

IN THE SUPREME COURT OF OHIO

The Cincinnati Reds, LLC,)	Appeal from the Ohio Board
)	of Tax Appeals
Appellant,)	
)	Board of Tax Appeals
vs.)	Case No. 2015-1707
)	
Joseph W. Testa,)	
Tax Commissioner of Ohio,)	Case No. 2017-0854
)	
Appellee.)	

**APPELLANT, THE CINCINNATI REDS, LLC'S MOTION FOR THE FULL COURT
TO HEAR ORAL ARGUMENT**

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Joseph W. Testa, Tax Commissioner of Ohio*

Appellant, The Cincinnati Reds, LLC, respectfully moves the Court to hear oral argument in this matter pursuant to Rule 17.07(A) of the Rules of Practice of the Supreme Court of Ohio. The reasons for this motion are described in the attached Memorandum in Support, which is incorporated herein by reference.

Respectfully submitted,

/s Steven A. Dimengo

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Memorandum in Support

This case calls for the full Court to hear the oral argument because of the importance of the issue and the precedential value of this Court's determination. This Court has issued just one opinion concerning the scope of the resale exemption as applied to transfers of tangible personal property in the last 27 years. *Stds. Testing Labs., Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804. See *General Motors Corp. v. Kosydar*, 37 Ohio St.2d 138, 310 N.E.2d 154 (1974); *Procter & Gamble Co. v. Lindley*, 17 Ohio St.3d 71, 477 N.E.2d 1109 (1985); *G&J Pepsi Cola Bottling, Inc. v. Limbach*, 48 Ohio St.3d 31, 548 N.E.2d 936 (1990). And this Court has *never* considered whether promotional items that are obligated to be transferred in exchange for the purchase of another item (in this case, admission to a professional baseball game and attendance at the game) is a resale of the promotional item. This Court's ruling on this matter will affect Ohio businesses that induce customers, through extensive advertising, to purchase a certain product by providing a promotional item as part of the purchase. The Tax Commissioner's Merit Brief laments the wide-reaching effect of the Court's determination in this case: "The practice of dispensing free promotional items to bolster ticket sales is not unique to the Cincinnati Reds. It is a widespread practice across the country and not limited to professional sports teams (or even limited to sports teams)." Commissioner's Brief, p. 3.

In this case, the Board of Tax Appeals found that the Reds did not resell the promotional items because there was no separately stated price. However, the Board's decision is contrary to the Supreme Court's previous holdings in several cases, which found consideration for the transfer of tangible personal property despite lacking a direct charge therefor. See *General Motors Corp.*, 37 Ohio St.2d at 146 and syllabus; *G&J Pepsi Cola Bottling, Inc.*, 48 Ohio St.3d 31, at syllabus; *Procter & Gamble Co.*, 17 Ohio St.3d at 76. The Tax Commissioner seems to

acknowledge the questionable nature of the Board's reasoning, as he seemingly has abandoned the contention that a separately identified price must be specified for a resale to occur. *See* Commissioner's Brief. Instead, the Tax Commissioner now contends that the resale exemption does not apply because the subsequent sale of the ticket is not subject to sales tax, which is contrary to the Tax Commissioner's published taxpayer guidance. Commissioner's Brief, p. 7 compare with Ohio Department of Taxation, *Information Release ST2010-01, Sales and Use Tax: Food Service – Equipment and Supplies Used in the Food Service Industry* (Aug. 2010), available at https://www.tax.ohio.gov/sales_and_use/information_releases/st_2010_01.aspx (accessed Dec. 20, 2017) (napkins, plastic ware, straws, etc. provided with carryout orders are resold by restaurants with the meal).

In conclusion, this issue of first impression presented for this Court's review (i.e., whether consideration is received for promotional items required to be conveyed in exchange for the purchase of another product, such that the promotional item is entitled to the resale exemption) is of great public importance and will serve as guidance for future compliance with Ohio sales and use tax. For these reasons, the Court, the litigants, and Ohio taxpayers will benefit from an oral argument that is held before the full Court rather than the Court's master commissioner. Therefore, The Cincinnati Reds, LLC respectfully requests that the Full Court hear the oral argument in this matter.

Respectfully submitted,

/s Steven A. Dimengo

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been sent by electronic mail this 21st day
of December, 2017 to:

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