



STATEMENT OF THE OHIO STATE BAR ASSOCIATION
IN OPPOSITION TO THE SALES TAX PROPOSALS
INCLUDED IN HOUSE BILL 64

Presented by Kelvin M. Lawrence
Taxation Law Committee Chair, Ohio State Bar Association
Before the House Ways and Means Committee
Jeffrey McClain, Chair
February 25, 2015

Chairman McClain, Vice-Chair Scherer, Ranking Member Cera, and members of the Committee, my name is Kelvin Lawrence, and I am the Chair of the Ohio State Bar Association Taxation Law Committee. Thank you for allowing us the time to offer our position with respect to a few of the tax proposals in House Bill 64 (HB 64) that will have a notable impact on the practice of law in Ohio and the businesses we serve.

The interest of the Ohio State Bar Association is to preserve the broadest access to legal services and to maintain the ability of Ohio legal professionals to provide their services competitively. H.B. 64 would impose Ohio sales and use tax on a number of new business services for the first time. These services include, but are not limited to: lobbying services, management consulting services, and debt collection services. These terms are so broadly and imprecisely defined that they could have the effect of expanding Ohio sales tax to include legal services, and that is our primary concern. For this reason, my testimony today is limited to these provisions of H.B. 64.

It is without question that the expansion of the sales tax to legal services will increase the cost of doing business in Ohio compared to other states, especially states on our borders, as businesses in Ohio will be placed at a competitive disadvantage. H.B. 64 would compel Ohio clients to consider addressing their legal needs from a state without similar tax burdens. To cite a common refrain, "It's nothing personal, it's only business."

We are also concerned because the language defining the newly-taxable services appears impossible to administer, an aggressive interpretation of the language drafted could impose sales tax on certain legal services, taxing legal services in this manner could result in the breach of the attorney-client privilege, and the taxation of services generally is problematic. During my oral testimony today, I intend to highlight a few of these concerns and have also included more information in my written testimony.

1. The definitions for the services subjected to Ohio sales and use tax in H.B. 64 are so imprecise as to make it difficult or impossible to determine which services are taxable.

The definitions for these services, as drafted, are the single most serious problem with H.B. 64 because they are so imprecise as to make it impossible for either a lawyer or her client to know whether a particular service is taxable. Legal services



are not explicitly made taxable by H.B. 64, however the new services subjected to tax are taxed “regardless of the profession of the provider of the service,” which means some – but not all – of the things lawyers do could become taxable. This creates great potential for a tax assessment to unexpectedly surprise taxpayers acting in good faith.

2. The experience of the sales tax on Employment Services has taught us that if the language used in the statute is not precise, the tax will expand.

The historical perspective of practitioners dealing with the tax on Employment Services is instructive. The tax on Employment Services was intended to encompass a very limited definition of temporary personnel staffing. However over time aggressive interpretation has broadened that definition to tax numerous other services, some of which did not exist at the time the statute was adopted. Many businesses providing management consulting, information technology, and computer programming services have found activities which they and their customers understood to be nontaxable professional services subjected to tax under audit. In light of this experience, the meaning of taxable lobbying services, management consulting services, and debt collection services, as proposed, are unclear at best.

3. The ultimate scope of the definitions, as drafted, is totally unknown.

Because the definitions are so imprecise, they have the potential to impose tax on more services than what is apparent, and could have significant unintended consequences by taxing services that do not yet exist. These broad definitions have the potential to impose tax on a number of other services beyond those they appear intended to encompass. “Lobbying services” is defined so as to include any effort that serves to influence the behavior or opinion of another for consideration. “Management consulting services” includes virtually any advice to any organization relating to business issues. This breadth creates opportunities for error by both taxpayers and tax administrators. Several of the services taxed in this proposal – lobbying and debt collection, for example – are defined and regulated under other provisions of the Ohio Revised Code, though H.B. 64 makes no reference to those provisions.

4. A selective tax on legal services could result in a breach of the attorney-client privilege.

If the Ohio Department of Taxation performs a sales and use tax audit of a law firm, an auditor must review all invoices from the law firm to its clients, and determine which services are subject to tax. This will require a detailed examination of the services described in each invoice, which would violate client confidences, and could result in a breach of the attorney-client privilege. Notably, The West Virginia Department of Revenue has determined that its sales tax on lobbying excludes the analysis an attorney provides to a specific client as professional services.



5. Any sales tax on services is difficult to administer, in part because services are difficult source.

If a service is taxable, it generally will be taxable to the state where the purchaser receives the benefit of the service. If tax is imposed on legal services, and a lawyer advises on an issue with multi-state implications, it may be impossible for the lawyer to know where the client will benefit from that advice. Growing businesses do not have the time or resources to engage in the philosophical inquiry required to fully answer that question. This is among the reasons that a sales tax on services generally should be avoided.

6. The sales tax fundamentally is tax on end consumption, not on business inputs, and this proposal is targeted specifically at business inputs.

If a business is subjected to a tax, the business must incorporate that tax into the price of its goods or services. The result is to compound the effect of the tax, and to increase prices across an economy. Imposing the sales tax on these business inputs will decrease the resources that businesses paying the tax can use to grow, and will require them to pass the tax on to their customers, thus increasing the cost of their services. This pyramiding effect has the potential to completely offset the benefits gained by a reduction in income tax. Additionally, taxing business inputs increases the cost of business development, thereby creating an anti-business atmosphere in Ohio.

7. Any construction of these statutes that imposes a tax on legal services provided by Ohio lawyers will place Ohio lawyers at a disadvantage.

A client comparing two invoices, one from a lawyer in Ohio and one from a lawyer with no presence in Ohio, will see a difference in tax that will discourage the purchase of legal services from Ohio. H.B. 64 not only imposes tax on these services for the first time, but it also raises the rate of the tax. This could result in a substantial combined Ohio state and local sales tax – for example, 8.5% in Cuyahoga County. This has the potential to create a significant “sticker shock” as compared to an out of state firm providing the same service.

8. For the reasons cited, the true dollar impact of the new tax is impossible to determine with any certainty.

An untried tax can give rise to significant problems in accurate revenue forecasting. While the effort to reduce the income tax burden on Ohioans is laudable, the definition of the services subjected to tax is unclear, and the sourcing mechanism for these services unpredictable. Errors in revenue forecasts are all but certain.



OHIO STATE BAR
ASSOCIATION

Connect. Advance. Succeed.

9. A tax on lobbying and public relations services raises concerns about the rights to free speech and association.

Our committee focuses on Ohio state tax laws, including the state and federal constitutions, to the extent they have implications for the tax laws of this state. The First Amendment seldom arises in this context, therefore the First Amendment implications of a tax on lobbying and public relations are outside the experience of most members of our Committee. Nevertheless, we recognize that a tax on lobbying and on public relations raises important questions regarding a tax on free speech.

10. A tax on legal services is so atypical that it would place Ohio well outside the norm.

To our knowledge only three states: Hawaii, New Mexico, and South Dakota, impose sales tax on legal services. A customer receiving an invoice with anywhere from 6.25% to 8.5% Ohio sales tax on services provided by a lawyer will take note of that amount. But that amount will be particularly noteworthy if it is the first time the customer has ever seen a tax of this type. For many businesses, an invoice from a post-H.B. 64 Ohio lawyer would be the first time encountering such a tax. Concerns like this have led several states that attempted to impose sales taxes on services in recent years – Florida, Louisiana, Massachusetts, Maryland and Michigan – to repeal or decline to enact those taxes.

House Bill 64 proposes to expand the sales tax base by taxing several broadly-drafted business services. The definitions provided for these services are imprecise, and threaten to impose Ohio sales and use tax on legal services, which would hinder providing legal services in Ohio. The language in H.B. 64 is so imprecise that what is subject to tax and the revenue implications of the new tax cannot be known. We thank you for your time and request that you address these issues raised by H.B. 64.