

**“THIS ONE BELONGS TO THE
REDS” – PROMOTIONAL ITEMS
NOT SUBJECT TO OHIO SALES OR
USE TAX**

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On November 21, 2018, the Ohio Supreme Court issued its opinion in *Cincinnati Reds, L.L.C v. Testa*, Slip Opinion No. 2018-Ohio-4669, agreeing with the Cincinnati Reds that purchases of promotional items that were distributed to fans as part of purchasing admission to certain games were not subject to Ohio sales or use tax under the “purchase for resale” exception. The decision could have a far-reaching impact on items that can be considered “purchased for resale” and not subject to Ohio sales or use tax.

The Court’s analysis of the statute determined that for the purchases of the promotional items to be exempt from sales and use tax, the Reds must have purchased the promotional items for the purpose of reselling the promotional items. A purchaser can have the purpose to “resell” if the purchaser intends to make “sales” of the items purchased. Based on the definition of “sale” in Ohio Revised Code (R.C.) 5739.01(B), a sale of an item applies when the item is transferred for consideration.

Based on the evidence and testimony provided by the Reds, the Court agreed that the Reds transferred the promotional items to fans for consideration. The Reds' chief financial officer, Doug Healy, testified that:

- The Reds advertise in advance to notify fans when specific promotional items will be distributed and that fans purchase tickets to those specific games with the expectation that the fans will receive such promotional items;
- The Reds attempt to purchase enough promotional items so that every fan that purchased a ticket will receive the promotional items;
- If the Reds run out of promotional items then the Reds would provide something of equivalent value, such as a different promotional item or a ticket to a future game; and
- The Reds include the costs of the promotional items when setting the ticket prices before the start of the season and that the promotional items are distributed at less desirable games for which tickets are not expected to be sold out.

Based on this testimony, the Court reasoned that instead of offering discounted ticket prices to the less desirable games, by including the cost of the promotional items in the ticket price, one portion of the ticket price accounts for the right to attend the less desirable game and a separate portion of the ticket price accounts for the right to receive the promotional item. As a result, the Court concluded that the promotional items constituted things of value in exchange for which fans paid money that was included in the ticket price. Therefore, the fans furnished consideration for the Reds' promise to hand out these types of promotional items and thus such transaction qualifies as a "sale". Because the promotional items are sold by the Reds to its ticket purchasers, the Reds' purchases of the promotional items qualify for the "purchased for resale" exception.

The Court made the distinction between the promotional items at issue and gratuitous promotional items, such as a foul ball or a t-shirt tossed into the stands, that fans might receive when attending the game. Fans have no expectation of receiving the gratuitous promotional items and did not purchase a ticket under the expectation that the item would be provided by the Reds.

ZHF Observations

1. Using the Court's analysis for when an item is resold could have a far-reaching impact on what qualifies for the resale exception. Businesses should review the promotional items that are distributed to customers to see if the items are transferred for consideration.
2. The Court did not address the issue of whether the sale of the tickets that included the promotional items is subject to sales tax and whether the Reds would be required to collect sales tax on the sale of those tickets or on a portion of the price that relates to the promotional items. Ohio's bundled transaction statute would need to be analyzed to determine if sales tax should be collected.

If you would like to discuss this topic, please contact [John Trippier](#), [Rich Farrin](#) or [any of the other professionals](#) at Zaino Hall & Farrin LLC.

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