documentation for updated questionnaire and explanation
 - At least 10 invoices showing vehicle being used in Transportation for Hire
 - Can provide lease agreement for specific vehicle showing hauling for others



Direct Use Farming

- Ohio does not tax sales “to persons engaged in farming, agriculture, horticulture, or floriculture” so long as the item purchased is used “primarily” in farming, agriculture, horticulture, or floriculture. O.R.C. 5739.02(B)(17).
- Sales of articles to be used or consumed in farming, agriculture, horticulture, or floriculture, directly in producing tangible personal property for sale, are not subject to the tax.
- Persons engaged in rendering farming, agricultural, horticultural, or floricultural services for others are deemed to be engaged directly in farming.



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Three Questions for Farm Exemption

- Farm exemption is not a status exemption: it is not available simply because someone owns farmland.
- For a sale to be exempt, there are three requirements:
 1. Was the seller engaged in one of the activities named by the statute *as a business*? (Farming, agriculture, etc.) See *Lee v. Testa*, BTA No. 2017-2278, 2018 WL 2409832
 2. Is the purchased item “directly” used in one of those activities?
 3. Is the purchased item “primarily” used in one of those activities?



Who Should Hold Title to the Vehicle?

- To qualify for exemption the vehicle must be titled to farming entity
- If an individual claim's the farming exemption and provides the schedule F of a parent, child, sibling, or associate the exemption will not be allowed
- If the vehicle is titled to an individual under an SSN and the taxpayer submits a schedule F for a corporation under a FEIN, the vehicle would not be tax exempt since the individual is not the farming entity
- If a spouse claiming the exemption files a joint return and their spouse files a Schedule F, we will allow the exemption.



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What is Needed to Qualify



- Submitted Questionnaire showing exempt usage
- Supporting Documentation
 - Individual
 - Federal 1040 Pg. 1 and 2, Schedule 1, Schedule F
 - Federal 1041 Pg. 1, Schedule F
 - Partnership
 - Federal 1065 Pg. 1, Schedule F
 - Corporations
 - Federal 1120
- Farm Rental Does not Qualify
 - Federal 1040, Schedule E and form 4835
 - Federal 1040, Schedule C without Schedule F

Questionnaire

- Questionnaire will be located **on the back** of the original notice
- Usage must equal 100%
- If listing “Other” it is important to be very specific in the explanation
 - If the explanation does not fit on allotted line you can attach an explanation

FARM USE QUESTIONNAIRE	
Please indicate the percentage of use for each activity that applies to the vehicle. Your total must equal 100%.	
Sowing Seed	_____ %
Cultivating Fields	_____ %
Spreading Fertilizer on Fields	_____ %
Spraying for Insects, Weeds, & Rodents	_____ %
Hauling Seed, Grain, Fertilizer, Hay, & Feed for Livestock	_____ %
Loading and Unloading Manure	_____ %
Corralling Loose Livestock	_____ %
Picking Up Rocks from Fields	_____ %
Repairing Fencing	_____ %
Field Inspection, Soil Sampling & Testing	_____ %
Cutting & Hauling Wood, Cutting and Hauling Brush	_____ %
Delivering Meals, Repair Parts or Messages to the Field	_____ %
Transporting Harvested Crops (within boundaries of the farm)	_____ %
Transporting Farm Machinery (within boundaries of the farm)	_____ %
Hauling Trash and Garbage	_____ %
Snowplowing	_____ %
Picking up Mail	_____ %
Recreational Activities (riding, hunting, etc.)	_____ %
Other (Be specific) _____	_____ %
Total %	100%
I produce _____ (tangible property) for sale, as reported to the IRS.	
Signature: _____ Date: _____	
Social Security Number (SSN) or Federal Employer Identification Number (FEIN): _____	
Phone: _____ Vendor's License (if applicable): _____	

Direct Use Public Utility



- O.R.C. 5739.02(B)(42)(a)
- Exempt from sales tax tangible personal property that is used directly in the rendition of a public utility service. The first requirement to qualify for this exemption is that the company must be providing a public utility service

Direct Use Public Utility



- Ambulance Service

- Vehicle is directly and primarily used in providing the ambulance service
- Requires Certificate of public convenience and necessity from the Public Utilities Commission of Ohio
- Private Companies do not qualify unless company holds above certificate

- City, County, Municipal, Regional Agencies

- Would not be considered for public utility exemption
- Government agencies would be tax exempt
- Should claim exemption, “**SP** State/political subdivision”



- Electric and Natural Gas Companies

- Vehicle must be designed or equipped specifically to provide a service to qualify for exemption
- Must complete question 2 on questionnaire

Questionnaire

- Questionnaire will be located on the back of the original notice
- Unlike Transportation for Hire and Direct Use Farming
 - No % usage needed, just mark primary

PUBLIC UTILITY QUESTIONNAIRE
1. Please indicate the use of the above vehicle:
<input type="checkbox"/> Ambulance Service - must attach Certificate of Public Convenience and Necessity (<i>The PUCO establishes the requirements to qualify for a Certificate. If the PUCO determines that a company's service does not require a Certificate, then the company does not qualify for the sales tax exemption in O.R.C. 5739.02(B)(42)(a) because it is not providing a public utility service.</i>)
<input type="checkbox"/> Bus Company (vendor's license required below)
<input type="checkbox"/> Cable Company
<input type="checkbox"/> City, County, Municipal or Regional agencies (police, fire, water, sewer)
<input type="checkbox"/> Telecommunications Company
<input type="checkbox"/> Electric Company (complete question 2)
<input type="checkbox"/> Limousine Service (vendor's license required below)
<input type="checkbox"/> Natural Gas Company (complete question 2)
<input type="checkbox"/> Taxi (vendor's license required below)
<input type="checkbox"/> Trucking Company (Complete Transportation for Hire Questionnaire. It can be found at tax.ohio.gov).
2. Has vehicle been specially designed or equipped (e.g. lift truck, ladder racks, tool storage)?
<input type="checkbox"/> Yes - please describe: _____
<input type="checkbox"/> No
I certify that the information I have given on this questionnaire is correct.
Signature: _____ Date: _____
Social Security Number (SSN) or Federal Employer Identification Number (FEIN): _____
Phone: _____ Vendor's License (if applicable): _____

Direct Use Manufacturing

- No questionnaire attached to inquiry
 - Must respond to inquiry with detailed description of how vehicle is being used
 - Provide supporting documentation (sales invoices, work orders, etc.)
- O.R.C. 5739.011, O.R.C. 5739.02 (B)(42)(g), and O.A.C. 5739-9-21 can be referenced for definitions, examples and exemption information



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Cement Mixer

- Exemption would generally apply when the purchaser of a motor vehicle is using the vehicle (through a power take-off unit) in the production of a product for sale by manufacturing processing, or refining
- Cement mixer where the mixing unit is operated through a power take-off unit instead of a separate power source would qualify



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Submitting Questionnaire

- Online Notice Response Service
 - [Tax.ohio.gov/ONRS](https://tax.ohio.gov/ONRS)
- Questionnaires can also be submitted via email
 - exemptions.group@tax.state.oh.us



The screenshot shows the Ohio Department of Taxation website. At the top, there is a navigation bar with the Ohio Department of Taxation logo and links for Resources for INDIVIDUALS, BUSINESSES, GOVERNMENT, PROFESSIONALS, and RESEARCHERS. Below this, there are icons for Forms, Contact Us, and Search. The main content area features the Ohio Department of Taxation seal and the title "Online Notice Response Service". The text explains that the service allows users to securely respond to notices and provides instructions for existing OHID users. A blue button labeled "LAUNCH" with a document icon is visible on the right side of the page.

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Resources for INDIVIDUALS BUSINESSES GOVERNMENT PROFESSIONALS RESEARCHERS

Forms Contact Us Search

Online Notice Response Service

The [Online Notice Response Service](#) allows you to securely respond to most notices received from the Ohio Department of Taxation or the Department's request for additional information. If you already have an account through OHID (e.g., Ohio Business Gateway), utilize the same Username and Password to access this service.

If you have general tax questions or need specific account information, please contact us by [email](#) or by [phone](#).

HELP CENTER

PHONE NUMBERS

LAUNCH 

Online Notice Response Service

Additional Information and Resources

- [Exemption Definitions | Department of Taxation \(ohio.gov\)](#)
- Compliance Business Division
 - 1(888) 405-4039
 - “Contact Us” feature on tax.ohio.gov has Help Center that includes:
 - Phone Numbers
 - Email
 - Online Notice Response Service
 - FAQ’s
 - Mailing Addresses
- Compliance Vehicle Group
 - Email: exemptions.group@tax.state.oh.us



HELP CENTER

PHONE NUMBERS

EMAIL US

ONLINE NOTICE RESPONSE
SERVICE

FAQS

MAILING ADDRESSES

FIND US

SPEAKER REQUEST

Help Center

The resources on this page are for individuals looking to contact the Department of Taxation. For frequently asked questions, check the status of their refund, report suspicious activity, or request a refund, provided by the Department.

Department representatives provide customer service by email and phone, Monday through Friday, 9:00 a.m. to 5:00 p.m. Eastern Standard Time.

Contact Us / For Help With:

- **Individual/School District Income Tax** - call 1-800-282-1780
 - File and pay at ODT's [online services](#)
 - Check the refund status of your current year tax return [here](#)
 - To contact the Department by email, use the general [email](#) portal and choose the appropriate category
- **Business taxes** - call 1-888-405-4039
- **Commercial Activity Tax** - call 1-888-722-8829
- **Liquor permit** - email liquorgroup@tax.state.oh.us



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