IN THE SUPREME COURT OF OHIO

DaimlerChrysler Corporation,	)	Appeal from Ohio Board of Tax Appeals
	)	
Appellant,	)	BTA Case No: 2004-T-187
	)	BTA Case No: 2004-T-188
v.	)	
	)	
William W. Wilkins,	)	Supreme Court Case 06-1731
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

Brief of Appellant

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GLOSSARY

In this brief certain names and terms have been abbreviated or assigned a shorthand name. These abbreviations and shorthand names are listed below, along with the page at which they first appear.

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STATEMENT OF CASE

October 1994 through December 1997

On July 30, 1999, the Ohio Department of Taxation ("Department") issued Notice of Assessment No. 99000098 U to DaimlerChrysler Corporation ("DCC"). The assessment covers the period from October 1, 1994 through December 31, 1997 and sought use tax from DCC in the amount of $1,303,631.64, a penalty in the amount of $195,544.75, and preassessment interest in the amount of $299,777.58. (ST.188/81).[1] The tax assessed was based on the cost of goodwill repairs paid for by DCC.

On August 26, 1999, DCC filed a Petition for Reassessment relating to this assessment. (ST.188/50-53).

January 1998 through December 2000

On August 29, 2002, the Department issued Notice of Assessment No. 7020417319 to DCC. The assessment covers the period from January 1, 1998 through December 31, 2000 and sought use tax from DCC in the amount of $2,313,834.25, a penalty in the amount of $115,691.71, and preassessment interest in the amount of $573,519.45. (ST.187/55).[2] Again, the tax assessed was based on the cost of goodwill repairs paid for by DCC.

On October 15, 2002, DCC filed a Petition for Reassessment relating to this assessment. (ST.187/35-40).

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[1] References to the transcript of evidence certified to the Board of Tax Appeals by the Tax Commissioner with respect to BTA Case No. 2004-T-188, which addressed Assessment No. 99000098 U, will be as follows: (ST.188/_).

[2] References to the transcript of evidence certified to the Board of Tax Appeals by the Tax Commissioner with respect to BTA Case No. 2004-T-187, which addressed Assessment No. 7020417319, will be as follows: (ST.187/_).

Final Determinations/Notices of Appeal

On December 18, 2003, the Tax Commissioner of Ohio ("Commissioner") issued a final determination relating to each of the Petitions for Reassessment filed by DCC. In his final determinations the Commissioner affirmed all but the penalty portion of Assessment No. 99000098 U and Assessment No. 7020417319 (together, the "Assessments"). (ST.188/1-8; ST.187/1-9).

On February 13, 2004, DCC appealed the Commissioner's final determinations to the Board of Tax Appeals ("Board"). Thereafter, on August 18, 2006, the Board issued a single Decision and Order affirming the Commissioner's final determinations in their entirety.

It is noted that the Board convened a hearing on February 3 and 4, 2005 for the purpose of receiving evidence related to the issues raised in DCC's Notices of Appeal. At this hearing, DCC offered the testimony of six witnesses and introduced into evidence 42 exhibits. References to such evidence will be to the Supplement ("Supp. __"). When considered helpful, an additional reference to the transcript of evidence certified by the Commissioner relating to BTA Case No. 2004-T-187, the transcript of evidence certified by the Commissioner relating to BTA Case No. 2004-T-188, the record of testimony presented during the Board's February 3 and 4, 2005 hearing (R3. __ and R4. __, respectively), and the exhibits received into evidence during the Board's hearing ("Exhibit __") will be provided.

Some of the evidence presented to the Board has not been included in the Supplement. To the extent such evidence is referred to in this brief, it will be referenced to the record certified by the Board.

STATEMENT OF FACTS

On November 17, 1998, Daimler-Benz AG acquired Chrysler Corporation and changed its name to DaimlerChrysler Corporation, i.e., DCC. (R3. 62/Supp. 16).

DCC was incorporated in 1925 under the laws of the State of Delaware. During the periods under review, the major portion of the company's operations involved the automotive products segment of its business. The automotive product segment included the design, manufacture, assembly, and sale of automobiles and trucks under the following brand names: Chrysler, Dodge, Plymouth, Jeep, and Eagle. (R3. 62/Supp. 16; Exhibit 3).

Most of the motor vehicles manufactured and sold by DCC are sold through a network of retail dealers. (R3. 61-63/Supp. 16; Exhibit 3). The arrangement between DCC and its dealers is documented in a Sales and Service Agreement ("Dealer Agreement"). (R3. 63-65/Supp. 16-17; Exhibit 4a-4e). The Dealer Agreement is supplemented by a document captioned Dealer Sales and Service - Additional Terms and Provisions ("Additional Terms Agreement"). (R3. 63-65/Supp. 16-17; Exhibit 5a-5b).

DCC's Sale of Products to Dealers

The Dealer Agreement, insofar as it addresses the sale of new motor vehicles to a dealer, provides in Article 1:

> Dealer has the right to order and purchase from CC and to sell at retail only those specific models of CC vehicles, sometimes referred to as "specified CC vehicles", listed on the Motor Vehicle Addendum, attached hereto and incorporated herein by reference.

The Additional Terms Agreement provides in Article 14:

> CC shall ship specified CC vehicles, parts, and accessories to Dealer only on Dealer's order. ***

> All orders are subject to acceptance by CC, which acceptance may be in whole or in part.

The Additional Terms Agreement further provides in Article 21:

> CC shall notify dealer from time to time of the prices, charges and terms of purchase for products sold under this agreement and shall charge dealer for such products according to the prices, charges and terms of purchase in effect at the date of shipment. ***.[3]

When setting the price for a new vehicle offered for sale to its dealers, DCC, in order to generate a profit on the sale, must recover the fixed and variable costs incurred when manufacturing the vehicle. Included among such costs are the anticipated cost of repairs covered by the company's warranty program. (R3. 134-145, 151, 191-192, 194-195/Supp. 34-37, 40, 48-49; Exhibit 13 and 14). These costs include the anticipated cost of goodwill repairs. (R3. 134/Supp. 34).[4]

Dealers' Sales to Public

With the exception of any transaction qualifying for exception or exemption from tax, an Ohio dealer's sale of a new vehicle is subject to Ohio sales or use tax. The amount of tax due on any such sale is the product of the amount paid by the purchaser for the vehicle (price), as set forth on the new vehicle sales contract (Exhibit 17), and the tax rate in effect for the county in which the vehicle will be registered. The price includes an amount attributable to the original manufacturer's warranty and related coverage that comes with every DCC vehicle -- including the anticipated cost of goodwill repairs -- which the dealer previously paid to DCC. There is no

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[3] The price set by DCC for any given vehicle is set forth in what is referred to as a Cost Guide. Exhibit 15 is an example of a Cost Guide. (R3. 73/Supp. 19).

[4] DCC quantifies the cost of anticipated warranty program repairs using a very complex mathematical model that takes into account actual warranty program expenses incurred in prior years. The process of calculating such cost was explained by James May, a retired executive of DCC. (R3. 134-145/Supp. 34-37; Exhibit 13 and 14).

separate itemized charge for such coverage on the new vehicle sales contract. (R4. 10-13/Supp. 54-55).

Limited Warranty Repair Procedure

Article 11(b) of the Additional Terms Agreement requires dealers to agree to service all Chrysler vehicles. Article 11(b) further provides:

> Dealer shall supply to all purchasers from dealer of new CC vehicles a copy of CC's appropriate new vehicle warranty ***.[5]
>
> [Dealers shall] provide owners of CC vehicles *** all warranty service and campaign inspections or corrections to which they may be entitled in accordance with the policies and procedures set forth in Chrysler Corporation's Warranty Policy and Procedures Manual" ***.

As alluded to above, all new vehicles manufactured by DCC are covered by a warranty. (R3. 81/Supp. 21). Focusing on the warranty applicable to 1994 Chrysler brand vehicles (Exhibit 10d), the warranty booklet provides at page 1 for either a 3 year/36,000 mile basic warranty or a 12 month/12,000 mile basic warranty with 7 year/70,000 mile powertrain coverage. (R3. 84/Supp. 21).

At page 8, the warranty booklet goes on to provide:

> During the terms of the Limited Warranties on your vehicle, Chrysler covers the cost of all parts and labor needed to repair or adjust any Chrysler supplied item (except tires and the OKI Cellular Telephone) that proves defective in material, workmanship or factory preparation.

If, for example, the owner of a 1994 Chrysler New Yorker (the "Owner") purchased on January 1, 1994 encountered alternator problems on March 1, 1994, having driven the vehicle only 2,000 miles, DCC would have been obligated to repair the defect without charge to the

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[5] Exhibits 10a - 10j are representative samples of the limited warranties applicable to vehicles manufactured by DCC from 1991 through 2000. (R3. 82-83/Supp. 21).

Owner. (R3. 85/Supp. 22). Procedurally, the repair transaction would have played out as follows.

The Owner would have taken his vehicle to a DCC dealer, who would have begun the process of filling out a universal repair order.[6] Eventually, the dealer would diagnose the problem. Upon determining that the vehicle's alternator was defective, the dealer would have repaired or replaced it — at no additional cost to the Owner. The dealer would have looked to DCC for reimbursement. To this end, the dealer would have electronically communicated to DCC all facts relevant to the repair transaction, including a description of the work performed and any parts used to repair the vehicle.[7] Based on the information provided by the dealer, DCC would have determined the reimbursement to which the dealer was entitled. (R3. 90-102/Supp. 23-26).

In the transaction described above, the dealer would have been entitled to 140% of the dealer price of the replacement alternator[8] plus an amount equal to a specified hourly labor rate (say $65) multiplied by the period of time allotted by DCC to replace a alternator (.4 hours).[9] In these circumstances, if the suggested retail price of the alternator was $100, DCC would have

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[6] Exhibit 11 is a blank copy of a universal repair order. The purpose/content of a universal repair order is described in the Basic URO Preparation section of Exhibit 9b at pages URO 8-10. (R3. 86-90/Supp. 22-23). The overall process relating to a repair transaction is described at pages 90-102 (Supp. 23-26) of the transcript of testimony elicited during the Board's February 3, 2005 hearing.

[7] The mechanism for conveying the relevant information to DCC is the so-called DIAL -- Dealer Information Access Link – system. (R3. 100-101/Supp. 25-26; Exhibit 9b at R 1; Exhibit 9a at WA 13).

[8] The method by which the amount a dealer is reimbursed for parts is described in Exhibit 8b at pages WR 13-15, and pages 94-97 (Supp. 24-25) of the transcript of testimony elicited during the Board's February 3, 2005 hearing. It is, essentially, either 130% or 140% of the dealer net price for any given part, depending on the model year of the vehicle to which the part relates.

reimbursed the dealer $166 for the parts and labor provided to the Owner. (R3. 101-102/Supp. 26).

In this transaction, DCC would not have taken physical possession of the alternator used to repair the Owner's vehicle. Nor would DCC have obtained title to the alternator. Indeed, the entire transaction would have been completed before DCC became aware of it. (R3. 109-110/Supp. 28).

Goodwill Repair Procedure

Goodwill repairs are also part of DCC's warranty program. A goodwill repair is a repair to a vehicle, the cost of which is borne by DCC, that is not covered by the DCC limited warranty applicable to the vehicle. (R3. 102/Supp. 26; Exhibit 9b at WP 6 and ARG 17).

Goodwill repairs are typically authorized when it appears that a condition is the result of a defect in material or workmanship as opposed to aging, physical damage, lack of proper maintenance or owner abuse. DCC's dealers are authorized to perform goodwill repairs in different ways depending on the dealer's status.

DSA Dealers

DCC has a DSA (Dealer Self Authorization) program that permits certain dealers, in certain circumstances, to authorize goodwill repairs. During the period from 1994 through 2000, approximately 75 percent of DCC's dealers were part of the DSA program. If a dealer was part

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[9] The method by which the amount a dealer is reimbursed for labor is described in Exhibit 9b at pages URO 11, which refers to DCC's Labor Operation Time Schedule (Exhibit 12), and pages 97-99 (Supp. 25) of the transcript of testimony elicited during the Board's February 3, 2005 hearing. Essentially, any given repair is allotted a certain amount of time for which DCC will reimburse a dealer at a specified hourly labor rate.

of the DSA program, he could authorize a goodwill repair on his own within certain limits described below. (R3. 103-105/Supp. 26-27).

If a dealer wasn't part of the DSA program, he could not authorize a goodwill repair on his own. Instead, the dealer would have to secure the approval of DCC's District Manager. (R3. 104/Supp. 26).

5 Star Dealers

DCC has what are referred to as 5 Star dealers. These dealers, if part of the DSA program, are authorized to approve goodwill repairs up to 5 years/50,000 miles from the warranty start date. Their authority is limited to $1,000 for non-powertrain repairs and $2,500 for powertrain repairs. (Exhibit 9b at WP 6). Beyond those cut-off points, a 5 Star dealer needs authorization from DCC's District Manager to perform a goodwill repair. R3. 105-106/Supp. 27).

Non 5 Star Dealers

Non 5 Star dealers who are part of the DSA program are authorized to approve goodwill repairs up to 12 months/12,000 miles beyond the limited warranty period. There authority is limited to $600 for non-powertrain repairs and $1,500 for powertrain repairs. (Exhibit 9b at WP 6). Beyond those cut-off points, a Non 5 Star dealer needs authorization from DCC's District Manager to perform a goodwill repair. R3. 106-108/Supp. 27).

sales in which the purpose of the consumer is "to use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service."

Except for the distinction noted above, the controlling provisions of law are identical in both cases.

Proposition of Law 1

DCC did not "use" any tangible personal property that may have been provided by its dealers when performing goodwill repairs. Nor did the company realize any benefit attributable to any taxable service provided by its dealers.

The Fundamental Statutory Provisions[12]

Pursuant to R.C. § 5741.02(A), the State of Ohio levies an excise (use) tax:

> [O]n the storage, use, or other consumption in [Ohio] of tangible personal property or the benefit realized in [Ohio] of any service provided.

The term "use" is defined in R.C. § 5741.01(C), which reads:

> "Use" means and includes the **exercise of any right or power incidental to the ownership of the thing used**. A thing is also "used" in this state if its consumer gives or otherwise distributes it, without charge, to recipients in this state. (Emphasis added)

The term "other consumption" is defined in R.C. § 5741.01(N), which reads:

> "Other consumption" includes **receiving the benefits of a service**. (Emphasis added)

The Commissioner argues that DCC "direct[s] [its] dealers to provide repair parts and services to vehicle owners, and agree[s] to pay the dealers for the parts and services ***." In so

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12 Unless otherwise noted, references in this brief to the Ohio Revised Code will be references to the Code as it read during the periods covered by the Assessments.

doing, the Commissioner argues, "[DCC] has purchased parts and services and exercised a right incidental to ownership of the parts and services." (ST.188/3; ST.187/3). The Board agreed.

Rules of Construction

The first point to be made in response to the foregoing argument is that the above-referenced sections impose a tax and, therefore, must be strictly construed. As the Court said in paragraph 1 of the syllabus of Gulf Oil Corporation v. Kosydar (1975), 44 Ohio St.2d 208:

> Strict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed. (Paragraph One of the syllabus in *Davis v. Willoughby*, 1973 Ohio St. 338, approved and followed.)

That this rule of statutory construction applies to statutes which impose a sales or use tax is made clear in The Hertz Corporation v. Tracy, BTA Case No. 96-K-211 (December 19, 1997), wherein the Board said:

> The issue in this case is whether the transactions in issue constitute sales within the purview of the definition set forth in R.C. 5739.01(B). Any presumption in this context is in favor of the taxpayer and the corresponding burden is upon the Tax Commissioner to establish that a sale has occurred as a matter of law. *Gulf Oil Co. v. Kosydar* (1975), 44 Ohio St.2d 208.

The second point to be made is that a clear and unambiguous statute is to be applied as written. As the Court stated in Storer Communications, Inc. v. Limbach (1988), 37 Ohio St.3d 193:

> In *Sears v. Weimer* (1944), 143 Ohio St. 312, 28 O.O. 270, 55 N.E.2d 413, we stated the first rule of statutory construction in paragraph five of the syllabus:
>
> "Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted."

> We amplified this rule in *State, ex rel. Foster, v. Evatt* (1944), 144 Ohio St. 65, 29 O.O. 4, 56 N.E.2d 265, at paragraphs seven and eight of the syllabus:
>
> "7. Courts have no legislative authority and should not make their office of expounding statutes a cloak for supplying something omitted from an act by the General Assembly. The question is not what did the General Assembly intend to enact, but what is the meaning of that which it did enact. (*Singluff v. Weaver,* 66 Ohio ST. 621, approved and followed.)
>
> "8. There is no authority under any rule of statutory construction to add to, enlarge, supply, expand, extend or improve the provisions of the statute to meet a situation not provided for."
>
> Statutes clear in their terms need no interpretation; they simply need application. If the inquiry into language of a statute "reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretative effort is at an end, and the statute must be applied according." *Provident Bank v. Wood* (1973), 36 Ohio St. 2d 101, 105-106, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381 citing *Sears v. Weimer, supra. Id.* at 194.[13]

Incidents of Ownership

With the preceding rule of statutory construction in mind, can it reasonably be said that the Commissioner has carried his burden of proving that DCC exercises any right incidental to ownership of the parts provided by its dealers when performing goodwill repairs ("Replacement Parts"). Consider the following.

DCC never owns the Replacement Parts. Nor does it ever physically possess the Replacement Parts. Nor can DCC require a dealer to use any Replacement Parts to repair any particular vehicle. All that DCC does is agree to reimburse a dealer for any Replacement Parts used during the course of a goodwill repair. Given these facts, where is the exercise of any right incidental to ownership of the Replacement Parts? The answer seems apparent. There is none.

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13 See also Philips Industries, Inc. v. Limbach (1986), 37 Ohio St.3d 100.

DCC is aware of the decision rendered in General Motors Corporation v. Wilkens 102 Ohio St.3d 33, 2004-Ohio-1869. In that case the Court considered whether General Motors "used" the parts provided by its dealers when performing warranty program repairs. The Court said:

> Just as GM does here, Drackett [referring to *Dracket Products Co. v. Limbach* (1988), 38 Ohio St. 3d 204] argued that it had never possessed the materials for which it was assessed a use tax. However, we held that "[t]he use tax, contrary to [Drackett's] argument, is not imposed upon the transfer of possession of tangible personal property. It is imposed upon the storage, use, or consumption of tangible personal property in Ohio." Id. at 205, 527 N.E.2d 860. Therefore, because the advertising supplements had been published and distributed in Ohio at Drackett's direction and expense, we found that Drackett had "exercised sufficient rights or powers incidental to ownership to subject its purchase of a portion of the supplement to the use tax." Id. at 206, 527 N.E.2d 860. Applying Drackett, we find that just as the advertising supplements were paid for by Drackett and distributed by the newspapers on Drackett's behalf, the repair parts were paid for by GM and were placed on the customers' vehicles on GM's behalf. Thus, GM exercised sufficient rights or powers incidental to ownership to subject it to the use tax for using the parts. (Emphasis added) *Id.* at 39-40.

Noting that the parts were placed on vehicles "on GM's behalf" -- i.e., the parts were used to fulfill General Motors' contractual obligation under its limited warranty -- the Court held that General Motors exercised rights or powers incidental to the ownership of the parts used by its dealers when performing repairs that were covered by the company's warranty program. In the matter at hand, DCC has no contractual obligation to a vehicle Owner to authorize or pay for goodwill repairs. Thus, it can not reasonably be said that simply by paying for any parts used in the performance of a goodwill repair DCC is fulfilling a contractual obligation to a vehicle Owner and, therefore, under the rationale of *General Motors Corporation v. Wilkens*, exercises a right or power incidental to ownership of such parts. This conclusion is also consistent with the

decision rendered in *Dracket Products Co. v. Limbach* (1988), 38 Ohio St. 3d 204, on which *General Motors Corporation v. Wilkins* was based.

In *Dracket Products Co. v. Limbach,* a marketing company that directed three out-of-state publishing companies to produce advertising supplements to be inserted into preselected newspapers was considered liable for use tax on amounts paid for supplements delivered in Ohio. Because the taxpayer contracted for and selected the content of the supplements, the newspaper in which they were placed, and the date on which they were to run, the Court determined that the taxpayer exercised sufficient rights or powers incident to ownership of the supplements to subject the taxpayer's purchase of the supplements to use tax.

Similarly, in *Midwest Foundation Independent Physicians Assn. v. Tracy,* (1996), 74 Ohio St.3d 221, a health maintenance organization was considered liable for use tax on the distribution to its Ohio members of a health care magazine that was published in, and mailed by an unaffiliated publisher from, another state. The Court held that by ordering and paying for the out-of-state magazines and directing their delivery to its Ohio members, the company was exercising rights and powers incidental to ownership of the magazines and, therefore, was subject to use tax.

In *T.V. Fanfare Publications, Inc. v. Tracy,* BTA Case No. 96-S-530 (August 28, 1998), an advertising company that solicited, designed, and produced advertisements for local businesses for display or distribution in stores located in Ohio was considered liable for Ohio use tax that it failed to collect from its customers. Citing the decisions in *Dracket Products* and *Midwest Foundation Independent Physicians Assn.*, the Board concluded that the taxpayer's customers purchased tangible personal property (i.e., advertisements printed on register tapes, laminated signs, etc.) and made a taxable use of these materials in Ohio.

In each of these cases the person considered to have exercised rights or powers incidental to ownership of the property in question initiated the process that led to the creation of the property, directed that the property be delivered to individuals or businesses located in Ohio, and also controlled the time and manner of distribution to such individuals or businesses. None of these facts are present in the case at hand.

Benefit of Service

In *General Motors Corporation v. Wilkins* the Court also considered whether General Motors realized any benefit from the repair services provided by its dealers when the dealers performed warranty program repairs. The Court said:

> There are two different transactions occurring when a vehicle is repaired. In one transaction, between GM and its customer, GM is fulfilling its obligations to its customer under the warranty or repair program. In order for GM to fulfill its obligations, it has entered into a separate transaction with the dealer. In this other transaction, which is between GM and its dealer, the dealer provides the parts and services necessary for GM to fulfill its obligations to its customer. *** When the dealer provides the parts and services to repair a vehicle, <u>GM receives a benefit because the parts and services enable GM to fulfill its warranty or repair-program obligation</u> to its customer. Thus, GM did realize a benefit from the repair services provided by its dealer and that benefit is subject to use tax. (Emphasis added) *Id.* at 40.

Because DCC has no obligation to authorize or pay for the cost of goodwill repairs, the benefit perceived in the General Motors case is not present in the matter at hand. Given this fact, *General Motors Corporation v. Wilkens* is distinguishable.

Proposition of Law 2

DCC is not a "consumer" of any tangible personal property or taxable service provided by its dealers when performing goodwill repairs.

Recall that R.C. § 5741.02(A) imposes a use tax:

> [O]n the storage, use, or other consumption in [Ohio] of tangible personal property or the benefit realized in [Ohio] of any service provided.

Recall also that, pursuant to R.C. § 5741.02(B):

> Each consumer, storing, using, or otherwise consuming in [Ohio] tangible personal property or realizing in [Ohio] the benefit of any service provided shall be liable for the tax ***.

The foregoing provision is similar to R.C. § 5739.03, which provides:

> Except as provided in section 5739.05 of the Revised Code, [Ohio's sales] tax *** shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale ***.

Thus, only a "consumer" can be held liable for Ohio's sales or use tax.

Consumer — Sales Tax Definition

R.C. § 5739.01(D) defines the term "consumer" for sales tax purposes. Insofar as it is relevant to the issue at hand, until September 29, 1997 the referenced section read:

> (1) "Consumer" means the person for whom the service is provided, to whom the transfer effected or license given by a sale is or is to be made or given, ***.

When the owner of a motor vehicle has the vehicle repaired by a dealer, it is the owner of the vehicle "for whom the service is provided", without regard to who may pay the dealer for his services. The same is true with regard to any parts that may be used by the dealer in the repair transaction.

Consider the transactions upon which the Assessments are based. When a dealer repaired a vehicle covered by the goodwill portion of DCC's warranty program, he wasn't performing any service for DCC. He was performing a service for the owner of the vehicle. That DCC agreed to pay for a repair does not transform DCC into the recipient of any service any more than one who grants a scholarship becomes the recipient of a college education. Thus, under R.C. § 5739.01(D), as it read from April 22, 1994 through September 27, 1997, DCC should not be considered the consumer for sales tax purposes of any parts and labor used to repair a vehicle simply because the company agreed to pay the dealer's fee.

September 29, 1997 Amendment

Effective September 29, 1997, the following language was added to R.C. § 5739.01(D):

> (5) A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under division (E)(1) of this section.

Thus, since September 29, 1997, the General Assembly has mandated that for sales tax purposes persons who sell repairs services be considered the consumer of any tangible personal property used when performing the repair service. In the matter at hand, that would be DCC's dealers.

R.C. § 5741.02(C)(2)

To the extent DCC can not be considered the consumer (for sales tax purposes) of any property or service involved in the transactions upon which the Assessments are based, it cannot be subject to sales tax on such transactions. That being the case, it can not be subject to use tax on those transactions either. This conclusion flows from R.C. § 5741.02(C), which provides:

> The [use] tax does not apply to the storage, use, or consumption in [Ohio] of the following described tangible personal property or services, nor to the storage, use, or consumption or benefit in [Ohio] of tangible personal property or services purchased under the following described circumstances:
>
> *** *** ***
>
> (2) [T]angible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code.

Because DCC is not subject to sales tax on the transactions on which the Assessments are based, it can not be subject to Ohio's use tax either. As the Board said in *Newfield Publications, Inc. v. Tracy*, BTA Case No. 96-K-91 (September 23, 1998): "*** If the transaction is not subject to sales tax, it follows that it is also excepted from the imposition of use tax. R.C. 5741.02(C)."

Consumer — Use Tax Definition

Even if one were to ignore the definition of "consumer" for sales tax purposes, under Ohio's use tax law DCC is not the consumer of any property or service provided in the transactions upon which the Assessments are based.

R.C. § 5741.01(F) defines the term "consumer" for use tax purposes. Insofar as it is relevant, it reads:

> "Consumer" means any person who has **purchased** tangible personal property or has been provided a service for storage, use, or other consumption or benefit in this state. "Consumer" does not include a person who receives, without charge, tangible personal property or a service. (Emphasis added)

The term "purchase" is defined in R.C. § 5741.01(D), which reads:

> "Purchase" means **acquired or received** for a consideration ***. (Emphasis added)

The dictionary definition of "acquire" is "to **gain possession of**." The definition of "receive" is "**to take or acquire** (something given, offered or transmitted); get." Given these definitions, it can not reasonably be concluded that DCC purchased any property or has been provided with any service in the transactions upon which the Assessments are based. Accordingly, DCC can not be considered the consumer of any such property or service for Ohio use tax purposes.

Response to Board's Critique

- At page 8 of its Decision and Order, responding to DCC's contention that under R.C. 5739.01(D), as it read prior to September 29, 1997, the owner of a vehicle on which a goodwill repair was performed should be considered the consumer of such repair, the Board writes:

> [V]ehicle owners are not the "consumers" of the property and services at issue in the goodwill repairs, as R.C. 5741.01(F) specifically excludes those who receive tangible personal property or the benefits of a service without charge.

But vehicle owners do pay (albeit in advance) for goodwill repairs. Indeed, the Board acknowledged this fact when addressing DCC's "purchase for resale" argument. See Decision and Order at pages 13 and 14. (Appendix 20-21). So too did the Supreme Court of Michigan in *General Motors Corporation v. Dept. of Treasury* (2002), 466 Mich. 231, 644 N.W.2d 734:

> Stated otherwise, we examine whether the cost of the goodwill adjustment policy is included in the retail price of GM vehicles as something that is purchased by customers." (Appendix 33).

The Michigan Court held that it is. And as will be explained in Proposition of Law 3 of this brief, the Michigan Court ultimately held that:

> [A]ssessment of use tax on the goodwill adjustments [involved in the General Motors case] was improper because they were taxed pursuant to

> the [Michigan] General Sales Tax Act when customers purchased vehicles at retail. ." (Appendix 27).

- Immediately following the passage in which the Board stated that vehicle owners are not consumers of the property and services involved in a goodwill repair, the Board went on to write:

> *** DCC argues that its dealers are the consumer in the transactions because it is the dealer who sells the repair service.

This argument was made only with respect to repair transactions occurring after September 29, 1997 – and then because of the specific provisions of R.C. § 5739.01(D)(5), as amended effective on that date.

- With regard to DCC's reliance on R.C. § 5739.01(D)(5) and R.C. § 5741.02(C)(2) as support for its argument that the company can't be subject to use tax on a transaction if it wouldn't be subject to sales tax on the same transaction, the Board concluded that such reliance was misplaced. The Board wrote at page 10 of its Decision and Order that:

> We find DCC's reliance upon R.C. 5739.01(D)(5) and 5741.02(C)(2) to be misplaced. The transaction in issue is the one between DCC and its dealers. While the dealers actually perform the service on DCC's behalf, DCC is the "seller" of the repairs under R.C. 5739.01(D)(5) and, as such, would be the consumer of any tangible personal property used in the repair. (Emphasis added.)

The first point to make seems obvious. When attempting to discern the identity of the consumer in the transaction between DCC and its dealer, it is irrelevant who might be considered the consumer in a subsequent transaction between DCC and a vehicle owner – the only transaction in which DCC could conceivably be viewed as (re)selling the repair service obtained from a dealer.

The Board goes on to write at page 11 of its Decision and Order that:

> Moreover, we do not find that R.C. 5741.02(C)(2) would be applicable to this situation [i.e., the transaction between DCC and a dealer.]

The Board acknowledged that R.C. § 5741.02(C)(2) provides that a transaction that is not subject to sales tax can not be subject to use tax. However, the Board went on to note that R.C. § 5739.01(D)(5) does not except any transaction from sales tax. It merely identifies who the consumer (and, therefore, the taxable party) happens to be. The conclusion the Board drew from this is that the transactions between DCC and its dealers remain subject to use tax regardless whether DCC would be subject to sales tax on the same transactions. This conclusion is flawed for at least two reasons.

First, if a transaction is a sale that by virtue of R.C. § 5739.01(D)(5) is not subject to sales tax <u>as to a given person</u>, any reasonable interpretation of R.C. § 5741.02(C)(2) leads to the conclusion that the transaction can not be subject to use tax <u>as to that same person</u>.

Second, as addressed in Proposition of Law 5, parts used to perform a repair service are specifically exempted from sales tax in the circumstances described in R.C. § 5739.01(E)(15). Thus, R.C. § 5741.02(C)(2) is triggered without regard to R.C. § 5739.01(D)(5).

- Finally, the Board notes at page 11 of its Decision and Order that, because no sales tax was remitted on the transactions between DCC and its dealers, DCC is liable for use tax under R.C. § 5741.02(C)(1). The conclusion does not follow from the premise. R.C. § 5741.02(C)(1) doesn't impose tax; it provides an exemption from tax.

Proposition of Law 3

If DCC is considered the consumer of any tangible personal property or taxable service provided by a dealer when performing goodwill repairs, such property or service was resold by DCC to the owners of the vehicles repaired by the dealers.

If DCC is considered to be the consumer of any parts or labor used by its dealers when performing goodwill repairs, DCC should be considered as having resold the parts and labor to the owners of the vehicles repaired by its dealers.[14] In these circumstances, the transactions between DCC and its dealers would have been excepted from the definition of "retail sale" under R.C. § 5739.01(E)(1) and, therefore, are not subject to Ohio sales or use tax.

Pursuant to R.C. § 5739.02:

> [A]n excise [sales] tax is *** levied on each retail sale made in [Ohio].

The term "retail sale" is defined in R.C. § 5739.01(E), which reads in pertinent part:

> "Retail sale" and "sales at retail" include all sales except those in which the purpose of the consumer is:
>
> (1) To resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person ***.

DCC builds into the price of each of the vehicles it manufactures an amount sufficient to cover the cost of goodwill repairs. In effect, DCC is paid in advance for the cost of these repairs.[15] That being the case, even if a goodwill repair service is considered to be provided by a dealer to DCC, DCC's purchase would still escape Ohio's sales (and, therefore, use) tax because

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[14] This contention is not applicable to property purchased after September 27, 1997. See R.C. § 5739.01(D)(5), as amended by Am. Sub. H.B. 215, 147 Ohio Laws, Part I, 1805, effective September 29, 1997.

[15] The Board acknowledges this fact. See Decision and Order at pages 13 and 14. (Appendix 20-21).

the repair service initially provided by the dealer is resold by DCC. This analysis is consistent with the Commissioner's historic treatment of warranty repairs.

Effective November 15, 1981, Am. Sub. H.B. 694, 138 Laws, Part II, 4016, expanded the definition of "sale" to include all transactions by which an item of tangible personal property is or is to be repaired or an item of tangible personal property is or is to be installed.[16] At the same time, the definition of "consumer" was amended to include the person "for whom [a] service is provided".

On January 13, 1982, the Commissioner issued a release that stated, effective November 15, 1981, a manufacturer would be considered the consumer of any parts or labor provided by another who has performed repairs covered by the manufacturer's warranty. (Exhibit 19/Supp. 57). Notwithstanding this release, manufacturers who included the cost of a warranty in the price of their products did not consider themselves to be subject to tax on the cost of such parts and labor. Moreover, the Commissioner's predecessors never issued an assessment (prior to a 1993 change in the law) that was based on the cost of parts or labor provided by one who performed repairs to a product covered by a manufacturer's warranty. The only conclusion one can draw from this fact is that if the Commissioner's predecessors considered the manufacturer of a product covered by a warranty to be the consumer of any tangible personal property or service that was transferred to the owner of the product at the time it was repaired, the manufacturer was considered by the Commissioner to have resold such property or service.

Additional support for the conclusion set forth in the preceding paragraph is provided in at least two releases issued by the Department after the 1991 enactment of Am. Sub H.B. 298, which for the first time characterized the issuance of warranty, maintenance and service contracts

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16 See R.C. § 5739.01(B)(3)(a) and (b).

as a sale for Ohio sales tax purposes.[17] The first release (Exhibit 21/Supp. 59) had the following to say about this enactment:

> B) THE SALE OF WARRANTIES, MAINTENANCE OR SERVICE CONTRACTS, OR SIMILAR AGREEMENTS, WHERE THE VENDOR AGREES TO REPAIR OR MAINTAIN TANGIBLE PERSONAL PROPERTY, IS SUBJECT TO THE SALES OR USE TAX.
>
> ***** SPECIAL NOTES *****
>
> The sale of a warranty, maintenance or service contract, or similar agreement is considered to be made at the vendor's location and is subject to the tax rate in effect in the vendor's county. All such sales must be reported under a regular county vendor's license which is obtained through the County Auditor's Office in the county where the sales are made. There is a $25 application fee and a $10 annual renewal fee.
>
> Taxable warranties, contracts or agreements would also include so-called "third party" agreements wherein the vendor agrees to pay for the repairs or maintenance which will actually be done by a "third party." This does not include bona fide insurance policies that protect against loss or damage.
>
> Since the transaction outlined in paragraphs A and B are now considered sales, the vendor could be eligible for exemption from sales or use tax on purchases of tangible personal property or selected services. **The exemption would be based on the "resale" or "used directly in making a retail sale" exemption.** If an exemption applies, the purchaser must provide the supplier with a properly completed exemption certificate.

The second release (Exhibit 22/Supp. 61), dated January 1992, reads as follows:

> D) AS THE PROVIDER OF THE REPAIR, MAINTENANCE OR SERVICE, DO I HAVE ANY CLAIMS FOR EXEMPTION?
>
> Yes
>
> You can claim exemption on the purchase of parts used in fulfilling the warranty based on the claim "purchased for resale."

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17 See R.C. § 5739.01(B)(7).

> **If you subcontract the repair service to another, you can claim exemption on the purchase of a repair service (parts and/or labor) based on the "purchased for resale" exemption.** (Emphasis added)

There is no substantive difference between (1) the sale of a warranty, separate from the sale of the warranted product, and (2) the sale of a product covered by a warranty program for an amount that covers the anticipated cost of future repairs. In both instances the consumer is subject to sales tax on the full amount that he paid for the warranty or product. And in both instances the vendor repairs any defects in the warranted product at no additional charge. It follows that in both instances the vendor has a valid claim that property or services purchased to repair the defective product is exempt under the purchase for resale theory recognized in the above referenced administrative releases.

The Commissioner's admission that a warrantor's purchase of parts and services in the circumstances described above qualifies as a purchase for resale may have been prompted by a desire to avoid the "double tax" issue that presents itself in this case. To further explain, assume an extended warranty is sold for $2,000. In a 7% county, the purchaser would be required to pay $140 tax on this transaction. If the warrantor is required to pay tax on the cost of future warranty repairs, and for that reason builds another $140 ($2,000 x 7%) into the price of the extended warranty, the additional amount due from the purchaser of the warranty would be $149.80 ($140 x 1.07%). In effect, the purchaser winds up paying $289.80 in tax on $2,000 of warranty repairs — an increase in tax on such repairs from 7% to 14.49%.

Even if the warrantor does not build an additional $140 into the cost of the extended warranty, if he is required to pay tax on the cost of $2,000 of anticipated repairs — the same repairs for which the purchaser has been billed and on which the purchaser has already paid tax — the result would be the same. Tax would be imposed twice on the same series of events.

The above-referenced administrative releases avoid this onerous result by eliminating (under a purchase for resale theory) the tax that would otherwise be due on the warrantor's purchases. The result should be the same when a manufacturer includes the cost of anticipated warranty program repairs in the price of its product.

General Motors Corporation v. Dept. of Treasury

Indeed, in *General Motors Corporation v. Dept. of Treasury*, Michigan's Supreme Court held as much. In the opening paragraph of its opinion, the Court framed the issue before it:

> Plaintiff, General Motors Corporation (GM), appeals from the Court of Appeals decision that defendant, Department of Treasury, could impose use tax on the vehicle components and parts plaintiff provided to customers as part of plaintiff's goodwill adjustments policy. We reverse the decision of the Court of Appeals and hold that assessment of use tax on **the goodwill adjustments** was improper because they **were taxed** pursuant to the General Sales Tax Act **when customers purchased vehicles** at retail. (Emphasis added.) (Appendix 27)

The Court's basic reasoning is captured in the following passage:

> MCL 205.94(1)(a) provides that "[p]roperty sold in this state on which transaction a tax is paid under the general sales tax act" is exempt from the use tax "if the tax was due and paid on the retail sale to a consumer." Thus, our inquiry is whether "tax was due and paid" pursuant to the GTA on the cost of the goodwill adjustments when vehicles were sold at retail. (Appendix 32)

Having concluded that "the cost of the goodwill adjustment policy is included in the retail price of GM vehicles", the Michigan Court held that such cost had been subject to tax at the time a vehicle was purchased at retail and that it would be improper to subject the same cost to tax a second time.

- At page 13 of its Decision and Order, responding to DCC's contention that it resold any goodwill repair service it may have purchased from its dealers, the Board wrote:

> Crucial to our inquiry is whether the benefit of the service was resold to the customer" in the same form" as that received by the dealer. (Emphasis added)

The foregoing sentence reveals a fundamental error in the Board's analysis. Recall that the overall transaction has been characterized as (1) a transaction between a dealer and DCC (the putative taxable event) and (2) a second transaction between DCC and the owner of a vehicle. Given this fact, the appropriate focus should be on whether the benefit of the service received by DCC from a dealer was resold by DCC to a vehicle owner in the same form as that received by DCC.

- At page 14 of its Decision and Order, the Board explained its understanding of the purchase for resale exemption. Citing *Bellemar Parts Industries, Inc. v. Tracy* (2000), 88 Ohio St.3d 351, *Corporate Staffing Resources, Inc. v. Zaino* (2002), 95 Ohio St.3d 1, and *Cousino Constr. Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, the Board first referred to what it calls the "actual benefit test". According to the Board, the actual benefit test requires that when determining whether a service is resold "in the form in which [it is received]", one must focus on the benefit received by the purchaser and compare that benefit with what the purchaser's customer receives.

In response, perhaps the clearest statement addressing the "in the form in which [it is received]" requirement is found in *Cousino Constr. Co. v. Wilkins* at paragraph 21:

> R.C. 5739.01(E) excludes from the definition of "[r]etail sale" (and therefore excludes from the R.C. 5739.02 sales tax on retail sales) any sale

> "in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person." In other words, when the purchaser's intent in buying goods or services is to resell them to yet another purchaser without changing the goods or services in any way, the original purchase is not considered a "retail sale" and is therefore not subject to the sales tax on retail sales. (And under R.C. 5741.02(C)(2), any sale not subject to sales tax is likewise not subject to the use tax.) (Emphasis added)

Cousino Constr. Co. v. Wilkins

Cousino Construction is a general contractor that restores property damaged by fires, floods, and other disasters. As a preliminary step, it hires subcontractors to remove soot, smoke, odors, mold, and water from the damaged property. Once that task is completed, Cousino reconstructs the damaged property, using drywall, paint, floor coverings, and any other materials and services needed to return the structure to its original condition.

Cousino claimed the services it received from its subcontractors were purchased for resale and, therefore, not subject to sales or use tax. The Commissioner argued that the resale exception did not apply because the services provided to Cousino were not resold by it in the form in which they were received.

The Court, after stating that the resale exemption applies to a sale "*** when the purchaser's intent in buying goods or services is to resell them to yet another purchaser without changing the goods or services in any way" (*Cousino Constr. Co. v. Wilkins* at paragraph 21), noted that Cousino received the benefit of the cleaning services provided by its subcontractors, but did not resell them in the form in which they were received. Instead, Cousino "added its project management/general contractor skills to the cleaning services" in order to "provide a restored and rebuilt building ***". (*Cousino Constr. Co. v. Wilkins* at paragraphs 23 and 24). This lead to the conclusion that:

> The benefit that Cousino delivered to its customers (reconstructed and restored buildings) was not the same benefit that Cousino purchased in the same form in which Cousino received it from the cleaning subcontractors. *Cousino Constr. Co. v. Wilkins* at paragraph 28.

In the matter at hand, DCC's dealers provided discrete repair services, which were passed along exactly as provided by the dealers to the owners of the repaired vehicles. Unlike the taxpayer involved in *Cousino Constr. Co. v. Wilkins*, DCC did not alter or add in any way to the services provided by its dealers. Indeed, DCC didn't even have an opportunity to do so. Accordingly, it must be concluded that if DCC is considered the consumer of any tangible personal property or taxable service provided by a dealer when performing goodwill repairs, such property or service was resold by DCC to the owners of the vehicles repaired by the dealers in the form in which it was received by DCC.

Corporate Staffing Resources, Inc. v. Zaino

Corporate Staffing Resources, Inc. v. Zaino involved a claim made on behalf of Sarcom, Inc., a computer hardware company, that Sarcom's use of temporary workers provided by Corporate Staffing Resources to maintain and repair computers owned by Sarcom's customers qualified as a purchase for resale of the temporary worker's labor. In rejecting this claim the Court said:

> In *Bellemar*, we explained that "[t]he benefit of the services of a temporary work force must include and focus upon its most obvious benefit --that provided by the labor itself." Id. at 353, 725 N.E.2d at 1135. Thus, <u>the actual benefit to a company using temporary employees is "their contribution of temporary, flexible, and less costly labor to its work force</u>." Id. Other such benefits also exist, including screening candidates for future employment and controlling the costs of benefits. Id. ***.
>
> These benefits contrast with the benefit that Sarcom provided to its customers. ***. <u>The benefit to Sarcom's customers</u>, then, was not the labor of CSR technicians, but <u>the end product of that labor: consistently operating computers</u>. ***.

> CSR's dual-benefit/site-focused approach thus fails to comport with our analysis in *Bellemar* and related cases, which follows the plain language of R.C. 5739.01(E)(1). We therefore reaffirm our prior holding that "[w]here a consumer contracts for temporary employees to add to its workforce, the benefit of that service is the labor of the employees, not the product of their work. Because it is the consumer of the services, not its customer, that receives the benefit of the service, the benefit is not resold in the same form and the resale exception from the sales tax does not apply." Bellemar, 88 Ohio St.3d 351, 725 N.E.2d 1132, paragraph one of the syllabus. Accordingly, we hold that Sarcom did not resell in the same form the actual benefit it realized from its transactions with CSR to those customers who had purchased the service agreement. 95 Ohio St.3d at 3-5.

Unlike in *Corporate Staffing Resources, Inc. v. Zaino*, there is no difference between any benefit realized by DCC when a dealer repairs a vehicle the cost of which is borne by DCC under its goodwill repair program -- specific defects in a specific vehicle are repaired; nothing more, nothing less -- and the benefit realized by the owner of the vehicle – the same defects in the same vehicle are repaired; nothing more, nothing less.

CCH Computax, Inc. v. Tracy

The conclusion set forth above is supported by the decision rendered in *CCH Computax, Inc. v. Tracy* (1993), 68 Ohio St.3d 86, which as the Court pointed out in *Corporate Staffing Resources, Inc. v. Zaino* was cited and relied on in *Bellemar Parts Industries, Inc. v. Tracy.* In *CCH Computax* the taxpayer prepared tax returns and related schedules for tax preparers – i.e., attorneys and accountants. Upon receipt of a return, the tax preparer signs it and then delivers it to his or her client for filing. In these circumstances, the Court wrote:

> Computax claims exemption from taxes under R.C. 5739.01(E)(1) because the benefit of its services is resold in the same form in which it is received by the [tax preparer].
>
> The BTA rejected the contention stating, "[t]he printed materials supplied by Computax to its customers are not resold in the same form as received by Computax's customer. * * *" The BTA found that Computax's customer (the tax preparer) signs the tax return (prepared by Computax),

> making it "significantly" different from the return prepared by Computax "as a matter of fact and law."
>
> *** *** ***
>
> The tax preparer's signature on the return may have increased the value of the return, but there is no evidence that the state or form of the return was changed. The BTA's finding to the contrary is unreasonable. See M.S. Osher, M.D. & R.S. Kerstine, M.D., Inc. v. Limbach (1992), 65 Ohio St.3d 312, 603 N.E.2d 997.

As was the case in *CCH Computax*, and unlike the cases involving employment services, DCC's dealers provide a specific repair service for DCC relating to a specific vehicle. That service is then resold by DCC to the vehicle owner without altering or adding to it in any way.

- At pages 14 and 15 of its Decision and Order, the Board attempts to distinguish the benefit received by DCC, its dealers, and a vehicle owner in any given goodwill repair transaction. Here the Board appears woefully confused.

First, the Board concludes that the dealer's benefit comes in the form of DCC's date of sale promise to reimburse it for parts and labor used when performing a goodwill repair. The simple fact is that a dealer's benefit, if any, is irrelevant to the outcome of this case.[18] What is relevant is the benefit realized by DCC and a vehicle owner.

With regard to the benefit derived by DCC, the Board says it is the labor of its dealer, not the repair service the dealer provides. The Board goes on to say that the benefit derived by a vehicle owner is a repaired vehicle, as opposed to the labor of the dealer who provided the repair service. The Board offers no explanation for the distinction it makes. Nor is there any reasonable explanation to offer. As previously explained, when a dealer repairs a vehicle the

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[18] If it were relevant, the benefit to a dealer associated with a goodwill repair is the actual receipt of payment for services rendered. While the Board correctly notes that the price paid by a dealer for a vehicle includes an amount sufficient to cover future goodwill repairs, that amount is recovered by the dealer from its customer at the time the vehicle is sold by the dealer.

cost of which is borne by DCC under its goodwill repair program, specific defects in a specific vehicle are repaired; nothing more, nothing less. Whether this benefit is characterized as (a) the dealer's labor or (b) a repaired vehicle, it is the same for DCC and the vehicle owner. That is to say, DCC passes along to a vehicle owner the dealer's labor or the repaired vehicle, call it what you will, exactly as it was provided by the dealer to the DCC -- without any alteration, modification or enhancement whatsoever (i.e., in the form in which it was received by DCC). The Board conclusion to the contrary is unreasonable and unlawful. The Court is respectfully requested to reverse it.

Proposition of Law 4

If DCC is considered to be the consumer of any tangible personal property or taxable service provided by a dealer when performing goodwill repairs, such property or service was either (1) incorporated into a vehicle produced for sale by DCC or (2) used primarily in a manufacturing operation to produce a vehicle for sale.

If DCC is considered to be the consumer of any parts or labor used by its dealers when performing goodwill repairs, DCC either (1) incorporated the parts and labor into a vehicle produced for sale or (2) used them primarily in a manufacturing operation to produce a vehicle for sale. In these circumstances, the transactions between DCC and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(2) and (9) and, therefore, are not subject to Ohio sales or use tax.

R.C. § 5739.01 provides:

> (E) "Retail sale" and "sales at retail" include all sales except those in which the purpose of the consumer is:
>
> *** *** ***
>
> (2) To incorporate the thing transferred as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining ***;

*** *** ***

> (9) To use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale ***.

Support for the conclusion that the amounts paid by DCC for parts and labor covered under its warranty program are covered by the incorporation exception of R.C. § 5739.01(E)(2) and/or the primary use in manufacturing exception of R.C. § 5739.01(E)(9) is found in General Motors Corporation v. Rose, 179 W.Va. 117, 370 S.E.2d 117 (1987). In that case the Court held that under the following provision of law General Motors was exempt from sales tax on the cost of repairs performed by automobile dealers in satisfaction of the company's warranty.

> [S]ales of property or services to persons engaged in this state in the business of *** manufacturing *** [are exempt from tax]: Provided however, that the exemption herein granted shall apply only to services, machinery, supplies and materials directly used or consumed in the business or organizations named above.

The Court reasoned that warranty program repairs are "an integral part of the overall manufacturing process."[19] In other words, the process of manufacturing a vehicle includes correcting any defects covered by the manufacturer. That being the case, if a manufacturer is considered to have purchased parts and labor used to correct a defect covered by its warranty program, the manufacturer's purchase should be accorded the same sales and/or use tax treatment as the cost of parts and labor incurred to manufacture the vehicle. Under R.C. § 5739.01(E)(2) and/or (9), such purchases are tax exempt.

---

[19] Moreover, the West Virginia Court, as the Michigan Court would do just a few years later, noted that the imposition of the consumer sales tax on warranty repairs would ultimately subject consumers to double taxation, insofar as consumers paid a privilege tax on the value of the automobile, along with a right to repairs under a warranty, at the time of purchase. These arguments are equally persuasive in the case at hand.

At page 16 and of its Decision and Order, responding to DCC's contention that the incorporation exception of R.C. 5739.01(E)(2) applies, the Board noted that goodwill repairs occur after manufacturing has been completed.[20] However, unlike the "use primarily in a manufacturing operation" exception, the incorporation exception applies whenever the thing transferred is incorporated into property produced for sale by manufacturing.

Proposition of Law 5

If DCC is considered to be the consumer of any tangible personal property provided by a dealer when performing goodwill repairs, DCC's purchase of such property is exempt from tax to the extent the property is permanently transferred to the consumer of the repair service as an integral part of the performance of the service.

As noted in Proposition of Law 2, R.C. § 5739.01(D)(5) has provided since September 27, 1997:

> A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under division (E)(1) of this section.

If under this subsection DCC is considered to be the consumer of parts used to perform repair service, those parts that are permanently transferred to the consumer of the service as an integral part of such service are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(15), which excepts from tax those sales in which the purpose of the consumer is:

> To use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be

[20] The Board also refers to and rejects the integrated plant theory, which was not cited or relied on by DCC and which has no application to the incorporation exception.

> permanently transferred to the consumer of the service as an integral part of the performance of the service.

Pursuant to R.C. § 5741.02(C)(2), it follows that those parts that are permanently transferred to the owner of a vehicle as an integral part of a repair service are also exempt from Ohio's use tax.

Response to Board's Critique

At page 18 and of its Decision and Order, responding to DCC's contention, the Board wrote:

> DCC, not the vehicle owner, is the consumer of the parts and labor utilized to make a goodwill repair.

For purposes of this proposition of law, DCC agrees.[21] If it weren't the consumer of the parts used in the performance of a goodwill repair, it wouldn't need to invoke the exemption provisions of R.C. 5739.01(E)(15). Simply stated, the referenced code section applies to purchases made by consumers.

The Board went on to write:

> Moreover, vehicle owners are not "consumers" because R.C. 5741.01(F) specifically excludes those who receive tangible personal property or the benefit of a service without charge. *Gen. Motors*, supra, at ¶65. Consequently, we find DCC's specification of error to be without merit.

Whether or not a vehicle owner is the consumer in a given transaction and, therefore, potentially able to take advantage of the exemption provided by of R.C. 5739.01(E)(15) is not

---

[21] As argued on pages 18-19 of this brief, pursuant to R.C. 5739.01(D)(5) DCC's dealers are the consumers of any parts used after September 29, 1997 in the performance of a goodwill repair. It is only if this argument is rejected and DCC is considered to be the consumer of such parts that Proposition of Law 5 and DCC's reliance on R.C. 5739.01(E)(15) comes into play.

the issue in the case before the Court. The transactions in play are those in which DCC paid for parts used during the course of a goodwill repair. The issue at hand is whether, if DCC is considered to be the consumer of those parts, it's purchases are exempt under the provisions of R.C. 5739.01(E)(15). The General Assembly has said that as long as the parts are transferred as an integral part of the performance of the repair service their purchase will qualify for exemption. That has occurred in the cases before the Court.

CONCLUSION

1. DCC did not acquire title to or possession of any tangible personal property that may have been provided in the transactions underlying the Assessments. Nor was a license to use or consume tangible personal property granted to DCC in these transactions. Consequently, the transactions on which the Assessments are based do not constitute sales for Ohio sales tax purposes and DCC can not be held liable for sales or use tax on such transactions pursuant to R.C. §§ 5739.01(B) and 5741.02(C)(2).

2. DCC did not use any tangible personal property or realize any benefit associated with any service that may have been provided in the transactions underlying the Assessments. Consequently, DCC can not be held liable for use tax on the amounts paid for such property or service pursuant to R.C. § 5741.02(A)

3. The amounts paid by DCC are for parts and labor used or consumed to perform goodwill repairs to motor vehicles owned by others. DCC is not the consumer of such parts and labor as the term "consumer" is defined in R.C. §§ 5739.01(D) or 5741.01(F). Consequently, DCC can not be held liable for use tax on the amounts paid for such parts and labor pursuant to R.C. §§ 5741.02(B) and (C)(2).

Moreover, pursuant to R.C. § 5739.01(D)(5), a person who sells a repair service is, as of September 29, 1997, specifically identified as the consumer of any tangible personal property used in performing such service. For this additional reason, DCC can not be considered the consumer of parts and labor used or consumed by its dealers on or after September 29, 1997 to repair motor vehicles owned by others.

4. If DCC is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, and if DCC's use of the parts and labor was in fulfillment of an obligation incurred under either (1) a warranty that comes with every motor vehicle manufactured by DCC or (2) a warranty, maintenance or service contract, or similar agreement by which DCC agreed to repair or maintain a motor vehicle, the transactions between DCC and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(13) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

5. If DCC is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DCC resold the parts and labor to the owners of the vehicles repaired by its dealers in the same form in which the parts and labor were received by DCC. In these circumstances, the transactions between DCC and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(1) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

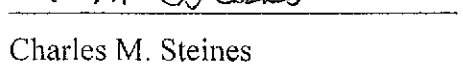
6. Because the amount charged for a new motor vehicle includes the anticipated cost of repairs to be performed in the future under DCC's warranty program, and further because sales or use tax was paid on the full amount charged for a new vehicle at the time the new vehicle was purchased, imposition of tax on the amount paid by DCC for repairs performed to vehicles

covered by the company's warranty program unlawfully subjects the cost of the repairs to double taxation. In these circumstances, the transactions between DCC and its dealers are not subject to Ohio use tax pursuant to R.C. §§ 5741.02(C)(1).

7. If DCC is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DCC either (1) incorporated the parts and labor into a vehicle produced for sale or (2) used the parts and labor primarily in a manufacturing operation to produce a vehicle for sale. In these circumstances, the transactions between DCC and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(2) and (9) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

8. If DCC is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DCC's purchases of the personal property used to perform such repairs are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(15) to the extent they occurred on or after September 29, 1997 and the property was permanently transferred to the consumer of the repair service as an integral part of such service. In these circumstances, DCC is not subject to Ohio sales or use tax on its purchases pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

Respectfully submitted



Charles M. Steines

IN THE SUPREME COURT OF OHIO

DaimlerChrysler Corporation,	)	Appeal from Ohio Board of Tax Appeals
	)	
Appellant,	)	BTA Case No: 2004-T-187
	)	BTA Case No: 2004-T-188
v.	)	
	)	
William W. Wilkins,	)	Supreme Court Case 06-1731
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

Appendix to Brief of Appellant

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IN THE SUPREME COURT OF OHIO

06-1731

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Appellant,	)	BTA Case No: 2004-T-187
	)	BTA Case No: 2004-T-188
v.	)	
	)	
William W. Wilkins,	)	
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

NOTICE OF APPEAL OF DAIMLERCHRYSLER CORPORATION

FILED
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IN THE SUPREME COURT OF OHIO

DaimlerChrysler Corporation,	)	Appeal from Ohio Board of Tax Appeals
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Appellant,	)	BTA Case No: 2004-T-187
	)	BTA Case No: 2004-T-188
v.	)	
	)	
William W. Wilkins,	)	
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

NOTICE OF APPEAL OF DAIMLERCHRYSLER CORPORATION

DaimlerChrysler Corporation ("DaimlerChrysler") hereby gives notice of its appeal as of right, pursuant to R.C. 5717.04, from the Decision and Order of the Board of Tax Appeals journalized in BTA Case Nos. 2004-T-187 and 2004-T-188 on August 18, 2006. A true copy of the Decision and Order of the Board of Tax Appeals being appealed is attached hereto and incorporated herein by reference.

Background Facts

On July 30, 1999, the Ohio Department of Taxation ("Department") issued Notice of Assessment No. 99000098 U to DaimlerChrysler. This assessment covers the period from October 1, 1994 through December 31, 1997 and sought use tax from DaimlerChrysler on the amount the company paid its dealers for the cost of so-called "goodwill repairs" performed during such period.

On August 29, 2002, the Department issued Notice of Assessment No. 7020417319 to DaimlerChrysler. This assessment covers the period from January 1, 1998 through December 31, 2000 and sought use tax from DaimlerChrysler on the amount the company paid its dealers for the cost of goodwill repairs performed during such period.

The above referenced assessments ("Assessments") were affirmed by the Board of Tax Appeals in its August 18, 2006 Decision and Order.

Allegations of Error

DaimlerChrysler contends that the Board of Tax Appeals, in its August 18, 2006 Decision and Order, erred in failing to find that:

1. DaimlerChrysler did not acquire title to or possession of any tangible personal property that may have been provided in the transactions underlying the Assessments. Nor was a license to use or consume tangible personal property granted to DaimlerChrysler in these transactions. Consequently, the transactions on which the Assessments are based do not constitute sales for Ohio sales tax purposes and DaimlerChrysler can not be held liable for sales or use tax on such transactions pursuant to R.C. §§ 5739.01(B) and 5741.02(C)(2).

2. DaimlerChrysler did not use any tangible personal property or realize any benefit associated with any service that may have been provided in the transactions underlying the Assessments. Consequently, DaimlerChrysler can not be held liable for use tax on the amounts paid for such property or service pursuant to R.C. § 5741.02(A)

3. The amounts paid by DaimlerChrysler are for parts and labor used or consumed to perform goodwill repairs to motor vehicles owned by others. DaimlerChrysler is not the consumer of such parts and labor as the term "consumer" is defined in R.C. §§ 5739.01(D) or 5741.01(F). Consequently, DaimlerChrysler can not be held liable for use tax on the amounts paid for such parts and labor pursuant to R.C. §§ 5741.02(B) and (C)(2).

Moreover, pursuant to R.C. § 5739.01(D)(5), a person who sells a repair service is, as of September 29, 1997, specifically identified as the consumer of any tangible personal property used in performing such service. For this additional reason, DaimlerChrysler can not be considered the consumer of parts and labor

used or consumed by its dealers on or after September 29, 1997 to repair motor vehicles owned by others.

4. If DaimlerChrysler is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, and if DaimlerChrysler's use of the parts and labor was in fulfillment of an obligation incurred under either (1) a warranty that comes with every motor vehicle manufactured by DaimlerChrysler or (2) a warranty, maintenance or service contract, or similar agreement by which DaimlerChrysler agreed to repair or maintain a motor vehicle, the transactions between DaimlerChrysler and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(13) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

5. If DaimlerChrysler is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DaimlerChrysler resold the parts and labor to the owners of the vehicles repaired by its dealers in the same form in which the parts and labor were received by DaimlerChrysler. In these circumstances, the transactions between DaimlerChrysler and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(1) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

6. Because the amount charged for a new motor vehicle includes the anticipated cost of repairs to be performed in the future under DaimlerChrysler's warranty program, and further because sales or use tax was paid on the full amount charged for a new vehicle at the time the new vehicle was purchased, imposition of tax on the amount paid by DaimlerChrysler for repairs performed to vehicles covered by the company's warranty program unlawfully subjects the cost of the repairs to double taxation. In these circumstances, the transactions between DaimlerChrysler and its dealers are not subject to Ohio use tax pursuant to R.C. §§ 5741.02(C)(1).

7. If DaimlerChrysler is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DaimlerChrysler either (1) incorporated the parts and labor into a vehicle produced for sale or (2) used the parts and labor primarily in a manufacturing operation to produce a vehicle for sale. In these circumstances, the transactions between DaimlerChrysler and its dealers are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(2) and (9) and, therefore, are not subject to Ohio sales or use tax pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

8. If DaimlerChrysler is considered to be the consumer of the parts and labor used by its dealers when performing goodwill repairs, DaimlerChrysler's purchases of the personal property used to perform such repairs are excepted from the definition of "retail sale" under R.C. § 5739.01(E)(15) to the extent they occurred on or after September 29, 1997 and the property was permanently

transferred to the consumer of the repair service as an integral part of such service. In these circumstances, DaimlerChrysler is not subject to Ohio sales or use tax on its purchases pursuant to R.C. §§ 5739.02 and 5741.02(C)(2).

DaimlerChrysler further contends that the Board of Tax Appeals, in its August 18, 2006 Decision and Order, erred when finding that:

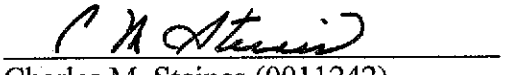
9. "The [goodwill] repair parts were paid for by DCC and placed into the customer's vehicle on behalf of DCC" and, therefore, "DCC exercised sufficient rights or powers incidental to ownership to subject it to the use tax for using the parts." Decision and Order at page 7.

10. "[DCC has] an obligation to repair defects under its goodwill repair program." Decision and Order at page 8.

11. "DCC is the 'seller' of the repairs under R.C. 5739.01(D)(5) and, as such, would be the consumer of any tangible personal property used in the repair." Decision and Order at page 10.

12. Notwithstanding its prior conclusion that "DCC is the 'seller' of the repairs under R.C. 5739.01(D)(5) and, as such, would be the consumer of any tangible personal property used in the repair", DCC can not avail itself of the exception provided in R.C. 5739.01(E)(15), which excepts purchases of tangible personal property used to perform repair services if the property is permanently transferred to the consumer of the repair service as an integral part of the performance of the service.

DaimlerChrysler respectfully requests the Court to reverse the Decision and Order of the Board of Tax Appeals journalized in BTA Case No. 2004-T-187 and 2004-T-188 and the Assessments the Decision and Order addresses.



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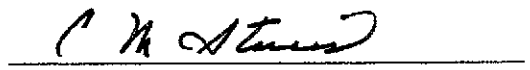
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the forgoing Notice of Appeal was served on counsel for Appellee, Cheryl Pokorny, Assistant Attorney General, Taxation Section, at her office located in the Rhodes State Office Tower, 30 East Broad Street, Columbus, Ohio 43216, on September 15, 2006.



Charles M. Steines

OHIO BOARD OF TAX APPEALS

DaimlerChrysler Corporation, Appellant, vs. William W. Wilkins, Tax Commissioner of Ohio, Appellee.	))))))))))	CASE NO. 2004-T-187 2004-T-188 (USE TAX) DECISION AND ORDER

APPEARANCES:

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Entered August 18, 2006

Ms. Margulies, Mr. Eberhart, and Mr. Dunlap concur.

The Board of Tax Appeals considers this matter pursuant to two notices of appeal filed by DaimlerChrysler Corporation ("DCC"). DCC appeals from two final determinations of the Tax Commissioner, in which the commissioner affirmed, with modification, use tax assessments levied against DCC on expenses connected to "goodwill" repairs performed on DCC vehicles between October 1994 and December 2000. BTA No. 2004-T-188 relates to assessment number 99000098U, which covers

the period of October 1994 through December 1997 and is for $1,603,409.22. BTA No. 2004-T-187 relates to assessment number 7020417319, which covers the period of January 1998 through December 2000 and is for $2,887,353.70.[1]

DCC is a Delaware corporation engaged in the design, manufacture, assembly, and sale of motor vehicles.[2] DCC sells motor vehicles under five "brand names": Chrysler, Dodge, Plymouth, Jeep and Eagle. The majority of vehicles sold by DCC are sold through a network of retail dealers, which operate under a "Sales and Service Agreement," also referred to as the "Dealer Agreement." Appellant's Exs. 4 & 5.

At issue in these appeals is use tax assessed against DCC on the purchase of repair parts and services used in performing goodwill repairs to DCC motor vehicles. All new DCC vehicles are sold subject to a limited warranty that covers repairs related to defects in materials or workmanship. The owner of the vehicle is not charged for any repair covered under the limited warranty. The warranty period typically begins on the date of purchase and continues for a set period or until the vehicle is driven a specified number of miles, whichever comes first.

A goodwill repair is a repair that is performed beyond the limited warranty period. The purpose of a goodwill repair is to correct, on a case-by-case basis, a defect in materials or workmanship that does not surface until after the

[1] The assessment amounts reflect the commissioner's remission of all penalties. See BTA No. 2004-T-187, S.T. at 8 and BTA No. 2004-T-188, S.T. at 7.
[2] Appellant was formally known as the Chrysler Corporation. Chrysler was acquired by Daimler-Benz AG in November 1998 and changed its name to DaimlerChrysler Corporation. H.R., Vol. I, at 62.

warranty period has expired. The owner of the vehicle does not pay for an authorized goodwill repair.

DCC does not itself make goodwill repairs to vehicles sold through the retail dealerships. Consistent with the dealer agreement, retail dealers perform the repairs. DCC then reimburses the dealer for the repair work according to the provisions of the Dealer Agreement. Goodwill repairs may be self authorized by specified dealers or must be authorized directly by DCC.

DCC has a "dealer self authorization" ("DSA") program that allows certain dealers to authorize goodwill repairs under specific circumstances. Approximately seventy-five percent of DCC's retail dealers are in the DSA, which are, in turn, divided into two groups. H.R., Vol. I, at 103-105. The first consists of what are called "five star dealers." Five star dealers are those who have met specified performance criteria throughout the dealership. H.R., Vol. I, at 105. A five star dealer who participates in the DSA may self-authorize any goodwill repair up to five years or 50,000 miles from the original sale date of the vehicle. H.R., Vol. I, at 105. The five star dealer may authorize up to $1,000 for non-powertrain repairs and up to $2,500 for powertrain repairs. H.R., Vol. I, at 106. A five star dealer must receive authorization from DCC's district manager in order to perform goodwill repairs in excess of these amounts. H.R., Vol. I, at 106.

Other dealers in the DSA program – those not five star rated – may self-authorize goodwill repairs up to twelve months or 12,000 miles beyond the expiration of the limited warranty. H.R. at 107. These dealers may authorize non-powertrain

repairs up to $600 and powertrain repairs up to $1,500. Again, anything beyond these amounts must be authorized by DCC's district manager. H.R., Vol. I, at 108. All other dealers, e.g., those not in the DSA program, must receive authorization from DCC's district manager before the repair may be made. H.R., Vol. I, at 104.

At issue is whether DCC is liable for use tax on the amounts it paid to its dealers on goodwill repairs, including parts and services. Initially, we observe that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Additionally, all sales of tangible personal property within Ohio are presumed to be subject to tax until shown otherwise. We emphasize that exceptions and exemptions to taxation are to be strictly construed in favor of taxation, and the burden rests with the taxpayer to affirmatively establish its right thereto. *National Tube Co. v. Glander* (1945), 157 Ohio St. 407. See, also, *Frankelite Co. v. Lindley* (1986), 28 Ohio St.3d 29.

In its first specification of error, DCC argues that it neither uses the parts and other tangible personal property provided in a goodwill repair nor realizes the benefit of the repair service provided by its retail dealers. R.C. 5741.02 provides:

> "(A) *** [A]n excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided. ***
>
> "(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property or realizing in this state the benefit of any service provided shall be liable for the tax ***.

The term "other consumption," as used in R.C. 5741.02(A), is defined in R.C. 5741.01(N) as including the receipt of "the benefits of a service."

R.C. 5741.01 (C) defines the term "use" as:

> "*** the exercise of any right or power incidental to the ownership of the thing used. A thing is also 'used' in this state if its consumer gives or otherwise distributes it, without charge, to recipients in this state."

DCC asserts it is not a user of repair parts because DCC takes neither physical possession of, nor legal title to, repair parts. DCC maintains its dealers take possession of parts. While DCC acknowledges that it pays for repair parts under DCC's goodwill program, it maintains that this is all it does. As such, DCC argues that it has not exercised any right incidental to ownership, as required under the use tax statutes. The commissioner counters that DCC used the repair parts to fulfill its goodwill repairs, which is part of DCC's customer satisfaction program; therefore, argues the commissioner, DCC exercised a right or power incidental to ownership. We agree with the commissioner.

In *Gen. Motors Corp. v. Wilkins*, 102 Ohio St.3d 33, 2004-Ohio-1869, the court considered an argument identical to the one now before us. There, GM

behalf. This promise of reimbursement is the benefit received by the dealer. The dealer does not receive the benefit of a repaired vehicle itself. The benefit received by the customer differs from both that of the dealer and DCC.

The benefit to the customer is not the labor of the dealer. It is the end product of that labor, a repaired vehicle, that is received by the customer. Accordingly, we find that the benefit of the service is not resold in the same form and, as such, the resale exception contained in R.C. 5739.01(E)(1) does not apply. *Bellemar, Corporate Staffing*, and *Cousino* supra. See, also, *Crew 4 you, Inc. v. Wilkins*, 105 Ohio St.3d 256, 2005-Ohio-2167.

In its next specification of error, DCC argues that it is excepted from use tax under R.C. 5739.01(E)(2) and 5739.01(E)(9) because DCC either incorporated the parts and services into a vehicle produced for sale or used them primarily in a manufacturing operation to produce a vehicle for sale.

R.C. 5739.01(E)(2), as in effect during the assessment period, provided that a "retail sale" included all sales except those in which the purpose of the consumer is to "incorporate the thing transferred as a material or part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining, ***." R.C. 5739.01(S) defined manufacturing as a "process in which materials are changed, converted, or transformed into a different state or form from which they previously existed ***." R.C. 5739.01(R) defined assembling as "attaching or fitting together parts to form a product."

In its brief, DCC argues that goodwill repairs are a part of the manufacturing process because "the process of manufacturing a vehicle includes correcting any defects covered by the manufacturer." Appellant's Brief, at 30. In support, DCC relies upon *General Motors Corp. v. Rose* (1987), 179 W.Va. 177, in which the West Virginia Supreme Court ruled that warranty program repairs were an "integral part of the overall manufacturing process." However, as correctly argued by the Tax Commissioner, Ohio has never adopted an integrated plant theory for purposes of the manufacturing exception. In fact, the court has expressly rejected the theory on numerous occasions. *Southwestern Portland Cement Co. v. Lindley* (1981), 67 Ohio St.2d 417; *OAMCO v. Lindley* (1986), 24 Ohio St.3d 124; *Ohio Ferro-Alloys Corp. v. Kosydar* (1973), 34 Ohio St.2d 113; *Youngstown Bldg. Material & Fuel Co. v. Bowers* (1958), 167 Ohio St. 363. Instead, each particular item should be examined to determine whether it qualifies for the exception. *OAMCO*, supra, at 129.

In *Bird & Son, Inc. v. Limbach* (1989), 45 Ohio St.3d 76, the court summarized the test to determine when the manufacturing exception should be applied to a particular item:

> "[D]espite the diverse factual contexts to which R.C. 5739.01(E)(2) has been applied, a synthesis of past decisions reveals a nearly uniform analysis. The central inquiry remains as follows: '[when] does the manufacturing or processing activity begin and end, and is the property used or consumed during and in the manufacturing or processing period?' *** Consequently, tangible personal property which is employed in operations preliminary or preparatory to production of the marketable product, *** or employed subsequent to completion of the manufacturing process, *** is not exempt." (Citations omitted.) Id. at 78-79.

It is clear from the record that parts and services consumed in making a goodwill repair are not used until after the vehicle has been produced, sold, and driven. They are neither incorporated into the vehicle during its manufacture nor otherwise used in the manufacturing process. R.C. 5739.01(E)(2) does not apply. Cf. *Roxanne Laboratories, Inc. v. Tracy* (1996), 74 Ohio St.3d 654.

R.C. 5739.01(E)(9) excepts from the definition of "retail sale" transactions where the purpose of the consumer is to "use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale ***." For purposes of the manufacturing exception contained in R.C. 5739.01(E)(9), the "thing transferred" must be one of the items contemplated by R.C. 5739.011(B), which defines that term. Although repair parts and services are listed under R.C. 5739.011(B)(11), the parts and services included are for repairs to machinery and equipment used in manufacturing a product for sale. Moreover, the parts and services herein are not used in a manufacturing operation, as required by R.C. 5739.01(E)(9). We note that R.C. 5739.011(A)(5) defines a completed product as "a manufactured item that is in the form and condition as it will be sold by the manufacturer." As previously stated, the parts and services at issue are consumed after the vehicle has been completed, sold, and driven for a period of years.

Finally, DCC specifies that the goodwill repair transactions are excepted under former R.C. 5739.01(E)(15),[6] which provided that a transaction is excepted from the definition of "retail sale" where the purpose of the consumer is to "use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service." The statute became effective on September 29, 1997. See Am. Sub. H.B. 215, 147 Ohio Laws, Part I, 1805.

DCC argues that, because the parts used in the subject goodwill repairs are permanently transferred to the owner of the vehicle as an integral part of the repair service, the transaction is excepted from sales tax under R.C. 5739.01(E)(15) and from use tax by virtue of R.C. 5741.01 (C)(2). However, as we have previously determined, DCC, not the vehicle owner, is the consumer of the parts and labor utilized to make a goodwill repair. Moreover, vehicle owners are not "consumers" because R.C. 5741.01(F) specifically excludes those who receive tangible personal property or the benefit of a service without charge. *Gen. Motors*, supra, at ¶65. Consequently, we find DCC's specification of error to be without merit.

In conclusion, we find that DCC has failed to prove, by competent and probative evidence, that its purchases of goodwill repair parts and services were not subject to use tax. We further find that the commissioner's final determinations are

[6] The provisions of R.C. 5739.01(E)(15) are now contained in R.C. 5739.02(B)(43)(m).

supported by a preponderance of the evidence and are in accordance with law. Accordingly, we affirm the Tax Commissioner's final determinations.

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Michigan Supreme Court
Lansing, Michigan 48909

Opinion

Chief Justice
Maura D. Corrigan

Justices
Michael F. Cavanagh
Elizabeth A. Weaver
Marilyn Kelly
Clifford W. Taylor
Robert P. Young, Jr.
Stephen J. Markman

FILED JUNE 4, 2002

GENERAL MOTORS CORPORATION,

Plaintiff-Appellant,

v No. 116984

DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Defendant-Appellee.

BEFORE THE ENTIRE BENCH

WEAVER, J.

Plaintiff, General Motors Corporation (GM), appeals from the Court of Appeals decision that defendant, Department of Treasury, could impose use tax[1] on the vehicle components and parts plaintiff provided to customers as part of plaintiff's goodwill adjustments policy. We reverse the decision of the Court of Appeals and hold that assessment of use tax on the goodwill adjustments was improper because they were taxed

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[1]Use Tax Act, 1937 PA 94, MCL 205.91 *et seq.*

pursuant to the General Sales Tax Act[2] when customers purchased vehicles at retail.

I

When customers purchase new GM automobiles, they are provided with a GM limited manufacturer's warranty. These limited manufacturer's warranties provide, in pertinent part, for the replacement of defective parts of the automobile under certain circumstances. They also generally provide coverage for an expressly stated length of time, subject to earlier expiration, if the vehicle is driven for a certain number of miles. The department acknowledges that parts provided under these limited warranties are not subject to use tax because the customers paid for the right to replacement parts under the warranties at the time of the retail sale.

In addition to the limited warranties, GM provides a more open-ended "goodwill" adjustment policy under which GM will, on a discretionary basis, pay for replacement parts for GM vehicles even after the limited warranty period has expired. Although not referred to by name as a "goodwill adjustment policy," notice of this policy is contained in the General Motors warranty manual provided to customers at the time of sale. In this regard, the manual provides:

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[2]1933 PA 167 as amended, MCL 205.51 *et seq*.

> Should you ever encounter a problem during *or after* the warranty periods that is not resolved, talk to a member of dealer management. If the problem persists, follow the additional procedure outlined in "Owner Assistance," on page 16 of this booklet. [Emphasis added.]

The Owner Assistance section of the manual outlines a "Customer Satisfaction Procedure." It states that problems will "normally" be resolved by the dealer's sales or service departments.[3] However, if a concern is not resolved at that level, the manual recommends first discussing the problem with the dealership management. If the problem is not resolved by the dealer management, customers are told to contact GM directly. A customer dissatisfied with the outcome of the procedure may elect arbitration. The manual states that, while a customer is not bound to accept the result of the

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[3]General Motors, in a bulletin to its dealers, directs them to make goodwill adjustments case by case "where special consideration is in order to enhance customer satisfaction and loyalty." GM provides the dealers with a recommended set of guidelines for goodwill policy adjustments to help them distinguish defects in materials and workmanship from defects caused by aging, physical damage, lack of proper maintenance, or owner abuse.

Testimony revealed that GM estimates the cost of, and establishes a budget reserve for, both warranty repairs and goodwill adjustments for the lifetime of every make and model of vehicle. Twice annually, GM internally audits both the cost of warranty repairs and that of the goodwill policy for each make and model of vehicle. A GM representative explained that the vehicle sales price is designed to recover all costs, including those associated with the goodwill adjustment policy, as well as to maintain profitability.

arbitration proceeding, GM will "generally" agree to be bound by it even though it reserves the right to terminate its participation in the arbitration program.[4]

The department conducted an audit of GM's compliance with Michigan tax laws for the period of January 1, 1986, through December 31, 1992. As a result of the audit, the department assessed against GM use taxes and interest of $5.5 million on the vehicle components and parts provided by GM to customers as goodwill adjustments. The department had not previously assessed such a tax. During the audit period, GM customers in Michigan obtained $82 million in components and parts under the goodwill policy.

GM appealed the assessment to the Court of Claims. In pertinent part, GM alleged that the department lacked the statutory authority to impose use tax on goodwill adjustments because sales tax was imposed on the cost of the goodwill adjustments when vehicles were sold at retail. However, the Court of Claims disagreed with GM's position and granted summary disposition in favor of the department pursuant to MCR 2.116(C)(10), holding, in relevant part, that the transfer of

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[4] We note the possibility of arbitration merely to provide a comprehensive outline of the complaint resolution procedure. In light of our analysis, it is not necessary to consider whether the possibility of arbitration is a form of "consideration" in this case.

parts under the goodwill program is subject to use tax. The Court of Appeals affirmed regarding this issue[5], concluding that "plaintiff's dealers were not obligated to provide all customers with goodwill adjustments" and, therefore, that the "value of the goodwill program was not included in the gross proceeds arising from the retail sales of plaintiff's vehicles."[6] The Court of Appeals also emphasized its view that the purchasers of GM vehicles did not obtain "any enforceable rights in the goodwill program." We granted leave to appeal.

II

Because the essential facts are not in dispute, we are presented with a question of law: whether replacement parts provided to customers at GM's expense through the goodwill program are independently subject to Michigan's use tax in connection with the transfer of the parts. We review questions of law de novo. *Kelly v Builders Square, Inc,* 465

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[5] However, the Court of Appeals would have reversed the Court of Claims in part and remanded for further proceedings with regard to GM's constitutionally based arguments that it was denied equal protection of the laws and the benefit of uniformity of taxation because the department did not apply the use tax in the same way to other similarly situated parties. In light of our conclusion that the transactions at issue are not subject to the use tax as a matter of statutory law, it is unnecessary to reach these constitutional issues.

[6] Unpublished opinion per curiam, issued May 9, 2000 (Docket No. 213186).

Mich 29, 34; 632 NW2d 912 (2001). This is the same standard of review applicable to the grant of a motion for summary disposition. *MacDonald v PKT, Inc,* 464 Mich 322, 332; 628 NW2d 33 (2001).

III

The sales tax and the use tax are interrelated. Sales tax is imposed by the General Sales Tax Act (GTA) on the gross proceeds of a business. MCL 205.52(1). The GTA defines "[g]ross proceeds" as the "amount received in money, credits, subsidies, property, or other money's worth in consideration of a sale at retail . . . ." MCL 205.51(1)(i). In contrast, pursuant to the Michigan Use Tax Act (UTA), use tax is generally imposed on the privilege of "using, storing, or consuming tangible personal property." MCL 205.93(1).

GM contends that the cost of its goodwill adjustments is exempt from use tax under § 4(1)(a) of the UTA. MCL 205.94(1)(a) provides that "[p]roperty sold in this state on which transaction a tax is paid under the general sales tax act" is exempt from the use tax "if the tax was due and paid on the retail sale to a consumer." Thus, our inquiry is whether "tax was due and paid" pursuant to the GTA on the cost of the goodwill adjustments when vehicles were sold at retail.

The sales and use taxes, while imposed in different ways, do not operate in isolation. Rather, provisions of the UTA

and the GTA are supplementary and complementary. *World Book, Inc v Treasury Dep't*, 459 Mich 403, 408; 590 NW2d 293 (1999); *Elias Bros Restaurants, Inc v Treasury Dep't*, 452 Mich 144, 153; 549 NW2d 837 (1996). UTA § 4(1)(a)'s exemption is an expression of a legislative intent to avoid pyramiding of sales and use tax. *Elias Bros, supra*. In other words, a transfer of property that has already been subjected to Michigan's sales tax is not subject to this state's use tax. As directed by § 4(1)(a), we examine the provisions of the GTA to determine whether tax was paid on the goodwill adjustment at the retail sale to a customer or whether the department's assessment of use tax was appropriate.

The GTA defines a "sale at retail" as "a transaction by which the ownership of tangible personal property is transferred for consideration, if the transfer is made in the ordinary course of the transferor's business and is made to the transferee for consumption or use, or for any purpose other than for resale . . . ." MCL 205.51(1)(b). The question is thus whether the goodwill adjustment policy is consideration flowing to customers when they purchase a GM vehicle or merely an illusory promise. Stated otherwise, we examine whether the cost of the goodwill adjustment policy is included in the retail price of GM vehicles as something that

is purchased by customers.

At the time of retail sale, GM customers receive an owner's manual. The manual invites customers to initiate a dialogue with the dealership when a defect arises, "during or after the warranty periods." The manual states the goal of resolving the defect to the "customer's satisfaction." GM admits that its customers are not guaranteed that requested after-warranty goodwill adjustments will be made. Indeed, GM suggests its dealers negotiate with customers for copayment on goodwill adjustments case by case.[7] Nevertheless, GM's goodwill policy is a promise to hear and address customer complaints even after the written warranty expires.

To have consideration there must be a bargained-for exchange. *Higgins v Monroe Evening News*, 404 Mich 1, 20-21; 272 NW2d 537 (1978). There must be "'a benefit on one side, or a detriment suffered, or service done on the other.'" *Plastray Corp v Cole*, 324 Mich 433, 440; 37 NW2d 162 (1949). Courts do not generally inquire into the sufficiency of consideration, *Harris v Bond & Mtg Corp*, 329 Mich 136, 145; 45 NW2d 5 (1950). It has been said "[a] cent or a pepper corn, in legal estimation, would constitute a valuable consideration." *Whitney v Stearns*, 16 Me 394 (1839). The

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[7]GM Service Bulletin No. 57-05-01, April 1995.

owner's manual provided at the time of sale invites customers to voice complaints even after the warranty period ends, with the goal of resolving the complaint to the customer's satisfaction. We hold that this opportunity for dialogue and possible resolution of complaints—even outside the warranty period-is a benefit flowing to purchasers of GM vehicles at the time of retail sale and, therefore, is consideration for the sale.[8] Therefore, replacement parts provided pursuant to the goodwill program are subject to the sales tax at the time of retail sale and are exempt from the use tax under § 4(1)(a) of the UTA.[9]

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[8]While acknowledging that a customer pays for the goodwill program, the dissent "cannot fathom" that a customer would bargain for the opportunity to have postwarranty complaints addressed. This skepticism is inconsistent with this Court's traditional reluctance to question the sufficiency of consideration and is not justification to override the Legislature's expression of intent in UTA § 4(1)(a) to avoid the pyramiding of the sales and use taxes.

[9] While not part of our dispositive analysis, it is noteworthy that GM audits the cost of the goodwill adjustment policy twice annually with the goal of recovering costs and maintaining profitability. A witness for the department acknowledged that GM uses the same method to account for the cost of warranty repairs and goodwill policy adjustments. It is evident that GM attempts to effectively include the cost of warranty repairs in the retail price of its vehicles. The record reflects that the cost of the goodwill adjustment policy is likewise included in the retail price of GM vehicles. A GM witness testified that "implicit in the price is the fact that we need to cover all the costs, and both policy and warranty are costs that are included . . . ."

a customer complaint.[10] Reinforcing this contractual undertaking to act in good faith is MCL 440.1203, part of Michigan's version of the Uniform Commercial Code. MCL 440.1203 provides that "[e]very contract or duty within this act imposes an obligation of good faith in its performance or enforcement."[11] This means that, should GM not consider complaints under the goodwill adjustment policy in good faith, it can be sued.

The dissent agrees that a unilateral or discretionary promise could "constitute valid consideration." *Post*, p 4. However, the dissent would decline to rule that GM's promise

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[10]As stated by Professor Arthur Corbin:

> Promissory words are not nullified by making the promise conditional on some event within the promisor's own power, if at the same time the promisor impliedly promises to make a reasonable effort to bring the event about or to use good faith and honest judgment in determining whether or not it has in fact occurred. [2 Corbin, Contracts, § 5.32, p 177.]

[11] Because the sale of a vehicle is the sale of a good, a contract for such a sale is subject to the Uniform Commercial Code. See MCL 440.2102 (providing generally that the UCC "applies to transactions in goods").

means there is discretion, i.e., a benefit to the consumer.[12] The dissent has fallen into the error of considering not merely if there is consideration, but its sufficiency. As we have stated, courts do not inquire into the adequacy of consideration to support a contract. *Higgins, supra.*[13] Thus, we conclude that the duty the goodwill policy imposes on GM to

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[12] We note that this is a greater right than the inherent ability to complain possessed by consumers generally. While a customer would typically have the practical ability to bring a complaint to the attention of a manufacturer, absent a contractual or other legal duty, the manufacturer would be free to simply ignore such complaints without giving them any consideration. However, because of its contractual undertaking for the goodwill policy, GM has a duty to consider such complaints in good faith.

[13] This point is reinforced by Professor Samuel Williston:

> It is an elementary and oft quoted principle that the law will not inquire into the adequacy of consideration so long as the consideration is otherwise valid to support a promise. By this is meant that so long as the requirement of a bargained-for benefit or detriment is satisfied, the fact that the relative value or worth of the exchange is unequal is irrelevant so that anything which fulfills the requirement of consideration will support a promise, regardless of the comparative value of the consideration and of the thing promised. The rule is almost as old as the doctrine of consideration itself. [3 Williston, Contracts (4th ed), § 7:21, pp 383-386.]

1986-1992, plaintiff provided "goodwill" parts to customers of General Motors cars having an estimated value of $82 million. As the dissent itself recognizes, "the cost of . . . [these] parts has been factored into the retail cost of the car . . . ." *Post*, p 5. If this is so, then such costs have been necessarily paid by the consumer at sale, i.e., a car otherwise valued at $9975 has been increased in price to $10,000 and the consumer has paid an additional $25 for the goodwill policy. Plaintiff, not being a charitable institution, must necessarily have factored the cost of the goodwill policy into the cost of the car, and such cost must necessarily have been paid by the consumer. Further, it can be presumed that the consumer paid $25 because something of value passed. The automobile industry is sufficiently competitive that few companies can afford to tack costs onto

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[14] In concluding that the goodwill program amounted to an illusory promise, the Court of Appeals referenced *Barbat v M E Arden Co*, 74 Mich App 540, 543-544; 254 NW2d 779 (1977), for the proposition that "[a]n unenforceable promise cannot constitute consideration." However, that case is inapplicable because it involved a promised performance that was "unenforceable" because it was void as illegal.

provide more than $13 million in annual benefits to consumers. Our interpretation of MCL 205.94(1)(a) does not constitute a "lax" interpretation of consideration as the dissent asserts. *Post*, p 7. Rather, our interpretation is based on fundamental contract principles and reflects the realities of the marketplace.[15]

IV

Because the goodwill adjustment policy provides an opportunity for GM customers to seek redress of vehicle defects and because the policy is included in the retail price of GM vehicles and purchased at the time of retail sale, it is part of the consideration flowing to GM customers when they purchase a GM vehicle that is taxed pursuant to the GTA at

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[15] The dissent asserts that "[m]erely because plaintiff proves through its accounting methods that it charges all consumers for costs associated with a program . . . , I cannot conclude that 'consideration' was paid by purchasers . . . ." *Post*, p 6, n 4. If this statement does not set forth the very essence of "consideration," it is hard to know what the term means. Of course, we recognize that not *every* cost factored into the price of a manufacturer's product is exempt from use tax as a form of "consideration" to a customer. Costs that do not provide a benefit to a customer could not be consideration.

concurred with WEAVER, J.

GENERAL MOTORS CORPORATION,

Plaintiff-Appellant,

v No. 116984

DEPARTMENT OF TREASURY,
REVENUE DIVISION,

Defendant-Appellee.

CAVANAGH, J. (*dissenting*).

I write separately to express my disagreement with the majority's conclusion that retail new car customers exchange consideration for goodwill policy parts when purchasing vehicles manufactured by plaintiff. Plaintiff has claimed its goodwill repair parts should not be subject to use tax because the costs are included in the price of the vehicle, which is subject to sales tax. Under MCL 205.94(1)(a), no use tax is owed on retail sales subject to sales tax. However, this exemption applies only if the parts are included in a "sale at retail," i.e., "a transaction by which the ownership of

Plaintiff directs its dealers to make goodwill adjustments case by case "where special consideration is in order to enhance customer satisfaction and loyalty."[1] Most dealers have the discretion to provide repair parts free or at a reduced rate to consumers after the original warranty expires.[2] These repairs are provided to select customers who

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[1] GM Service Bulletin No. 57-05-01, April 1995.

[2] Plaintiff provides specific negotiation tactics:

> In situations beyond the warranty period, but within your claim authorization empowerment, customers have received a value from use of the vehicle. It would be reasonable to consider partial payment by the customer. The judgment belongs to you.
>
> * * *
>
> In those cases which warrant a Policy Adjustment, there is seldom a reason for Buick to pay the entire amount. Never lose sight of the fact that the owner has driven the vehicle for the life of the warranty, and then some. Unquestionably, the customer has received some value from the investment. Do not hesitate to bring this up during the negotiation.

Dealers are also advised to "determine what the owner expects . . . evaluate the . . . complaint . . . [and]

(continued...)

in the warranty manual of their right to contact plaintiff after the manufacturer's warranty expires if they are dissatisfied with the dealer's offered resolution. The written warranty also indicates that arbitration proceedings may be an option.[3] In essence, the consumer is given an opportunity to ask for free repair parts, but has no legal right to any specific repair and knows nothing of the goodwill policy program in general, or of its specific terms. Though plaintiff may agree to subject itself to arbitration proceedings, consumers gain no legally enforceable right as a result of this program, a program purportedly "purchased" at the retail sale.

Consideration requires bargained-for legal detriment.

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[2](...continued)
[d]etermine if the customer will be satisfied with any offer you might make."

[3] Contrary to the implication by the majority, plaintiff's participation in arbitration is in no way guaranteed. While a consumer may always request arbitration, plaintiff reserves the right to refuse to participate. See 1990 Warranty and Owner Assistance Information for Buick New Cars ("GM will *generally* agree to be bound by the arbitrator's decision . . . . [GM] reserves the right to change eligibility limitations and/or to discontinue its participation in the program" [emphasis added]).

may constitute valid consideration. *J R Watkins Co v Rich,* 254 Mich 82, 84-85; 235 NW 845 (1931); *Wood v Lucy, Lady Duff-Gordon,* 222 NY 88; 118 NE 214 (1917). However, I am not convinced that plaintiff's good-faith exercise of its discretionary power is sufficient to permit a finding of bargained-for consideration in this instance. A party relying on the good-faith exercise of another's unilateral discretion generally has some knowledge of the scope of discretion involved and the potential benefits that might accrue. In this case, customers have little if any knowledge of what they allegedly bargained and paid for at the retail sale. I cannot fathom what rational, self-interested market participant would actually bargain for and purchase such a promise. If it came free with the purchase price, most would accept it, but almost no one would *buy* it.

Further, I am not sure that an arbitrator would have *any* reason to rule in favor of a customer if dissatisfaction actually resulted in an arbitration hearing. On the basis of the contract between the parties, the express warranty would have expired if a customer requested parts under the goodwill

and the opportunity to purchase supplemental promises (extended warranty) evidence the parties' intention that plaintiff escape liability for defects after the original warranty period expires. Because information concerning the terms of the goodwill policy is generally kept secret, I am not sure that a consumer could adequately plead his case to the arbitrator, assuming plaintiff agreed to participate. All a consumer is left with is the right to complain to plaintiff, and I believe it is a stretch to consider that sufficient consideration where such a right exists regardless of the goodwill policy. Therefore, I would hold that the goodwill policy adjustment program does not constitute valid consideration.[4]

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[4]Like the majority, I respect the doctrine that generally prohibits courts from questioning the adequacy of consideration. Unfortunately, that doctrine is inapplicable here because absolutely no consideration for the goodwill parts passed between the parties at the retail sale. Merely because plaintiff proved through its accounting methods that it charges all consumers for costs associated with a program that results in free or discounted parts to some, I cannot conclude that "consideration" was paid by purchasers at the retail sale for goodwill parts. GM's $82 million dollars worth of repairs, while certainly of value, simply cannot be regarded as legal consideration.

(continued...)

only costs transferred for consideration in a retail sale, the Legislature essentially failed to avoid pyramiding taxes where costs are factored into a product, but are not actually part of the consideration paid. MCL 205.51, 205.94(1)(e).[5]

(...continued)

Further, the majority implies that any cost factored into the price of the car by GM should be exempt from use tax. If that were the case, no manufacturer would ever pay use tax because generally all costs work their way into the price of products. The statute as currently drafted does not provide an exclusion per se for all costs factored into product prices, only those for which consideration has passed at a retail sale. See MCL 205.94(1)(a), 205.51(1)(b).

The majority also presumes that a customer can pinpoint the costs associated with a program it knows nothing of and buy the car in part on the basis of the promised value associated with the goodwill policy. The error lies in that assumption. We cannot assume market participants are making rationale choices when they lack sufficient knowledge of the goodwill policy. Neither GM nor the dealer bargains over this product with the consumer. GM keeps the terms and scope of the program confidential, thereby making it impossible for a consumer to pay for such a program with consideration. The majority's attempt to rebut my position ignores the foundational principles of consideration, i.e., bargained-for consideration is absent where "the action that the promisee took was *not induced* by the promise." Farnsworth, Contracts, (2d ed), § 2.6, p 52 (emphasis in original). In this case, plaintiff simply fails to give consumers an opportunity to be induced by the alleged benefit.

[5]In an attempt to refute my position, the majority erroneously infers the following:

(continued...)

Plaintiff grants adjustments "in order to enhance customer satisfaction and loyalty." In essence, the goodwill policy is a select form of advertising, i.e., a large scale version of the distribution of free pens and cups to conference participants or the provision of free pharmaceutical samples to physicians. Dealers probably grant the benefits of the discretionary goodwill program to those customers most likely to experience enhanced manufacturer loyalty. Because the program most resembles a marketing or customer satisfaction

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[5](...continued)

> [T]he dissent would decline to rule that GM's promise is valid consideration in part because GM's customers have "little if any" knowledge of the scope of GM's discretion. *Id.* That it is unknown how liberally GM will exercise its discretion does not mean there is no discretion. In fact, it means there is discretion, i.e., a benefit to the consumer. [*Ante* at 10-11.]

To clarify, I conclude that GM's parts cannot constitute valid consideration because the consumers did not bargain for, and were not induced to act because of, the goodwill policy in general or the parts in particular. Moreover, I agree that GM has discretion. In fact, GM has so much discretion that it would be impossible for consumers to bring an action claiming that discretion was exercised without good faith. The majority errs by inferring from my statement that describes a consumer's lack of knowledge concerning the scope of GM's discretion that the existence of discretion is itself dispositive of the inquiry.

Morton Co, 220 Va 852, 859; 263 SE2d 413 (1980) (when a distributor of products withdrew products from inventory within the state for free disposition to customers also within the state, the distributor exercised a power incident to ownership of the products, and this use of products previously held for resale was not within the exemption from use tax).

III

The majority permits a lax interpretation of consideration in order to bridge the gap between the text of the statute and the general desire to avoid duplicate taxation. While the end might be worthwhile, the method arguably creates an empty definition of consideration that could affect future bargainers. Rather than compensate for the legislative failure to exempt all product costs from use tax by watering down our understanding of consideration, I

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[6] MCL 205.94(1)(c) exempts from use tax certain promotional items, which include:

> [P]romotional merchandise transferred pursuant to a redemption offer to a person located outside this state or any packaging material, *other than promotional merchandise,* acquired for use in fulfilling a redemption offer or rebate to a person located outside this state. [Emphasis added.]

Sales and use-- Persons and transactions subject to tax-- Packaging-- Conveyor equipment and sortation system--

The exemption from Ohio sales and use tax for equipment used primarily in packaging tangible personal property produced for sale was not available to a retail seller of books, cards, and toys for conveyor equipment and a sortation system the seller used to prepare and transport products to the U.S. Postal Service bulk mail centers for delivery to the seller's customers, because the products were already packaged by the time they reached the equipment in question. R.C. Sec. 4739.02(B)(15).

Furthermore, the conveyor equipment and sortation system could not qualify for exemption as items used for "repackaging" products for sale, even though they were used to move the packaged products to destinations in the seller's facility where they were placed in larger containers for transportation to the bulk mail centers. The equipment and system were not used for "repackaging," because the larger containers were ultimately reused or discarded by the mail centers after the packaged products were removed, rather than used to ship the packaged products to the seller's customers.

See ¶60-600

For appellant: Edward J. Bernert, George H. Boerger.

For appellee: Betty D. Montgomery, Attorney General of Ohio, by Phyllis J. Shambaugh, Assistant Attorney General.

Ms. Jackson and Mr. Manoranjan concur. Mr. Johnson not participating.

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on February 5, 1996, by appellant, Newfield Publications, Inc. Appellant appeals a final determination of the TaxCommissioner, dated December 18, 1995, wherein said official denied objections to a use tax assessment which had been issued for the period of April 1, 1991 through June 30, 1993. The Tax Commissioner did, however, conditionally remit a portion of the penalty which had been assessed.

We now proceed to consider this appeal based upon appellant's notice of appeal, the statutory transcript certified by the Tax Commissioner, the record of the hearing convened before this Board on October 31, 1996 and the written briefs which have been submitted by counsel. In addition to the documentary exhibits which were introduced on its behalf, at this Board's hearing appellant presented the testimony of two witnesses: Andrew M. Marx, a former employee of appellant familiar with the systems in issue; and Vilis Donis, an employee of appellant who was involved in appellant's original acquisition of the items in issue and their subsequent transfer to Neodata, the company which has since acquired the items in issue.

Appellant is engaged in the business of selling books, both juvenile and adult, decks of cards and children's toys. These items are packaged at appellant's distribution facility located in Fairfield, Ohio [1] and transported to United States Postal Service bulk mail centers for ultimate delivery to appellant's customers. Marx described appellant's packaging of its products as follows. Although some books, depending upon their size, may be placed into individual cartons manually, most of appellant's products are placed into flat cartons by its "Series 1,000" machine. These individual packages, which are the packages ultimately delivered to appellant's customers, are then closed, sealed and labeled with a bar code.

Throughout the packaging process, the individual packages are transported on Automotion conveyor equipment which allows them to travel without interruption from machine to machine. Marx indicated the length of the conveyor equipment utilized at appellant's facility is a specific design feature intended to allow the sorting process to catch-up with the actual packaging of appellant's products. Photobeams are in place at various points throughout the process which monitor the movements of packages and, in the event there is a back-up, cause each piece of equipment to shut down.

In his final determination, the Tax Commissioner concluded that the items at issue were "used for various functions before and after packaging, but are not used in packaging as that term is defined in the statute." As a result, he denied appellant's claim that the purchases of the Kosan and the Automotion conveyor equipment were exempt from tax. On appeal, appellant has specified the following as error:

"*THE AMOUNT OF USE TAX INCLUDED IN THE FINAL DETERMINATION IS INCORRECT DUE TO, BUT NOT LIMITED TO, THE FOLLOWING REASONS*:

"1. The Final determination and Assessment unlawfully imposes a sales/use taxupon purchases of machinery, equipment, and materials for use in packaging tangible personal property sold at retail. R.C. 5739.01(B)(15).

"2. The Final Determination and Assessment unlawfully imposes a sales/use tax twice upon a single purchase of tangible personal property. Pursuant to R.C. 5739.02, it is intended that a sales/use tax be levied upon the same transaction once [2].

"3. The aforementioned Final Determination and Assessment includes and does not abate penalties and penalty interest notwithstanding the following facts:

"--Newfield did not intentionally disregard the sales and use tax laws of the State of Ohio;

"--Newfield attempted, to the best of its ability, to comply with Ohio's use tax reporting requirements;

"--Newfield is registered and currently files its Consumers' Use Tax Accounts on a timely basis;

"--Newfield extended its full cooperation and assistance to the Agent throughout the course of the audit and the audit review meeting; and

"--Newfield believes that many of the assessed purchases involve complicated issues with regard to the applicability of sales and use tax.

"Wherefore, Newfield had requested, in its timely filed Petition for Reassessment, full abatement of any and all penalties included in the Assessment." (Emphasis *sic.*)

In an appeal from a final determination of the Tax Commissioner, an appellant shoulders an affirmative burden to demonstrate error in the factual findings made by that official. In *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, the Supreme Court stated:

It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the preceding presumption and establish a clear right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a similar tax is imposed upon the storage, use or consumption in this state of any tangible personal property or the benefit realized in this state of any services provided. R.C. 5741.02(A). If the transaction is not subject to sales tax, it follows that it is also excepted from the imposition of use tax. R.C. 5741.02(C). Given the complementary nature of these taxing provisions, we will refer only to the applicable sales tax statutes within the remainder of our decision.

As previously indicated, appellant challenges the Tax Commissioner's denial of the packaging exemption with respect to its purchases of the Kosan and Automotion conveyor equipment. Relative in this regard, R.C. 5739.02(B)(15) exempts from taxation:

"Sales to persons engaged in any of the activities in division (E)(2) or (9) of section 5739.01 of the Revised Code, to persons engaged in making retail sales, or to persons who purchase for sale from a manufacturer tangible personal property that was produced by the manufacturer in accordance with specific designs provided by the purchaser, of packages, including materials and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale by or on the order of the person doing the packaging, or sold at retail. Packages include bags, baskets, cartons, boxes, cans, bottles, bindings, wrappings, and other similardevices and containers and `packaging' means placing therein. [3] "

Two requirements must be met in order for a purchase to be exempt from tax pursuant to R.C. 5739.02(B)(15): (1) the item in issue must be purchased by an entity either engaged in manufacturing or making retail sales; and (2) the item so purchased must be used primarily in packaging tangible personal property produced for sale. The parties apparently agree that appellant is engaged in an enterprise of the type described in R.C. 5739.01(E)(2) in that it makes retail sales to its customers. With respect to the second requirement, the parties also agree a package, in this case a large cardboard container, must restrain movement in more than one plane of direction. *Custom Beverage Packers v. Kosydar* (1973), 33 Ohio St.2d 68. The point upon which they disagree involves whether the packaging exemption extends to the present situation in which an item, already packaged for delivery to the end-consumer, is placed in a container for transportation from appellant's packaging facility to a bulk mailing center. For the reasons which follow, we conclude that the exemption does not so apply and that the items at issue are not entitled to the exemption set forth in R.C. 5739.02 (B)(15).

In *Hawthorne Mellody v. Lindley* (1981), 65 Ohio St.2d 47, the Supreme Court considered the application of the packaging exemption to a portion of an overall conveyor system which unstacked and cleaned returned plastic and wire milk cases and then transported the cases to another part of the taxpayer's operations where they would be repacked with filled milk cartons. Rejecting the Tax Commissioner's argument that the conveyor system was not entitled to the packaging exemption because it was not used to place the product into the package, the court held:

"The issue presented is whether this portion of the conveyor system should be considered as a separate piece of machinery or equipment used to unstack, clean and convey milk cases (packages); or, alternatively, as an integral part of machinery or equipment used in placing milk cartons (tangible personal property produced for sale) in milk cases (packages). Only in the latter case would this portion of the conveyor system be excepted from taxation under R.C. 5739.02(B)(15). ***

Thereafter, in *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245, the court reaffirmed the preceding decision and this Board's application of it, when we found exempt those "items comprising the product-packaging lines, based on its finding that they were used in `an integrated activity and an essential part of the packaging activity[.]' " The Supreme Court again rejected the Tax Commissioner's argument that entitlement to R.C. 5739.02(B)(15) is restricted to only those "purchases of packages or equipment for use in packing tangible personal property produced for sale and used directly in inserting such product into the package." *Id.* at 246.

On February 12, 1992, the Supreme Court decided two cases in which claim was made to the packaging exemption. In *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474, the court reversed this Board's finding that the taxpayer's purchases of an automated carton-forming system [4] and an automated conveyorsystem were entitled to the R.C. 5739.02(B)(15) exemption. The carton-forming system was briefly described by the court as one producing cartons which the taxpayer sold to its customers, while the conveyor system was described as being "used to move constructed cartons to a work station where partitions were inserted by an employee and from there to a packaging point where `the packer would install the bottles into the cartons.' " Id. at 476.

In *Union Carbide Corp. v. Limbach* (1992), 62 Ohio St.3d 548, although affirming this Board's determination that the taxpayer's packaging of batteries was exempt pursuant to R.C. 5739.02(B)(15), the court disabused the notion that, as argued in the present case by appellant, a continuous packaging operation warrants exemption to all equipment used therein:

"In *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245, at 247 *** we stated:

"`The BTA was correct to follow the analysis of *Hawthorne Mellody* and its action was reasonable and lawful.'

"In *Kroger, supra,* the BTA found that `the items comprising the product-packaging lines *** were used in "an integrated activity and an essential part of the packaging activity" ***.' *Id.* at 246 ***. The *Kroger* decision ratified our holding in *Hawthorne Mellody v. Lindley* (1981), 65 Ohio St.2d 47 ***. In *Hawthorne Mellody, supra,* we acknowledged the correctness of the Tax Commissioner's strict construction requirement for exceptions from taxation, but granted exception because the particular portion of the taxpayer's conveyor system was not `considered as a separate piece of *** equipment used to unstack, clean and convey milk cases (packages)' but rather `as an integral part of *** equipment used in placing milk cartons (tangible personal property produced for sale) in milk cases (packages).' *Id.* at 52 ***. By affirming the finding of the BTA and by embracing the language of *Hawthorne Mellody, supra,* we do not reject our earlier determinations relative to the appropriate construction of tax statutes or to the propriety of separating items of tangible personal property from a system of manufacturing, processing, or packaging. Rather, we reiterate our conclusion that we will examine particular items of machinery, equipment or material alleged to be excepted from taxation by reason of the function they perform." [5] Id. at 549-550. (Parallel citations omitted.)

See, also, *Anheuser-Busch, Inc. v. Tracy* (Oct. 24, 1997), B.T.A. Nos. 95-T-922, *et seq.,* unreported, appeal pending Sup. Ct. No. 97-2443.

As previously indicated, appellant asks that we find exempt its purchases of equipment which repackage the items it sells because larger cartons constitute a "package" and because its packaging operations are part of integrated plant system. While appellant repeatedly refers to the items in issue as being part of its continuous, uninterrupted and integrated packaging operations, as pointed out by the court in *Union Carbide,* the use of the items themselves must be

As additional support for its claim, appellant has cited several decisions of this Board in which items involved in the "repackaging" of goods sold at retail have beengranted exemption. See, *e.g., Avon Products, Inc. v. Lindley* (Sept. 11, 1984), B.T.A. No. 82-F-104, unreported; *The Limited Stores, Inc. v. Tracy* (Mar. 18, 1994), B.T.A. No. 91-K-1287, unreported. However, we find those cases distinguishable from the present one in that the larger containers in which smaller ones were placed in those instances were actually used to ship the goods to sales representatives or individual retail stores. In this case, the large cardboard containers, which are either reused or discarded by the mail centers after the packaged items are removed, serve merely as a device for transporting appellant's packaged products to a mail center.

Appellant also asserted in its notice of appeal that the Tax Commissioner's decision to conditionally reduce penalties is erroneous. While appellant's assistance in the underlying audit is to be commended, we are unable to conclude that the Tax Commissioner abused his discretion in declining to remit penalties in their entirety. See *Huffman v. Hair Surgeon, Inc.* (1985), 19 Ohio St.3d 83. Indeed, by conditionally remitting a portion of the penalty it appears that the Tax Commissioner took into consideration appellant's actions. See *Gen. Motors Corp. v. Tracy* (Feb. 25, 1994), B.T.A. No. 91-K-1558, unreported, at 14-16, affirmed (1995) 73 Ohio St.3d 29, 32, affirmed on other grounds (1997) --U.S. --.

Based upon the foregoing, it is the decision of the Board of Tax Appeals that appellant's specifications of error are not well-taken and they are therefore overruled. Accordingly, it is the order of this Board that the Tax Commissioner's final determination must be, and hereby is, affirmed.

1 Initially, appellant's distribution facility was located in Columbus, Ohio. However, in August 1992, appellant's distribution operations were transferred to Fairfield, Ohio. The items whose purchases are at issue in this appeal were purchased for use at the Fairfield, Ohio facility.

2 No evidence was presented at hearing with respect to this claim nor was any legal argument advanced by appellant in its post-hearing brief. We will therefore presume that appellant has now waived this specification of error.

3 R.C. 5739.02(B)(15) was amended on several occasions throughout the audit period. The version quoted above, to which both parties have referred, became effective January 1, 1993. As it appears that the issue in this case is unaffected by the various statutory changes, this Board likewise refers to the January 1, 1993 version of R.C. 5739.02 (B)(15).

4 With respect to the carton-forming system, the matter was remanded in order for us to determine whether it was excepted from tax "as machinery or equipment used directly in the production of tangible personal property for sale by manufacturing or processing as contemplated by former R.C. 5739.01(E)." *Id.* at 480. Subsequently, this Board found that the carton-forming equipment soqualified. See *Ball Corp. v. Limbach* (July 17, 1992), B.T.A. No. 88-H-1091, unreported.

5 In reaching this conclusion, the court, earlier in its decision, made the following reference to R.C. 5739.02(B)(15):

"In analyzing the applicability of this exception we `*** focus upon the distinct function of each item of tangible personal property subject to assessment and its relationship to' the packaging process. *Bird & Son, Inc. v. Limbach* (1989), 45 Ohio St.3d 76, at 79 ***." *Id.* at 549.

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STATE-CASE-TAX-CT, OH-TAXRPTR, ¶402-610, Ohio Board of Tax Appeals, The Hertz Corporation v. Roger W. Tracy, Tax Commissioner of Ohio, Sales and use-- "Sale" defined-- Free car rentals--, (December 19, 1997)

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The Hertz Corporation v. Roger W. Tracy, Tax Commissioner of Ohio

Ohio Board of Tax Appeals, No. 96-K-211, December 19, 1997

Sales and use-- "Sale" defined-- Free car rentals--

A car rental company was not liable for sales tax on free rentals provided to participants in airline frequent flyer programs, because these transactions did not constitute "sales." The rental company entered into agreements with various airlines to provide free rental cars to airline passengers who qualified as frequent flyers. The Tax Commissioner maintained that these rentals had a monetary value because the frequent flyer received a certificate that entitled the individual to a free rental car. However, the Board of Tax Appeals determined that no consideration was given when a frequent flyer exchanged a certificate for a free rental car because the certificate had no assigned cash value.

See ¶60-210

For appellant: Mark A. Engel, Bricker & Eckler, Columbus, Ohio. For appellee: Betty D. Montgomery, Attorney General of Ohio, by Richard C. Farrin, Phyllis J. Shambaugh, Assistant Attorneys General, Columbus, Ohio.

[Decision and Order]

Mr. Johnson, Ms. Jackson and Mr. Manoranjan concur.

This cause and matter is before the Board of Tax Appeals as a result of a notice of appeal filed on March 5, 1996 by the above-named appellant. Appellant, which is engaged in the automobile rental business, appeals a final determination of the Tax Commissioner, dated January 31, 1996, in which that official modified a sales and use tax assessment previously issued.

The underlying assessment arose from an audit of appellant's purchases and sales for the period of April 1, 1989 through December 31, 1991. The audit covered four Ohio areas where appellant conducts its business, i.e., Toledo, Cincinnati, Dayton and Cleveland. The assessment originally totaled $171,401.89, inclusive of taxes, penalties and interest. Appellant filed a petition for reassessment contesting a portion of the assessment. In his final determination, the Tax Commissioner allowed in part and denied in part appellant's objections, resulting in a reduction in the assessment of $18,575.73 in sales tax, $123.97 in use tax and $4,665.13 in preassessment interest. In addition, the Tax Commissioner conditionally cancelled the penalties.

Appellant subsequently appealed to this Board, renewing several of the objections which it had made before the Tax Commissioner. Thereafter, an evidentiary hearing was scheduled before this Board. In addition to the exhibits which it offered, appellant presented the testimony of three individuals in its employ: Robert E. Wines, manager of tax audits; Elliot Friedman, director of travel industries marketing; and John L. Brockett, senior station manager for the Cincinnati area. The Tax Commissioner presented no additional evidence and instead elected to rely upon the statutory transcript which had been previously certified to this Board and counsel's cross-examination of appellant's witnesses. Both parties have filed post-hearing briefs in which they have set forth their various arguments.

In its brief, appellant framed its objections to the Tax Commissioner's final determination into three distinct categories styled as "propositions of law." As this manner of classification provides a simple means by which to address the arguments advanced by appellant, we shall refer to each one in turn, beginning with the first:

> "Tangible personal property that is neither received in Ohio, nor brought into Ohio for use, is not subject to sales or use tax in Ohio."

Appellant maintains that several of the transactions on which it was assessed use tax involved the acquisition of items neither received nor used by appellant in Ohio. Appellant's argument in this regard is premised upon the language set forth in R.C. 5741.02(A), which provides in pertinent part:

"For the use of the general revenue fund of this state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided."

Citing the test announced in Complete Auto Transit, Inc. v. Brady (1977), 430 U.S. 274, appellant points out that if a transaction does not occur in Ohio, or if the item acquired in the transaction is not stored, used or consumed within this state, then "substantial nexus" is lacking and the transaction is not subject to Ohio tax. See, also, Big Boy's Toy, Ltd. v. Limbach (1992), 64 Ohio St.3d 448. According to appellant, the transactions at issue are not subject to use tax because the items involved were never "stored, used or consumed" in Ohio. In support of this contention, as previously indicated, appellant presented both documentary evidence and the testimony of several witnesses.

The Tax Commissioner, having now been provided with the additional information which he had previously requested from appellant, see, e.g., S.T. 218, 219, agrees that the following transactions should be removed from the assessment:

Ford Motor Co. Cas, S.T. 344, Record Nos. 3, 4 and 5

NJS Carpentry Inc., S.T. 344, Record No. 50

Graco Inc., S.T. 344, Record No. 58 [1]

Ace Tool Company, S.T. 344, Record No. 80; S.T. 345, Record Nos. 68 and 69

Telxon Corp., S.T. 344, Record Nos. 78 and 79; S.T. 350, Record No. 43

Wen Industries, Inc., S.T. 345, Record No. 9

G & G Technologies, Inc., S.T. 345, Record No. 15

Imperial, Inc., S.T. 349, Record No. 14

MobilComm, S.T. 350, Record No. 28; S.T. 352, Record No. 73 [2]

Oasis Plants Inc., S.T. 350, Record No. 30

Goodall Mfg. Co., S.T. 350, Record No. 31

Halco Industries, S.T. 350, Record No. 32

Prime Atomic Envelope Corp., S.T. 351, Record No. 54

Fashion World Career Apparel, S.T. 351, Record No. 60

Radiator Specialty Company, S.T. 351, Record No. 62

Cintas Corp., S.T. 352, Record No. 76

Whitemarsh Corp., S.T. 352, Record No. 83

Frank's Electric, S.T. 352, Record No. 86

U.S. Paging Corp., S.T. 353, Record Nos. 96 and 97

However, transactions involving four vendors remain at issue. Accordingly, we will proceed to address each one individually, beginning with the following:

Koors' Mat & Shop Towel Service, S.T. 351, Record No. 49; S.T. 352, Record No. 74; and S.T. 353, Record No. 87 [3]

These transactions involved appellant's acquisition of items described as mats, towels, soap and fender covers. At the hearing before this Board, appellant tendered John Brockett, its senior station manager in the Cincinnati area, who testified that Koors had its business location in Elsmere, Kentucky. He further testified that the mats and fender covers appellant acquired from Koors "certainly would have been used at the airport," [4] while the towels "most likely," would have been used at that location. H.R. at 163. Although we consider Brockett to have been a credible witness, it appears that his testimony in this regard is conflicting.

When testifying regarding the first Koors invoice, which identified the items sold as mats, towels and soap, Brockett indicated that the delivery address was one on Colerain Avenue in Cincinnati where appellant operated a used car lot. When questioned during his direct examination about the location where these items would have been used, the following discourse occurred:

"Q. It appears that these items then were for the retail sales lot in Ohio?

"A. Uh-huh, it appears that way." H.R. at 156.

Thus, Brockett's testimony that mats and fender covers would only have been used at the airport location is contradicted by his earlier testimony to the contrary. Furthermore, Brockett admitted that it was possible that appellant may have indeed used towels at either the Colerain Avenue location or at Cincinnati area hotels, located in Ohio, where appellant routinely stationed some of its cars. Again, we do not question Brockett's veracity. However, due to the inconsistencies in his testimony in this regard, appearing to result from his lack of personal knowledge, we are unable to conclusively determine that the items were never used in Ohio. Accordingly, we find no basis for removing these transactions from the assessment.

The next transaction is as follows:

American Speedy Printing, S.T. 351, Record No. 52

The order description identifies the items purchased as "Labels (Grounded for Turnback)." The only testimony regarding this specific transaction is again that of Brockett:

"I'm guessing that these labels were the stickers that we put onto vehicles to identify them. We give each vehicle a numerical designation, I'm assuming that's whatthis is, but I can't say so for sure." H.R. at 157.

As with the Koors transactions, we consider Brockett's testimony to be too speculative upon which to conclude that the items purchased were not used by appellant at one of its Ohio locations. Therefore, there exists no basis upon which to order its removal from the assessment.

The third transaction still at issue is the following:

Empire Safe Company, Inc., S.T. 344, Record No. 29

The invoice indicates that two items, described as "C Rate Depository Safe 20"D w/Rotary Hopper-Gray," were delivered to "Osborne Trucking, 11001 Kenwood Rd., Cincinnati, OH 45242." [5] Brockett's testimony with respect to this purchase was as follows:

"We actually had at that time three safes of this nature, there's a shipping quantity of two here. There was one located in a small office storeroom type area behind each of the counters in each of the three baggage claims at the airport.

"We have a couple of types of safes, but that's one, that's the one that --are used at service counters, cash funds at the counters." H.R. at 165.

Brockett indicated that although he was unfamiliar with Osborne Trucking, the safes were of a type used at appellant's airport location. He further testified that safes of this nature were not used, during the period in issue, at any of its other Cincinnati area locations because appellant did not have the facilities which would house such an item. Given the fact that the safes were identified as having been used in appellant's "Cincinnati area" and that the only place they could have been used was at appellant's airport location, again which is in Kentucky, we find that they are appropriately removed from the assessment.

The final transaction in which the item's location of receipt or use remains in issue is the following:

Kent-Moore, SPX Corp., S.T. 345, Record No. 13

The invoice, which reflects a delivery location in Detroit, Michigan, describes the items as "Pass/Vats Interrog." With respect to this purchase, Brockett testified:

"I'm not familiar with either the vendor, or whatever this description is talking about, `pass/vats interrog', I'm not sure, but the shipped to is Hertz Corporation and the Attention: John, I'm assuming that would be John Fontana, the Detroit maintenance manager that appeared on a previous invoice.

"***

"It talks about a tool tax, so I would assume it's maintenance related." H.R. at 171-172.

Clearly, Brockett's testimony is insufficient to identify either the items involved or the location where they were used. Nevertheless, appellant argues that because the delivery was outside Ohio, their acquisition by appellant should be considered beyond the state's taxing authority. We disagree. The reason this purchase, as well as all of the others in the assessment, were identified as being subject to Ohio tax is due to the fact that appellant attributed them to the "Cincinnati area" through its own invoicing system. Had appellant's only Cincinnati area location been at the Cincinnati airport, we may have been inclined to agree. However, appellant did have a physical presence within this state and, as corroborated by the testimony of its witnesses, used some of the items at issue in Ohio. Given the presumption generally accorded the Tax Commissioner's factual findings, see, e.g., Alcan Aluminum Corp. v. Limbach (1989), 42 Ohio St.3d

121, we find appellant has failed to carry its burden of proving that the purchase of these items is not subject to Ohio tax.

Appellant's second proposition of law provides:

"Permissive sales or use tax may not be imposed upon the sale or use of tangible personal property that does not occur in the county imposing the tax."

In his post-hearing brief, the Tax Commissioner has conceded, based upon information provided by appellant at this Board's hearing, that Hamilton County permissive tax should not have been imposed upon appellant's transactions with Champion International. Accordingly, that item shall be removed from the assessment.

Finally, we consider appellant's third argument:

"Where automobiles are provided to customers at no charge, and no consideration is received by the provider of the automobile from a third party, the transaction is not a sale and sales tax may not be imposed on the transaction."

During the audit period, appellant indicated that it would occasionally provide rental cars to members of its "Hertz Gold Club" or to senior members of the travel industry, e.g., a president of an airline, at discounted rates or without charge. In addition, appellant was involved in "frequent flyer programs" operated by several airlines. [6] Through these programs, travelers of an individual airline earned "frequent flyer miles" redeemable for benefits from that airline or other participating business entities. Appellant indicated that its decision to participate in frequent flyer programs was based upon its need to remain competitive. Not only were its competitors participants in these programs, but through its own involvement, appellant gained access to a larger potential customer base through newsletters periodically mailed to "frequent flyers."

Although several of appellant's frequent flyer program contracts operated in a similar manner, appellant negotiated each one separately. For example, under the terms of its agreements with Delta and US Air, appellant agreed to pay a quarterly fee, or one based upon the number of rentals utilized, in order to participate in each airline's program. Unique agreements existed with United Airlines and American Airlines. Under the United Airlines contract, appellant was required to purchase frequent flyer miles at a cost of 1.3 cents with a minimum purchase of $1,000,000 per calendar year. Appellant was also obligated to offer special awards if requested but it would receive a credit from United in exchange for its use by a customer. With respect to the American Airlines contract, appellant agreed to pay $6.50 per rental for which frequent flyer miles were awarded. A portion of that amount was placed into an escrow account, referred to as a "travel fund," which was used to pay for rentals provided to employees of American Airlines. Any monies remaining within the account at the end of each year were used for joint promotional purposes, while American Airlines would be billed by appellant for any shortage in the account attributable to excess employee travel.

Apparently common to all of the frequent flyer programs was the manner in which frequent flyer miles were "redeemed." Once a specified number of miles had been "earned," the frequent flyer would contact the airline and obtain a travel package which, depending upon the number of miles redeemed, generally included a free airline ticket, a hotel discount or free night's stay, and a discounted or free car rental. In the case of the car rental, the frequent flyer received a certificate which could be used at appellant or one of its competitors. When wishing to use a rental car certificate, a frequent flyer would contact appellant and reserve a car. At the time of the reservation, the frequent flyer provided the name of the airline issuing the certificate and the promotion code assigned to that certificate. When the frequent flyer arrived at appellant's rental counter, he or she would then be required to present the certificate and have the promotion code verified. At that time, the "value" of the certificate would be applied to the rental.

During the course of the audit, the auditing agent discovered several invoices which reflected a rental amount but no amount being paid. As previously indicated, "unpaid" invoices resulted from the redemption of frequent flyer miles or appellant making cars available to members of the travel industry or its Gold Club. [7] The Tax Commissioner assessed sales tax only on those transactions where cars had been made available at no charge and not those where a discount had been given.

Appellant maintains that an assessment on these transactions is improper because they do not satisfy the statutory definition of a "sale" because there exists no"consideration." Appellant argues that when a "complimentary" car is given to a frequent flyer, it receives no consideration for the transaction. Rather, appellant pays for the privilege of participating in the frequent flyer programs and, as a result of such participation, occasionally provides free cars to frequent flyers.

Absent consideration between appellant and the frequent flyers, the transaction does not constitute a "sale" and cannot be subject to tax.

The Tax Commissioner disagrees with appellant's characterization of cars provided to frequent flyers as "complementary." The Tax Commissioner points out that appellant provides a frequent flyer with a car without charge only upon the presentation of a valid certificate. Such certificates are not made available to the general public but are instead "earned" by the frequent flyer through his or her travel. Since a certificate entitles a frequent flyer to a free rental car, the Tax Commissioner insists that it has a monetary value.

We begin our review of this issue by referring to R.C. 5739.01(B) which provides in relevant part:

"'Sale' and `selling' include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or exchange, and by any means whatsoever:

"(1) All transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted[.]"

Although the term "consideration" is not expressly defined in R.C. Chapter 5739, that portion of R.C. 5739.01(B) quoted above which describes "sale" and "selling" has been the one referred to as the provision which "broadly defines consideration." Hawthorne Mellody v. Lindley (1981), 65 Ohio St.2d 47, 53. However, as the court in Hawthorne acknowledged in footnote seven of its decision: "The only relevant term of R.C. 5739.01(B) that is defined by statute is `price.' See R.C. 5739.01(H). However, it is apparent that `price' merely illustrates (and does not restrictively define) consideration within the meaning of R.C. 5739.01(B)." Id. at 53-54. See, also, Kloepfer's, Inc. v. Peck (1953), 158 Ohio St. 577. It is against this backdrop that we now consider the parties' arguments.

Both parties have discussed the Supreme Court's decision in Jewel Companies v. Porterfield (1970), 23 Ohio St.2d 121, in which customers received, and were charged for, "bonus credits" along with their purchases of merchandise. These bonus credits were accumulated in an account and could later be used to reduce the price of future purchases. When a taxable item was purchased, the cash value of the bonus credit was included in the "price" and the taxpayer collected tax on the entire price. However, no sales tax was collected on bonus credits issued when a customer purchased an item exempt from tax. Ultimately, the court concluded that all bonus credits purchased, whether accumulated on a taxable or exempt item, were subject to sales tax.

In a footnote included within its decision in Jewel Companies, [8] the court made reference to this Board's decision in Grand Duchess Steaks, Inc. v. Bowers (July 10, 1958), B.T.A. No. 36791, unreported. In that case, customers purchasing steaks received coupons which could be redeemed, either for free or at a discount, for "premiums" such as spatulas, cookbooks, etc. Finding these transactions to be subject to tax, the Board held:

"From the testimony and evidence relating to appellant's business operations it is clear that title and possession of items of tangible personal property (premiums) were transferred by appellant to a consumer for a consideration (coupons). Under the plain provisions of RevisedCode Section 5739.01 each of these transactions therefore constituted a `sale.'

"As noted above, the appellant, during the audit period, set certain valuations in money upon the premiums which it offered to exchange for a certain number of coupons.

"While it is true that the statutory definition of `price' refers to the delivery of something of value by the consumer to the vendor, it appears to the Board of Tax Appeals that if a vendor offers to exchange an item of tangible personal property (upon which he has placed a certain money value) for certain specified coupons in the possession of a consumer, the aggregate value in money of the coupons is the 'value' of the tangible personal property given up by the vendor. We do not think that the Tax Commissioner acted unreasonably or erroneously in finding that the aggregate value in money of the coupons was the 'value' in money set up by the appellant for the premiums." Id. at 4-5.

Although not expressly distinguishing the preceding decision, subsequent cases have held otherwise, seemingly focusing upon the dissemination of discounts made available to the general public for free. For example, in Morse

Sewing Center of Ohio, Inc. v. Bowers (Oct. 9, 1961), B.T.A. No. 45950, unreported, the taxpayer distributed "gift certificates" which entitled the holder to a forty dollar discount off the purchase of a sewing machine. The issue in that case was whether Ohio sales tax should be calculated on the price at which the sewing machines were sold or, as the Tax Commissioner argued, the price plus the amount of the discount. Rejecting the Tax Commissioner's position, this Board held:

"It does not appear likely that anyone would give $40.00 for a gift certificate which they could receive from appellant for nothing. It appears that the gift certificate had no value in money. It further appears that the designation `gift certificate' is a misnomer when applied to this type of a discount certificate. The 'gift certificates' distributed by appellant were, in all respects, similar to discount cards issued by, what are commonly known as, discount houses. The gift certificate did not entitle the holder to a gift. It only entitled the holder to a discount provided he purchased one of appellant's sewing machines within a limited period.

"It is the finding of this Board that the gift certificate had no value in money and, therefore, was not part of the `price' as that term is defined by Revised Code Section 5739.01(H), supra." Id. at 7. (Emphasis sic.)

Relying on the preceding decision, this Board in The Pizza Inn, Inc. v. Lindley (Mar. 26, 1981), B.T.A. No. 78-B-604, unreported, again rejected the Tax Commissioner's contention that the value of a discount needed to be added to the price actually paid for purposes of calculating the amount of sales tax due:

"The fact pattern in the case at bar is similar to the Morse case. The appellant, The Pizza Inn, Inc., issued the coupons free of charge to its customers. The customers could only use the coupons in conjunction with the purchase of a pizza at the regular price. The coupons merely entitled a customer to a discount on the total number of pizzas purchased. The discount was given at the time of sale and not after the sale was consummated.

"Therefore, it is the finding of the Board of Tax Appeals that the coupons issued by the appellant, had no value in money, and consequently, only the amount of currency actually paid to the appellant was subject to Ohio sales tax." Id. at 9.

See, also, Burger Chef Systems, Inc. v. Lindley (Feb. 17, 1982), Hamilton App. No. C-810137, unreported (distinguishing Grand Duchess Steaks, supra, and relying on Morse Sewing, supra, and Pizza Inn, supra, so as to conclude it was error to include the value of coupons in the price of items purchased for purposes of determining a gross sales figure resulting from a test check); Mindy's, Inc. v. Lindley (July 15, 1981), B.T.A. Nos. 80-A-41, et seq., unreported (although affirming denial of the taxpayer's refund claim, due to the fact sales tax had been collected from customers who must be presumed to have believed they were paying the correct amount of tax, this Board acknowledged that the taxpayer had erroneously calculated the sales price of items by not taking into account a discount which was given).

Although some of the language in Grand Duchess Steaks, supra, lends support to the position espoused by the Tax Commissioner, we are unable to conclude that consideration exists in the present case when a frequent flyer exchanges a certificate for a discounted or free rental car. Appellant paid for the privilege of participating in the frequent flyer programs. There exists no evidence that a third-party paid the costs of a rental car provided for free or at a discount, that frequent flyers paid to participate in theprograms or that they separately purchased frequent flyer miles. We must therefore conclude that the certificate exchanged for a rental car, in and of itself, had no assigned cash value.

While the Tax Commissioner maintains that these certificates, unlike coupons freely distributed to the public, have a value because they are obtained through the redemption of miles "earned" by frequent flyers, we consider his position to be severely undercut by the fact that he only assessed tax on cars made available without charge. The Tax Commissioner's failure to assess tax on the full rental amount when the redemption of frequent flyer miles resulted only in a discount, suggests, despite his arguments to the contrary, that he does not consider the certificates as having independent value.

We also acknowledge the Tax Commissioner's citation to a decision of the Federal Court of Claims issued in Colgate & Co. v. United States (1928), 66 C. Cls. 510, in which the appellant, in an effort to increase sales, included within the packaging of products it sold, coupons redeemable for jewelry. Claiming that the court's decision that consideration existed in that case warrants a like finding in the present matter, the Tax Commissioner states as follows:

"The Court found that Colgate received consideration, `added customers and a larger volume of sales.' *** Further, the court reasoned that the customer was in effect paying for the premiums, payment in the form of an increased sales price of the soap product. *** The court stated that `the coupons were issued for valuable consideration', and upheld the application of the federal excise tax to the premiums[.]" Brief of Appellee at 12. (Citations omitted.)

The Tax Commissioner's attempt to have this Board apply the conclusions in Colgate to the present case ignores Ohio decisions holding to the contrary. For example, in H.J. Heinz Co. v. Bowers (1960), 170 Ohio St. 423, the court held in paragraph one of its syllabus:

"Where a processor and wholesaler of foodstuffs purchases advertising material for distribution to and display by retail stores handling his wares, includes the cost thereof in price for which he sells his products, makes no separate and distinct charge for such material, and exacts the same price for his products regardless of whether such advertising material is used and displayed by those who receive it, there is no resale of the advertising material and no consideration present which would bring the transaction within the exceptions to the sales and use taxes contained in Sections 5739.01 and 5741.01, Revised Code."

See, also, San-A-Pure Co. v. Bowers (1962), 173 Ohio St. 469 (holding that an agreement to maintain exclusive use of transferred refrigerated cases for storage and display of a product, absent a direct charge or specified increase in cost, did not constitute consideration); Coca-Cola Bottling Corp. v. Kosydar (1975), 43 Ohio St.2d 186 (holding that an agreement to maintain an average number of beverage cylinders per week and to use exclusively its supplier's products did not constitute consideration for the use of rent-free soft drink dispensing equipment); Scovill Manufacturing Co., Nutone Division v. Lindley (June 24, 1981), B.T.A. No. 79-D-582, unreported (even though there was a markup included in the sale price of display board units to account for the costs of frames provided by the taxpayer "free-of-charge" to its customers, such frames were not sold because no consideration was given to obtain them); The Drackett Products Co. v. Limbach (June 30, 1992), B.T.A. No. 87-C-975, unreported (no consideration given, even though purchase price was inflated to include associated "give away" costs, where customers redeemed coupons entitling them to a free dustpan with the purchase of brooms).

Although the Tax Commissioner does not direct our attention to the line of cases which found "consideration" in the context of R.C. 5739.01(B) is not limited to monetary consideration, appellant has cited General Mills Fun Group, Inc. v. Lindley (1982), 1 Ohio St.3d 27, wherein the Supreme Court found consideration lacking where there was no charge for the use of the items transferred nor any evidence of of a legal detriment. The court in General Mills Fun Group contrasted its earlier decision in General Motors Corp. v. Kosydar (1974), 37 Ohio St.2d 138, where the court did find consideration existed based upon contractual arrangements between the taxpayer and its vendors. These agreements constituted bilateral requirements contracts and included detrimental promises between the parties, which satisfied the definition of sale within the purview of R.C. 5739.01(E)(1). The Supreme Court followed the rationale expressed in General Motors in Proctor & Gamble Co. v. Lindley (1985), 17 Ohio St.3d71, finding sufficient detriment to the vendor in bilateral requirements contracts to constitute the consideration necessary to satisfy the definition of sale in R.C. 5739.01 (B).

In the instant appeal, the contractual arrangement which exists is between appellant and the various airlines. The monetary consideration and legal detriment flows in fact from appellant to the airline. The consumer, i.e., the frequent flyer, in legal contemplation receives at most a gratuity in the form of the use of the rental car by virtue of a contract to which that consumer is not a party. The frequent flyer provides no monetary consideration for the use of the car as there exists neither a charge for participation in the frequent flyer program nor an increased fee when purchasing an airline ticket that earns frequent flyer miles. Further, the necessity of obtaining a frequent flyer certificate from the airline and being required to present it to appellant at its place of business can hardly be said to constitute a legal detriment in the context of the preceding cases.

Finally, we feel compelled to respond to the Tax Commissioner's counsel's suggestion in his post-hearing brief that there is any presumption of taxability in this instance which must be overcome by appellant. The issue in this case is whether the transactions in issue constitute sales within the purview of the definition set forth in R.C. 5739.01(B). Any presumption in this context is in favor of the taxpayer and the corresponding burden is upon the Tax Commissioner to establish that a sale has occurred as a matter of law. Gulf Oil Co. v. Kosydar (1975), 44 Ohio St.2d 208.

We therefore conclude that no consideration was given in those instances where appellant provided a car to frequent flyers without charge. Accordingly, that portion of the assessment which included a tax on such transactions should be removed. [9]

Based upon the foregoing, it is the decision of the Board of Tax Appeals that appellant's appeal is well-taken in part. Accordingly, consistent with the discussion contained herein, it is the order of this Board that the Tax Commissioner's final determination must be, and hereby is, affirmed in part and reversed in part.

[1] As pointed out by the Tax Commissioner, when identifying this transaction appellant inadvertently referenced S.T. 345.

[2] The Tax Commissioner specifically conceded the MobileComm transaction at S.T. 350, Record No. 28, but failed to mention the second transaction identified by appellant as being in issue. However, since the Tax Commissioner did not proceed to contest the transaction appearing at S.T. 352, Record No. 73, this Board will presume that it was the intention of the Tax Commissioner to agree with appellant's contention that neither of the MobileComm transactions are subject to taxation.

[3] The invoices associated with these assessments identify the vendor as either "Koors' Mat & Shop Towel Service" or "Koors Supply Company," both of which have the same address. We note also that while appellant, in its brief, cited to S.T. 353, Record No. 62, it appears that the item intended to be referenced is that as set forth above.

[4] The Greater Cincinnati/Northern Kentucky Airport is located in the State of Kentucky. See, e.g., H.R. at 12, 136.

[5] Appellant indicated that its invoices for the Cincinnati area bore a general identification number of 1542. Each of the specific locations where appellant conducted its business were assigned more specific location numbers, e.g., 1542-11 reflected its airport location, the Mariott Hotel is identified as 1542-20, the Westin Hotel is 1542-10 and Champion International is 1542-16. The invoice at issue was simply marked as 1542.

[6] Beginning in 1989, appellant began to exit the frequent flyer programs as contracts expired. However, in subsequent years, due to an apparent decrease in business, appellant began to reenter some of these programs.

[7] In their brief, counsel for the Tax Commissioner focus exclusively upon rental cars provided at no charge to frequent flyers. We will assume that the Tax Commissioner no longer objects to having removed from the assessment cars which appellant elected to make available at no charge for the other above-stated reasons. We will therefore restrict our discussion to the frequent flyer programs. Nevertheless, to the extent these transactions are still contested, we apply the same rationale as expressed regarding appellant's involvement in frequent flyer programs.

[8] The court also referred to its earlier decision in Red Head Premium Co. v. Schneider (1964), 1 Ohio St.2d 45, indicating that "the question of the taxation of trading stamps has not been decided by this court ***." Id. at 127. In Red Head Premium, the parties had agreed that trading stamps or coupons, distributed by the appellant, which were redeemed for merchandise from it, constituted a "sale" under R.C. 5739.01. Therefore, the issue before the court was the manner of calculating, for purposes of determining the amount of sales taxes owed, the "price" attributable to such sales. This issue was addressed in the syllabus of the court's decision as follows:

"Where a merchandiser is engaged in the redemption of trading stamps or coupons in exchange for articles of merchandise and publishes a catalog listing numerous articles therein, together with the price of each article in coupons having a value of `one cent or more,' the Tax Commissioner, in ascertaining a price base under the provisions of Section 5739.01 et seq. of the Revised Code, for the assessment of sales tax on such transactions, may take into consideration the 'value' of each article in coupons or trading stamps as displayed in the merchandiser's catalog and convert such value into money."

[9] Because the issue is not now before this Board, no determination is made regarding the liability of a taxpayer for use tax on its original purchase of items later made available without charge upon the presentation of a coupon or certificate. See, e.g., Am. Cyanamid Co. v. Tracy (1996), 74 Ohio St.3d 468; Boehringer Ingelheim Pharmaceuticals, Inc. v. Tracy (1996), 74 Ohio St.3d 472.

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Sec. 5739.01. As used in sections 5739.01 to 5739.31 of the Revised Code:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

(B) "Sale" and "selling" include all OF THE FOLLOWING transactions FOR A CONSIDERATION IN ANY MANNER, WHETHER ABSOLUTELY OR CONDITIONALLY, WHETHER FOR A PRICE OR RENTAL, IN MONEY OR BY EXCHANGE, AND BY ANY MEANS WHATSOEVER:

(1) ALL TRANSACTIONS by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted; ~~and include all~~

(2) ALL transactions by which lodging by a hotel is or is to be furnished to transient guests; ~~and include all~~

(3) ALL TRANSACTIONS BY WHICH:

(a) AN ITEM OF TANGIBLE PERSONAL PROPERTY IS OR IS TO BE REPAIRED, EXCEPT PROPERTY, THE PURCHASE OF WHICH WOULD BE EXEMPT FROM THE TAX IMPOSED BY SECTION 5739.02 OF THE REVISED CODE;

(b) AN ITEM OF TANGIBLE PERSONAL PROPERTY IS OR IS TO BE INSTALLED, EXCEPT PROPERTY, THE PURCHASE OF WHICH WOULD BE EXEMPT FROM THE TAX IMPOSED BY SECTION 5739.02 OF THE REVISED CODE;

(c) AN ITEM OF TANGIBLE PERSONAL PROPERTY IS OR IS TO BE INCORPORATED INTO A STRUCTURE OR STRUCTURAL IMPROVEMENT ON AND BECOMING A PART OF REAL PROPERTY, UNLESS EITHER OF THE FOLLOWING APPLY:

(i) THE TRANSACTION IS A CONSTRUCTION CONTRACT EXCLUDED FROM THE DEFINITION OF SALE OR SELLING UNDER DIVISION (B)(5) OF THIS SECTION;

(ii) THE ITEM IS OR IS TO BE INCORPORATED INTO AND WILL BECOME A PART OF A PUBLIC UTILITY'S PRODUCTION, TRANSMISSION, TRANSPORTATION, OR DISTRIBUTION SYSTEM AND RETAINS ITS CLASSIFICATION AS TANGIBLE PERSONAL PROPERTY AFTER SUCH INCORPORATION;

(d) THE SERVICE OF WASHING, CLEANING, WAXING, POLISHING, OR PAINTING A MOTOR VEHICLE IS OR IS TO BE FURNISHED;

(e) INDUSTRIAL LAUNDRY CLEANING SERVICES ARE OR ARE TO BE PROVIDED.

(122nd General Assembly)
(House Bill Number 215)

AN ACT

To amend sections 3.17, 3.24, 9.06, 101.23, 101.27, 101.35, 102.02, 103.143, 103.21, 105.41, 107.30, 107.40, 111.15, 111.16, 111.18, 117.44, 119.01, 120.04, 120.33, 121.04, 121.08, 121.37, 121.38, 121.40, 121.52, 122.15, 122.151, 122.152, 122.153, 122.154, 122.17, 122.18, 122.29, 122.89, 124.136, 124.15, 124.152, 124.18, 124.181, 124.34, 124.382, 124.383, 124.385, 124.391, 125.04, 125.05, 125.13, 125.15, 125.22, 125.28, 125.42, 125.83, 125.831, 125.87, 126.07, 126.12, 126.21, 126.26, 127.16, 131.35, 131.44, 135.142, 145.73, 149.303, 164.08, 164.09, 169.02, 169.03, 169.05, 169.08, 171.05, 173.02, 175.21, 181.52, 307.86, 321.46, 329.04, 341.25, 715.691, 718.01, 924.10, 991.03, 1309.32, 1309.39, 1309.40, 1309.41, 1309.42, 1309.43, 1310.37, 1503.05, 1503.141, 1506.21, 1506.22, 1506.23, 1513.29, 1513.30, 1515.09, 1517.11, 1557.06, 1703.03, 1703.05, 1703.07, 1703.12, 1703.22, 1703.26, 1703.27, 1707.041, 1707.44, 1731.07, 1785.01, 1901.06, 1907.13, 2151.23, 2151.355, 2151.421, 2744.01, 2744.02, 2744.03, 2744.05, 2941.51, 3113.33, 3301.075, 3301.0711, 3301.0714, 3301.0719, 3301.80, 3307.01, 3309.01, 3311.053, 3311.056, 3313.172, 3313.372, 3313.843, 3313.871, 3313.975, 3316.03, 3316.04, 3317.01, 3317.02, 3317.022, 3317.023, 3317.0212, 3317.0213, 3317.03, 3317.08, 3317.10, 3317.11, 3318.02, 3318.03, 3318.041, 3319.17, 3332.07, 3333.04, 3333.12, 3333.20, 3333.27, 3334.01, 3334.03, 3334.08, 3334.09, 3334.10, 3334.11, 3334.17, 3343.08, 3345.11, 3345.12, 3345.50, 3345.51, 3365.01, 3365.02, 3365.021, 3365.03, 3365.06, 3383.01, 3383.08, 3501.10, 3501.11, 3501.17, 3501.28, 3701.14, 3701.261, 3701.502, 3701.74, 3702.30, 3702.511, 3702.68, 3705.24, 3719.02, 3719.021, 3729.40, 3734.18, 3734.57, 3734.82, 3734.904, 3734.907, 3737.02, 3743.01, 3743.02, 3743.03, 3743.04, 3743.05, 3743.06, 3743.07, 3743.08, 3743.15, 3743.16, 3743.17, 3743.18, 3743.19, 3743.20, 3743.21, 3743.40, 3743.44, 3743.45, 3743.50, 3743.51, 3743.52, 3743.53, 3743.54, 3743.58, 3743.59, 3743.60, 3743.61, 3743.64, 3743.65, 3743.66, 3743.68, 3743.80, 3743.99, 3745.11, 3745.21, 3745.25, 3746.121, 3748.05, 3748.07, 3748.12, 3748.13, 3769.088, 3769.10, 3770.01, 3770.02, 3770.06, 3773.43, 3773.56, 3781.061, 3781.182, 3781.21, 3793.10, 3901.17, 3905.30, 3905.34, 3905.35, 3905.36, 3905.37, 3917.01, 3918.01, 3918.02, 3921.30, 3960.03, 4111.01, 4117.01, 4117.02, 4117.06, 4121.39, 4123.31, 4123.418, 4301.10, 4301.12, 4301.17, 4301.19, 4301.24, 4301.30, 4301.43, 4305.13, 4305.131, 4509.101, 4511.102, 4511.191, 4511.83, 4513.263, 4701.20, 4703.16, 4703.50, 4709.05, 4709.06, 4709.12, 4713.19, 4715.06, 4715.13, 4715.14, 4715.16, 4715.21, 4715.24, 4715.27, 4715.35, 4717.06, 4717.07, 4717.09, 4717.18, 4723.08, 4723.24, 4723.28, 4723.31, 4723.46, 4723.56, 4723.59, 4725.06, 4725.45, 4729.15, 4729.29, 4729.51, 4729.52, 4729.54, 4729.55, 4729.65, 4731.09, 4731.10, 4731.14, 4731.15, 4731.17, 4731.22, 4731.24, 4731.26, 4731.281, 4731.291, 4731.38, 4731.40, 4731.53, 4731.56, 4732.04, 4732.141, 4733.08, 4734.07, 4734.16, 4735.01, 4735.05, 4736.06, 4740.03, 4741.03, 4741.17, 4741.25, 4743.05, 4747.03, 4749.02, 4751.06, 4751.07, 4753.04, 4755.10, 4755.12, 4755.40, 4755.41, 4755.43, 4755.47, 4755.48, 4755.49, 4755.60, 4755.61, 4755.62, 4755.64, 4755.65, 4755.99, 4757.22, 4757.23, 4757.31, 4759.08, 4763.01, 4767.01, 4901.10, 4901.19, 4903.10, 4903.11, 4903.23, 4905.10, 4905.21, 4905.26, 4905.66, 4905.69, 4905.80, 4905.81, 4911.18, 4923.12, 4937.02, 4937.05, 4981.033, 4981.09, 5101.02, 5101.06, 5101.07, 5101.14, 5101.141, 5101.58, 5104.02, 5111.01, 5111.011, 5111.11, 5111.111, 5111.17, 5111.18, 5112.04, 5112.18, 5112.21, 5115.01, 5119.02, 5119.03, 5119.47, 5119.53, 5120.03, 5120.09, 5120.16, 5120.38, 5121.04, 5122.43, 5123.05, 5123.122, 5123.18, 5123.19, 5123.34, 5126.022, 5126.08, 5126.356, 5139.01, 5139.03, 5139.04, 5139.07, 5139.34, 5139.36, 5139.42, 5139.43, 5139.86, 5153.16, 5153.161, 5153.162, 5531.10, 5701.01, 5701.05, 5703.21, 5705.412, 5709.62, 5709.63, 5709.632, 5709.66, 5711.22, 5711.32, 5725.01, 5725.18, 5727.111, 5727.12, 5728.09, 5728.10, 5729.03, 5733.01, 5733.02, 5733.022, 5733.03, 5733.031, 5733.04, 5733.042, 5733.05, 5733.051, 5733.052, 5733.053, 5733.055, 5733.06, 5733.061, 5733.065, 5733.066, 5733.067, 5733.068, 5733.069, 5733.09, 5733.11, 5733.12, 5733.121, 5733.26, 5733.31, 5733.311, 5733.32, 5733.33, 5733.34, 5733.98, 5735.11, 5735.12, 5735.121, 5739.01, 5739.02, 5739.024, 5739.033, 5739.07, 5739.072, 5739.13, 5739.132, 5739.133, 5739.15, 5739.17, 5741.10, 5741.101, 5741.14, 5743.081, 5743.082, 5743.52, 5743.56, 5747.01, 5747.02, 5747.025, 5747.03, 5747.054, 5747.057, 5747.062, 5747.07, 5747.072, 5747.08, 5747.11, 5747.12, 5747.13, 5747.14, 5747.15, 5747.18, 5747.20, 5747.21, 5747.22, 5747.26, 5747.261, 5747.30, 5747.31, 5747.32, 5747.98, 5749.06, 5749.07, 5749.10, 5902.01, 5910.04, 6109.21, and 6121.02; to amend and renumber as indicated in parentheses section 122.19 (122.16) as it results from Sub. H.B. 441 of the 121st General Assembly; to enact new sections 901.41, 901.42, 1703.08, and 3905.33 and sections 111.25, 113.21, 121.371, 126.14, 131.38, 131.41, 175.041, 177.011, 901.54, 1506.24, 1515.091, 1555.09, 1751.68, 2151.422, 2151.55, 3113.40, 3301.134, 3301.801, 3311.057, 3313.535, 3313.613, 3313.844, 3314.01 to 3314.10, 3316.041, 3317.015, 3317.026, 3317.51, 3319.283, 3323.012, 3329.16, 3333.29, 3345.122,

3345.182, 3345.70, 3701.031, 3702.31, 3702.5211, 3702.5212, 3743.25, 3743.56, 3743.70, 3793.21, 4117.101, 4121.446, 4123.402, 4141.131, 4707.011, 4723.561, 5101.142, 5101.143, 5101.144, 5103.12, 5104.381, 5111.172, 5123.194, 5126.081, 5126.082, 5126.121, 5155.311, 5501.38, 5512.08, 5725.181, 5729.031, 5733.056, 5733.057, 5733.0611, 5733.111, 5733.36, 5733.37, 5733.38, 5733.40, 5733.41, 5735.143, 5747.059, 5747.131, 5747.211, 5747.231, 5747.34, 5747.35, 5747.36, 5747.40, 5747.41, 5747.42, 5747.43, 5747.44, 5747.45, 5747.451, 5747.452, and 5747.453; to repeal sections 125.94, 164.13, 173.07, 901.41, 901.42, 1703.08, 1703.09, 1703.10, 1703.11, 1703.14, 2503.14, 2503.15, 2503.16, 2503.18, 3318.33, 3905.33, 3921.32, 4743.04, 5111.171, 5111.85, 5119.25, 5119.28, 5123.06, 5123.32, and 5153.164; to repeal section 1751.68, effective July 1, 1999; to repeal section 3319.223, effective January 1, 2002; to repeal section 5725.181, effective January 1, 2003; and to repeal sections 5753.01, 5753.02, 5753.03, 5753.04, 5753.05, 5753.06, 5753.07, 5753.08, 5753.09, 5753.10, 5753.11, 5753.12, 5753.13, 5753.14, 5753.15, 5753.16, and 5753.99 of the Revised Code, effective January 1, 1999; and to amend Section 4 of Am. Sub. H.B. 478 of the 119th General Assembly, as subsequently amended; to amend Section 162 of Am. Sub. H.B. 298 of the 119th General Assembly; to amend Section 33 of Am. S.B. 206 of the 119th General Assembly, as subsequently amended; to amend Section 184 of Am. Sub. H.B. 152 of the 120th General Assembly, as subsequently amended; to amend Section 3 of Am. Sub. S.B. 20 of the 120th General Assembly; to amend Section 5 of Am. Sub. S.B. 50 of the 121st General Assembly; to amend Section 5 of Sub. S.B. 223 of the 121st General Assembly; to amend Sections 5.01, 5.05, 15.02, and 19 of Am. Sub. S.B. 264 of the 121st General Assembly; to amend Sections 45.32, 153, and 178 of Am. Sub. H.B. 117 of the 121st General Assembly; to amend Section 3 of Sub. H.B. 441 of the 121st General Assembly; to amend Section 4 of Sub. H.B. 167 of the 121st General Assembly, as subsequently amended; to amend Section 13 of Am. Sub. H.B. 60 of the 121st General Assembly; to amend Sections 4, 42, 47, and 48 of Am. H.B. 748 of the 121st General Assembly; to amend Sections 13, 35, 39, 40, 51.03, 51.04, 51.06, and 52 of Am. H.B. 748 of the 121st General Assembly, as subsequently amended; to amend Sections 5 and 6 of Am. Sub. S.B. 102 of the 122nd General Assembly; to repeal Section 12 of Am. Sub. S.B. 259 of the 121st General Assembly; to repeal Sections 40, 41, 42, and 43 of Am. Sub. S.B. 310 of the 121st General Assembly; to repeal Section 166 of Am. Sub. H.B. 117 of the 121st General Assembly; to repeal Section 201 of Am. Sub. H.B. 117 of the 121st General Assembly, as subsequently amended; to repeal Section 29 of Sub. H.B. 670 of the 121st General Assembly; to repeal Section 5 of Sub. H.B. 870 of the 119th General Assembly; to amend section 5729.031 of the Revised Code on July 1, 1999; to maintain certain provisions of this act on and after September 30, 1997, by amending the version of section 2151.355 of the Revised Code that takes effect on that date; and to maintain certain provisions of this act on and after March 4, 1998, by amending the version of section 4301.17 of the Revised Code that takes effect on that date to make operating appropriations for the biennium beginning July 1, 1997, and ending June 30, 1999, and to provide authorization and conditions for the operation of state programs.

Sec. 5739.01. As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

(B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

(1) All transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted;

(2) All transactions by which lodging by a hotel is or is to be furnished to transient guests;

(3) All transactions by which:

(a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would be exempt from the tax imposed by section 5739.02 of the Revised Code;

(b) An item of tangible personal property is or is to be installed, except property, the purchase of which would be exempt from the tax imposed by section 5739.02 of the Revised Code or property that is or is to be incorporated into and will become a part of a production, transmission, transportation, or distribution system for the delivery of a public utility service;

(c) The service of washing, cleaning, waxing, polishing, or painting a motor vehicle is or is to be furnished;

(d) Industrial laundry cleaning services are or are to be provided;

(e) Automatic data processing, computer services, or electronic information services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. Notwithstanding any other provision of this chapter, such transactions that occur between members of an affiliated group are not sales. An affiliated group means two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.

(f) Telecommunications service is provided that originates or terminates in this state and is charged in the records of the telecommunications service vendor to the consumer's telephone number or account in this state, or that both originates and terminates in this state;

(g) Landscaping and lawn care service is or is to be provided;

(h) Private investigation and security service is or is to be provided;

(i) Information services or tangible personal property is provided or ordered by means of a nine hundred telephone call;

(j) Building maintenance and janitorial service is or is to be provided;

(k) Employment service is or is to be provided;

(l) Employment placement service is or is to be provided;

(m) Exterminating service is or is to be provided;

(n) Physical fitness facility service is or is to be provided;

(o) Recreation and sports club service is or is to be provided.

(4) All transactions by which printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter are or are to be furnished or transferred;

(5) The production or fabrication of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production of fabrication work; and include the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. Except as provided in section 5739.03 of the Revised Code, a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property, provided that the sale and installation of carpeting, the sale and installation of agricultural land tile, the sale and erection or installation of portable grain bins, or the provision of landscaping and lawn care service and the transfer of property as part of such service is never a construction contract. The transfer of copyrighted motion picture films for exhibition purposes is not a sale, except such films as are used solely for advertising purposes. Other than as provided in this section, "sale" and "selling" do not include professional, insurance, or personal service transactions which involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

As used in division (B)(5) of this section:

(a) "Agricultural land tile" means fired clay or concrete tile, or flexible or rigid perforated plastic pipe or tubing, incorporated or to be incorporated into a subsurface drainage system appurtenant to land used or to be used directly in production by farming, agriculture, horticulture, or floriculture. The term does not include such materials when they are or are to be incorporated into a drainage system appurtenant to a building or structure even if the building or structure is used or to be used in such production.

(b) "Portable grain bin" means a structure that is used or to be used by a person engaged in farming or agriculture to shelter the person's grain and that is designed to be disassembled without significant damage to its component parts.

(6) All transactions in which all of the shares of stock of a closely held corporation are transferred, if the corporation is not engaging in business and its entire assets consist of boats, planes, motor vehicles, or other tangible personal property operated primarily for the use and enjoyment of the shareholders;

(7) All transactions in which a warranty, maintenance or service contract, or similar agreement by which the vendor of the warranty, contract, or agreement agrees to repair or maintain the tangible personal property of the consumer is or is to be provided.

(C) "Vendor" means the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given and, for sales described in division (B)(3)(i) of this section, the telecommunications service vendor that provides the nine hundred telephone service; if two or more persons are engaged in business at the same place of business under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor.

Physicians, dentists, hospitals, and veterinarians who are engaged in selling tangible personal property as received from others, such as eyeglasses, mouthwashes, dentifrices, or similar articles, are vendors. Veterinarians who are engaged in transferring to others for a consideration drugs, the dispensing of which does not require an order of a licensed veterinarian or physician under federal law, are vendors.

(D)(1) "Consumer" means the person for whom the service is provided, to whom the transfer effected or license given by a sale is or is to be made or given, to whom the service described in division (B)(3)(f) or (i) of this section is charged, or to whom the admission is granted.

(2) Physicians, dentists, hospitals, and blood banks operated by nonprofit institutions and persons licensed to practice veterinary medicine, surgery, and dentistry are consumers of all tangible personal property and services purchased by them in connection with the practice of medicine, dentistry, the rendition of hospital or blood bank service, or the practice of veterinary medicine, surgery, and dentistry. In addition to being consumers of drugs administered by them or by their assistants according to their direction, veterinarians also are consumers of drugs that under federal law may be dispensed only by or upon the order of a licensed veterinarian or physician, when transferred by them to others for a consideration to provide

treatment to animals as directed by the veterinarian.

(3) A person who performs a facility management, or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of this section.

(4)(a) In the case of a person who purchases printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of that printed matter, and the purchase of that printed matter for that purpose is a sale.

(b) In the case of a person who produces, rather than purchases, printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of all tangible personal property and services purchased for use or consumption in the production of that printed matter. That person is not entitled to claim exception under division (E)(8) of this section for any material incorporated into the printed matter or any equipment, supplies, or services primarily used to produce the printed matter.

(c) The distribution of printed matter to the public or to a designated segment of the public, free of charge, is not a sale to the members of the public to whom the printed matter is distributed or to any persons who purchase space in the printed matter for advertising or other purposes.

(5) A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under division (E)(1) of this section.

(E) "Retail sale" and "sales at retail" include all sales except those in which the purpose of the consumer is:

(1) To resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person;

(2) To incorporate the thing transferred as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining, or to use or consume the thing transferred directly in producing a product for sale by mining, including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, and persons engaged in rendering farming, agricultural, horticultural, or floricultural services, and services in the exploration for, and production of, crude oil and natural gas, for others are deemed engaged directly in farming, agriculture, horticulture, and floriculture, or exploration for, and production of, crude oil and natural gas; directly in the rendition of a public utility service, except that the sales tax levied by section 5739.02 of the Revised Code shall be collected upon all meals, drinks, and food for human consumption sold upon Pullman and railroad coaches. This paragraph does not exempt or except from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

(3) To hold the thing transferred as security for the performance of an obligation of the vendor;

(4) To use or consume the thing transferred in the process of reclamation as required by Chapters 1513. and 1514. of the Revised Code;

(5) To resell, hold, use, or consume the thing transferred as evidence of a contract of insurance;

(6) To use or consume the thing directly in commercial fishing;

(7) To incorporate the thing transferred as a material or a part into, or to use or consume the thing transferred directly in the production of, magazines distributed as controlled circulation publications;

(8) To use or consume the thing transferred in the production and preparation in suitable condition for market and sale of printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter;

(9) To use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale;

(10) To use the benefit of a warranty, maintenance or service contract, or similar agreement, as defined in division (B)(7) of this section, to repair or maintain tangible personal property, if all of the property that is the subject of the warranty, contract, or agreement would be exempt on its purchase from the tax imposed by section 5739.02 of the Revised Code;

(11) To use the thing transferred as qualified research and development equipment;

(12) To use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility when the inventory is primarily distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing. Division (E)(12) of this section does not apply to motor vehicles registered for operation on the public highways. As used in division (E)(12) of this section, "affiliated group" has the same meaning as in division (B)(3)(e) of this section and "direct marketing" has the same meaning as in division (B)(37) of section 5739.02 of the Revised Code.

(13) To use or consume the thing transferred to fulfill a contractual obligation incurred by a warrantor pursuant to a warranty provided as a part of the price of the tangible personal property sold or by a vendor of a warranty, maintenance or service contract, or similar agreement the provision of which is defined as a sale under division (B)(7) of this section~~.~~

~~As used in division (E) of this section, "thing" includes all transactions included in divisions (B)(3)(a), (b), and (e) of this section~~;

(14) To use or consume the thing transferred in the production of a newspaper for distribution to the public;

(15) To use tangible personal property to perform a service listed in division (B)(3) of this section, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service.

As used in division (E) of this section, "thing" includes all transactions included in divisions (B)(3)(a), (b), and (e) of this section.

Sales conducted through a coin-operated device that activates vacuum equipment or equipment that dispenses water, whether or not in combination with soap or other cleaning agents or wax, to the consumer for the consumer's use on the premises in washing, cleaning, or waxing a motor vehicle, provided no other personal property or personal service is provided as part of the transaction, are not retail sales or sales at retail.

(F) "Business" includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. "Business" does not include the activity of a person in managing and investing the person's own funds.

(G) "Engaging in business" means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds self out to the public as conducting such business. Making a casual sale is not engaging in business.

(H)(1) "Price," except as provided in divisions (H)(2) and (3) of this section, means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, in the complete performance of a retail sale, without any deduction on account of the cost of the property sold, cost of materials used, labor or service cost, interest, discount paid or allowed after the sale is consummated, or any other expense. If the retail sale consists of the rental or lease of tangible personal property, "price" means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, in the complete performance of the rental or lease, without any deduction for tax, interest, labor or service charge, damage liability waiver, termination or damage charge, discount paid or allowed after the lease is consummated, or any other expense. The sales tax shall be calculated and collected by the lessor on each payment made by the lessee. Price does not include the consideration received as a deposit refundable to the consumer upon return of a beverage container, the consideration received as a deposit on a carton or case that is used for such returnable containers, or the consideration received as a refundable security deposit for the use of tangible personal property to the extent that it actually is refunded, if the consideration for such refundable deposit is separately stated from the consideration received or to be received for the tangible personal property transferred in the retail sale. Such separation must appear in the sales agreement or on the initial invoice or initial billing rendered by the vendor to the consumer. Price is the amount received inclusive of the tax, provided the vendor establishes to the satisfaction of the tax commissioner that the tax was added to the price. When the price includes

both a charge for tangible personal property and a charge for providing a service and the sale of the property and the charge for the service are separately taxable, or have a separately determinable tax status, the price shall be separately stated for each such charge so the tax can be correctly computed and charged.

The tax collected by the vendor from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state and of counties levying an additional sales tax pursuant to section 5739.021 or 5739.026 of the Revised Code and of transit authorities levying an additional sales tax pursuant to section 5739.023 of the Revised Code. Except for the discount authorized in section 5739.12 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of such tax.

(2) In the case of a sale of any new motor vehicle by a new motor vehicle dealer, as defined in section 4517.01 of the Revised Code, in which another motor vehicle is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the motor vehicle received in trade.

(3) In the case of a sale of any watercraft or outboard motor by a watercraft dealer licensed in accordance with section 1547.543 of the Revised Code, in which another watercraft, watercraft and trailer, or outboard motor is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the watercraft, watercraft and trailer, or outboard motor received in trade. As used in division (H)(3) of this section, "watercraft" includes an outdrive unit attached to the watercraft.

(I) "Receipts" means the total amount of the prices of the sales of vendors, provided that cash discounts allowed and taken on sales at the time they are consummated are not included, minus any amount deducted as a bad debt pursuant to section 5739.121 of the Revised Code. "Receipts" does not include the sale price of property returned or services rejected by consumers when the full sale price and tax are refunded either in cash or by credit.

(J) "Place of business" means any location at which a person engages in business.

(K) "Premises" includes any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.

(L) "Casual sale" means a sale of an item of tangible personal property which was obtained by the person making the sale, through purchase or otherwise, for the person's own use in this state and which was previously subject to the state's taxing jurisdiction on its sale or use, and includes such items acquired for the seller's use which are sold by an auctioneer employed directly by the person for such purpose, provided the location of such sales is not the auctioneer's permanent place of business. As used in this division, "permanent place of business" includes any location where such auctioneer has conducted more than two auctions during the year.

(M) "Hotel" means every establishment kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether such rooms are in one or several structures.

(N) "Transient guests" means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.

(O) "Making retail sales" means the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated to provide a service or to transfer title to or possession of the item sold. "Making retail sales" does not include the preliminary acts of promoting or soliciting the retail sales, other than the distribution of printed matter which displays or describes and prices the item offered for sale, nor does it include delivery of a predetermined quantity of tangible personal property or transportation of property or personnel to or from a place where a service is performed, regardless of whether the vendor is a delivery vendor.

(P) "Used directly in the rendition of a public utility service" means that property which is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and which retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation or distribution system, including only such motor vehicles as are specially designed and

equipped for such use. Tangible personal property and services used primarily in providing highway transportation for hire are not used in providing a public utility service as defined in this division.

(Q) "Refining" means removing or separating a desirable product from raw or contaminated materials by distillation or physical, mechanical, or chemical processes.

(R) "Assembly" and "assembling" mean attaching or fitting together parts to form a product, but do not include packaging a product.

(S) "Manufacturing operation" means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. "Manufacturing operation" does not include packaging.

(T) "Fiscal officer" means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county which is a transit authority, the fiscal officer of the county transit board if one is appointed pursuant to section 306.03 of the Revised Code or the county auditor if the board of county commissioners operates the county transit system.

(U) "Transit authority" means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit system is created pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority which includes territory in more than one county must include all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(V) "Legislative authority" means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county which is a transit authority, the board of county commissioners.

(W) "Territory of the transit authority" means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(X) "Providing a service" means providing or furnishing anything described in division (B)(3) of this section for consideration.

(Y)(1)(a) "Automatic data processing" means processing of others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data.

(b) "Computer services" means providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.

(c) "Electronic information services" means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

(i) Examining or acquiring data stored in or accessible to the computer equipment;

(ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.

(d) "Automatic data processing, computer services, or electronic information services" shall not include personal or professional services.

(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, "personal and professional services" means all services other than automatic data processing, computer services, or electronic information services, including but not limited to:

(a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies,

alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

(d) Feasibility studies including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;

(e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled and reported so that it will be meaningful to management;

(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

(i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;

(j) Providing debt collection services by any oral, written, graphic, or electronic means.

The services listed in divisions (Y)(2)(a) to (j) of this section are not automatic data processing or computer services.

(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.

(AA) "Telecommunications service" means the transmission of any interactive, two-way electromagnetic communications, including voice, image, data, and information, through the use of any medium such as wires, cables, microwaves, cellular radio, radio waves, light waves, or any combination of those or similar media. "Telecommunications service" includes message toll service even though the vendor provides the message toll service by means of wide area transmission type service or private communications service purchased from another telecommunications service provider, but does not include any of the following:

(1) Sales of incoming or outgoing wide area transmission service or wide area transmission type service, including eight hundred or eight-hundred-type service, to the person contracting for the receipt of that service;

(2) Sales of private communications service to the person contracting for the receipt of that service that entitles the purchaser to exclusive or priority use of a communications channel or group of channels between exchanges;

(3) Sales of telecommunications service by companies subject to the excise tax imposed by Chapter 5727. of the Revised Code;

(4) Sales of telecommunications service to a provider of telecommunications service, including access services, for use in providing telecommunications service;

(5) Value added nonvoice services in which computer processing applications are used to act on the form, content, code, or protocol of the information to be transmitted;

(6) Transmission of interactive video programming by a cable television system as defined in section 505.90 of the Revised Code.

(BB) "Industrial laundry cleaning services" means removing soil or dirt from or supplying towels, linens, or articles of clothing that belong to others and are used in a trade or business.

(CC) "Magazines distributed as controlled circulation publications" means magazines containing at least twenty-four pages, at least twenty-five per cent editorial content, issued at regular intervals four or more times a year, and circulated without charge to the recipient, provided that such magazines are not owned or controlled by individuals or business concerns which conduct such publications as an auxiliary to, and essentially for the advancement of the main business or calling of, those who own or control them.

(DD) "Landscaping and lawn care service" means the services of planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, fertilizing, and providing similar services to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover, and other flora, or otherwise maintaining a lawn or landscape grown or maintained by the owner for ornamentation or other nonagricultural purpose. However, "landscaping and lawn care service" does not include the providing of such services by a person who has less than five thousand dollars in sales of such services during the calendar year.

(EE) "Private investigation and security service" means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749. of the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices. "Private investigation and security service" does not include special duty services provided by off-duty police officers, deputy sheriffs, and other peace officers regularly employed by the state or a political subdivision.

(FF) "Information services" means providing conversation, giving consultation or advice, playing or making a voice or other recording, making or keeping a record of the number of callers, and any other service provided to a consumer by means of a nine hundred telephone call, except when the nine hundred telephone call is the means by which the consumer makes a contribution to a recognized charity.

(GG) "Research and development" means designing, creating, or formulating new or enhanced products, equipment, or manufacturing processes, and conducting scientific or technological inquiry and experimentation in the physical sciences with the goal of increasing scientific knowledge which may reveal the bases for new or enhanced products, equipment, or manufacturing processes.

(HH) "Qualified research and development equipment" means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 of the Revised Code, or used for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

(II) "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, "building maintenance and janitorial service" does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.

(JJ) "Employment service" means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service. "Employment service" does not include:

(1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser.

(2) Medical and health care services.

(3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.

(4) Transactions between members of an affiliated group, as defined in division (B)(3)(e) of this section.

(KK) "Employment placement service" means locating or finding employment for a person or finding or locating an employee to fill an available position.

(LL) "Exterminating service" means eradicating or attempting to eradicate vermin infestations from a building or structure, or the area surrounding a building or structure, and includes activities to inspect, detect, or prevent vermin infestation of a building or structure.

(MM) "Physical fitness facility service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a physical fitness facility such as an athletic club, health spa, or gymnasium, which entitles the member to use the facility for physical exercise.

(NN) "Recreation and sports club service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a recreation and sports club, which entitles the member to use the facilities of the organization. "Recreation and sports club" means an organization that has ownership of, or controls or leases on a continuing, long-term basis, the facilities used by its members and includes an aviation club, gun or shooting club, yacht club, card club, swimming club, tennis club, golf club, country club, riding club, amateur sports club, or similar organization.

(OO) "Livestock" means farm animals commonly raised for food or food production, and includes but is not limited to cattle, sheep, goats, swine, and poultry. "Livestock" does not include invertebrates, fish, amphibians, reptiles, horses, domestic pets, animals for use in laboratories or for exhibition, or other animals not commonly raised for food or food production.

(PP) "Livestock structure" means a building or structure used exclusively for the housing, raising, feeding, or sheltering of livestock, and includes feed storage or handling structures and structures for livestock waste handling.

(QQ) "Horticulture" means the growing, cultivation, and production of flowers, fruits, herbs, vegetables, sod, mushrooms, and nursery stock. As used in this division, "nursery stock" has the same meaning as in section 927.51 of the Revised Code.

(RR) "Horticulture structure" means a building or structure used exclusively for the commercial growing, raising, or overwintering of horticultural products, and includes the area used for stocking, storing, and packing horticultural products when done in conjunction with the production of those products.

(SS) "Newspaper" means an unbound publication bearing a title or name that is regularly published, at least as frequently as biweekly, and distributed from a fixed place of business to the public in a specific geographic area, and that contains a substantial amount of news matter of international, national, or local events of interest to the general public.

(TT) "Professional racing team" means a person that employs at least twenty full-time employees for the purpose of conducting a motor vehicle racing business for profit. The person must conduct the business with the purpose of racing one or more motor racing vehicles in at least ten competitive professional racing events each year that comprise all or part of a motor racing series sanctioned by one or more motor racing sanctioning organizations. A "motor racing vehicle" means a vehicle for which the chassis, engine, and parts are designed exclusively for motor racing, and does not include a stock or production model vehicle that may be modified for use in racing. For the purposes of this division:

(1) A "competitive professional racing event" is a motor vehicle racing event sanctioned by one or more motor racing sanctioning organizations, at which aggregate cash prizes in excess of eight hundred thousand dollars are awarded to the competitors.

(2) "Full-time employee" means an individual who is employed for consideration for thirty-five or more hours a week, or who renders any other standard of service generally accepted by custom or specified by contract as full-time employment.

BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5739. SALES TAX
DEFINITIONS

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5739.01 DEFINITIONS

As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

(B) "Sale" and "selling" include all of the following transactions for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever:

(1) All transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted;

(2) All transactions by which lodging by a hotel is or is to be furnished to transient guests;

(3) All transactions by which:

(a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would be exempt from the tax imposed by section 5739.02 of the Revised Code;

(b) An item of tangible personal property is or is to be installed, except property, the purchase of which would be exempt from the tax imposed by section 5739.02 of the Revised Code or property that is or is to be incorporated into and will become a part of a production, transmission, transportation, or distribution system for the delivery of a public utility service;

(c) The service of washing, cleaning, waxing, polishing, or painting a motor vehicle is or is to be furnished;

(d) Industrial laundry cleaning services are or are to be provided;

(e) Automatic data processing, computer services, or electronic information services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. Notwithstanding any other provision of this chapter, such transactions that occur between members of an affiliated group are not sales. An affiliated group means two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.

(f) Telecommunications service is provided that originates or terminates in this state and is charged in the records of the telecommunications service vendor to the consumer's telephone number or account in this state, or that both originates and terminates in this state; but does not include transactions by which telecommunications service is paid for by using a prepaid authorization number or prepaid telephone calling card;

(g) Landscaping and lawn care service is or is to be provided;

(h) Private investigation and security service is or is to be provided;

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(i) Information services or tangible personal property is provided or ordered by means of a nine hundred telephone call;

(j) Building maintenance and janitorial service is or is to be provided;

(k) Employment service is or is to be provided;

(l) Employment placement service is or is to be provided;

(m) Exterminating service is or is to be provided;

(n) Physical fitness facility service is or is to be provided;

(o) Recreation and sports club service is or is to be provided.

(4) All transactions by which printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter are or are to be furnished or transferred;

(5) The production or fabrication of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production of fabrication work; and include the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. Except as provided in section 5739.03 of the Revised Code, a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property, provided that the sale and installation of carpeting, the sale and installation of agricultural land tile, the sale and erection or installation of portable grain bins, or the provision of landscaping and lawn care service and the transfer of property as part of such service is never a construction contract. The transfer of copyrighted motion picture films for exhibition purposes is not a sale, except such films as are used solely for advertising purposes. Other than as provided in this section, "sale" and "selling" do not include professional, insurance, or personal service transactions which involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

As used in division (B)(5) of this section:

(a) "Agricultural land tile" means fired clay or concrete tile, or flexible or rigid perforated plastic pipe or tubing, incorporated or to be incorporated into a subsurface drainage system appurtenant to land used or to be used directly in production by farming, agriculture, horticulture, or floriculture. The term does not include such materials when they are or are to be incorporated into a drainage system appurtenant to a building or structure even if the building or structure is used or to be used in such production.

(b) "Portable grain bin" means a structure that is used or to be used by a person engaged in farming or agriculture to shelter the person's grain and that is designed to be disassembled without significant damage to its component parts.

(6) All transactions in which all of the shares of stock of a closely held corporation are transferred, if the corporation is not engaging in business and its entire assets consist of boats, planes, motor vehicles, or other tangible personal property operated primarily for the use and enjoyment of the shareholders;

(7) All transactions in which a warranty, maintenance or service contract, or similar agreement by which the vendor of the warranty, contract, or agreement agrees to repair or maintain the tangible personal property of the consumer is or is to be provided;

(8) All transactions by which a prepaid authorization number or a prepaid telephone calling card is or is to be transferred.

(C) "Vendor" means the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given and, for sales described in division (B)(3)(i) of this section, the telecommunications service vendor

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that provides the nine hundred telephone service; if two or more persons are engaged in business at the same place of business under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor.

Physicians, dentists, hospitals, and veterinarians who are engaged in selling tangible personal property as received from others, such as eyeglasses, mouthwashes, dentifrices, or similar articles, are vendors. Veterinarians who are engaged in transferring to others for a consideration drugs, the dispensing of which does not require an order of a licensed veterinarian or physician under federal law, are vendors.

(D)(1) "Consumer" means the person for whom the service is provided, to whom the transfer effected or license given by a sale is or is to be made or given, to whom the service described in division (B)(3)(f) or (i) of this section is charged, or to whom the admission is granted.

(2) Physicians, dentists, hospitals, and blood banks operated by nonprofit institutions and persons licensed to practice veterinary medicine, surgery, and dentistry are consumers of all tangible personal property and services purchased by them in connection with the practice of medicine, dentistry, the rendition of hospital or blood bank service, or the practice of veterinary medicine, surgery, and dentistry. In addition to being consumers of drugs administered by them or by their assistants according to their direction, veterinarians also are consumers of drugs that under federal law may be dispensed only by or upon the order of a licensed veterinarian or physician, when transferred by them to others for a consideration to provide treatment to animals as directed by the veterinarian.

(3) A person who performs a facility management, or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of this section.

(4)(a) In the case of a person who purchases printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of that printed matter, and the purchase of that printed matter for that purpose is a sale.

(b) In the case of a person who produces, rather than purchases, printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of all tangible personal property and services purchased for use or consumption in the production of that printed matter. That person is not entitled to claim exception under division (E)(8) of this section for any material incorporated into the printed matter or any equipment, supplies, or services primarily used to produce the printed matter.

(c) The distribution of printed matter to the public or to a designated segment of the public, free of charge, is not a sale to the members of the public to whom the printed matter is distributed or to any persons who purchase space in the printed matter for advertising or other purposes.

(5) A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under division (E)(1) of this section.

(E) "Retail sale" and "sales at retail" include all sales except those in which the purpose of the consumer is:

(1) To resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person;

(2) To incorporate the thing transferred as a material or a part, into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining, or to use or consume the thing transferred directly in producing a product for sale by mining, including without limitation the extraction from the earth of all substances which are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, and persons engaged in rendering farming, agricultural, horticultural, or floricultural services, and services in the exploration for, and production of, crude oil and natural gas, for others are deemed engaged directly in farming,

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agriculture, horticulture, and floriculture, or exploration for, and production of, crude oil and natural gas; directly in the rendition of a public utility service, except that the sales tax levied by section 5739.02 of the Revised Code shall be collected upon all meals, drinks, and food for human consumption sold upon Pullman and railroad coaches. This paragraph does not exempt or except from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

(3) To hold the thing transferred as security for the performance of an obligation of the vendor;

(4) To use or consume the thing transferred in the process of reclamation as required by Chapters 1513. and 1514. of the Revised Code;

(5) To resell, hold, use, or consume the thing transferred as evidence of a contract of insurance;

(6) To use or consume the thing directly in commercial fishing;

(7) To incorporate the thing transferred as a material or a part into, or to use or consume the thing transferred directly in the production of, magazines distributed as controlled circulation publications;

(8) To use or consume the thing transferred in the production and preparation in suitable condition for market and sale of printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter;

(9) To use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale;

(10) To use the benefit of a warranty, maintenance or service contract, or similar agreement, as defined in division (B)(7) of this section, to repair or maintain tangible personal property, if all of the property that is the subject of the warranty, contract, or agreement would be exempt on its purchase from the tax imposed by section 5739.02 of the Revised Code;

(11) To use the thing transferred as qualified research and development equipment;

(12) To use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility when the inventory is primarily distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing. Division (E)(12) of this section does not apply to motor vehicles registered for operation on the public highways. As used in division (E)(12) of this section, "affiliated group" has the same meaning as in division (B)(3)(e) of this section and "direct marketing" has the same meaning as in division (B)(37) of section 5739.02 of the Revised Code.

(13) To use or consume the thing transferred to fulfill a contractual obligation incurred by a warrantor pursuant to a warranty provided as a part of the price of the tangible personal property sold or by a vendor of a warranty, maintenance or service contract, or similar agreement the provision of which is defined as a sale under division (B)(7) of this section;

(14) To use or consume the thing transferred in the production of a newspaper for distribution to the public;

(15) To use tangible personal property to perform a service listed in division (B)(3) of this section, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service.

As used in division (E) of this section, "thing" includes all transactions included in divisions (B)(3)(a), (b), and (e) of this section.

Sales conducted through a coin-operated device that activates vacuum equipment or equipment that dispenses water, whether or not in combination with soap or other cleaning agents or wax, to the consumer for the consumer's use on the premises in washing, cleaning, or waxing a motor vehicle, provided no other personal property or personal service is

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provided as part of the transaction, are not retail sales or sales at retail.

(F) "Business" includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. "Business" does not include the activity of a person in managing and investing the person's own funds.

(G) "Engaging in business" means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds self out to the public as conducting such business. Making a casual sale is not engaging in business.

(H)(1) "Price," except as provided in divisions (H)(2) and (3) of this section, means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, in the complete performance of a retail sale, without any deduction on account of the cost of the property sold, cost of materials used, labor or service cost, interest, discount paid or allowed after the sale is consummated, or any other expense. If the retail sale consists of the rental or lease of tangible personal property, "price" means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, in the complete performance of the rental or lease, without any deduction for tax, interest, labor or service charge, damage liability waiver, termination or damage charge, discount paid or allowed after the lease is consummated, or any other expense. The sales tax shall be calculated and collected by the lessor on each payment made by the lessee. Price does not include the consideration received as a deposit refundable to the consumer upon return of a beverage container, the consideration received as a deposit on a carton or case that is used for such returnable containers, or the consideration received as a refundable security deposit for the use of tangible personal property to the extent that it actually is refunded, if the consideration for such refundable deposit is separately stated from the consideration received or to be received for the tangible personal property transferred in the retail sale. Such separation must appear in the sales agreement or on the initial invoice or initial billing rendered by the vendor to the consumer. Price is the amount received inclusive of the tax, provided the vendor establishes to the satisfaction of the tax commissioner that the tax was added to the price. When the price includes both a charge for tangible personal property and a charge for providing a service and the sale of the property and the charge for the service are separately taxable, or have a separately determinable tax status, the price shall be separately stated for each such charge so the tax can be correctly computed and charged.

The tax collected by the vendor from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state and of counties levying an additional sales tax pursuant to section 5739.021 or 5739.026 of the Revised Code and of transit authorities levying an additional sales tax pursuant to section 5739.023 of the Revised Code . Except for the discount authorized in section 5739.12 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of such tax.

(2) In the case of a sale of any new motor vehicle by a new motor vehicle dealer, as defined in section 4517.01 of the Revised Code, in which another motor vehicle is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the motor vehicle received in trade.

(3) In the case of a sale of any watercraft or outboard motor by a watercraft dealer licensed in accordance with section 1547.543 of the Revised Code, in which another watercraft, watercraft and trailer, or outboard motor is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the watercraft, watercraft and trailer, or outboard motor received in trade. As used in division (H)(3) of this section, "watercraft" includes an outdrive unit attached to the watercraft.

(I) "Receipts" means the total amount of the prices of the sales of vendors, provided that cash discounts allowed and taken on sales at the time they are consummated are not included, minus any amount deducted as a bad debt pursuant to section 5739.121 of the Revised Code. "Receipts" does not include the sale price of property returned or services rejected by consumers when the full sale price and tax are refunded either in cash or by credit.

(J) "Place of business" means any location at which a person engages in business.

(K) "Premises" includes any real property or portion thereof upon which any person engages in selling tangible

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personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.

(L) "Casual sale" means a sale of an item of tangible personal property which was obtained by the person making the sale, through purchase or otherwise, for the person's own use in this state and which was previously subject to the state's taxing jurisdiction on its sale or use, and includes such items acquired for the seller's use which are sold by an auctioneer employed directly by the person for such purpose, provided the location of such sales is not the auctioneer's permanent place of business. As used in this division, "permanent place of business" includes any location where such auctioneer has conducted more than two auctions during the year.

(M) "Hotel" means every establishment kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether such rooms are in one or several structures.

(N) "Transient guests" means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.

(O) "Making retail sales" means the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated to provide a service or to transfer title to or possession of the item sold. "Making retail sales" does not include the preliminary acts of promoting or soliciting the retail sales, other than the distribution of printed matter which displays or describes and prices the item offered for sale, nor does it include delivery of a predetermined quantity of tangible personal property or transportation of property or personnel to or from a place where a service is performed, regardless of whether the vendor is a delivery vendor.

(P) "Used directly in the rendition of a public utility service" means that property which is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and which retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system, including only such motor vehicles as are specially designed and equipped for such use. Tangible personal property and services used primarily in providing highway transportation for hire are not used in providing a public utility service as defined in this division.

(Q) "Refining" means removing or separating a desirable product from raw or contaminated materials by distillation or physical, mechanical, or chemical processes.

(R) "Assembly" and "assembling" mean attaching or fitting together parts to form a product, but do not include packaging a product.

(S) "Manufacturing operation" means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. "Manufacturing operation" does not include packaging.

(T) "Fiscal officer" means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county which is a transit authority, the fiscal officer of the county transit board if one is appointed pursuant to section 306.03 of the Revised Code or the county auditor if the board of county commissioners operates the county transit system.

(U) "Transit authority" means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit system is created pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority which includes territory in more than one county must include all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

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(V) "Legislative authority" means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county which is a transit authority, the board of county commissioners.

(W) "Territory of the transit authority" means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(X) "Providing a service" means providing or furnishing anything described in division (B)(3) of this section for consideration.

(Y)(1)(a) "Automatic data processing" means processing of others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data.

(b) "Computer services" means providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.

(c) "Electronic information services" means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

(i) Examining or acquiring data stored in or accessible to the computer equipment;

(ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.

(d) "Automatic data processing, computer services, or electronic information services" shall not include personal or professional services.

(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, "personal and professional services" means all services other than automatic data processing, computer services, or electronic information services, including but not limited to:

(a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

(d) Feasibility studies including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;

(e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled and reported so that it will be meaningful to management;

(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

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(i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;

(j) Providing debt collection services by any oral, written, graphic, or electronic means.

The services listed in divisions (Y)(2)(a) to (j) of this section are not automatic data processing or computer services.

(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.

(AA) "Telecommunications service" means the transmission of any interactive, two-way electromagnetic communications, including voice, image, data, and information, through the use of any medium such as wires, cables, microwaves, cellular radio, radio waves, light waves, or any combination of those or similar media. "Telecommunications service" includes message toll service even though the vendor provides the message toll service by means of wide area transmission type service or private communications service purchased from another telecommunications service provider, but does not include any of the following:

(1) Sales of incoming or outgoing wide area transmission service or wide area transmission type service, including eight hundred or eight-hundred-type service, to the person contracting for the receipt of that service;

(2) Sales of private communications service to the person contracting for the receipt of that service that entitles the purchaser to exclusive or priority use of a communications channel or group of channels between exchanges;

(3) Sales of telecommunications service by companies subject to the excise tax imposed by Chapter 5727. of the Revised Code;

(4) Sales of telecommunications service to a provider of telecommunications service, including access services, for use in providing telecommunications service;

(5) Value-added nonvoice services in which computer processing applications are used to act on the form, content, code, or protocol of the information to be transmitted;

(6) Transmission of interactive video programming by a cable television system as defined in section 505.90 of the Revised Code.

(BB) "Industrial laundry cleaning services" means removing soil or dirt from or supplying towels, linens, or articles of clothing that belong to others and are used in a trade or business.

(CC) "Magazines distributed as controlled circulation publications" means magazines containing at least twenty-four pages, at least twenty-five per cent editorial content, issued at regular intervals four or more times a year, and circulated without charge to the recipient, provided that such magazines are not owned or controlled by individuals or business

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concerns which conduct such publications as an auxiliary to, and essentially for the advancement of the main business or calling of, those who own or control them.

(DD) "Landscaping and lawn care service" means the services of planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, fertilizing, and providing similar services to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover, and other flora, or otherwise maintaining a lawn or landscape grown or maintained by the owner for ornamentation or other nonagricultural purpose. However, "landscaping and lawn care service" does not include the providing of such services by a person who has less than five thousand dollars in sales of such services during the calendar year.

(EE) "Private investigation and security service" means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749. of the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices. "Private investigation and security service" does not include special duty services provided by off-duty police officers, deputy sheriffs, and other peace officers regularly employed by the state or a political subdivision.

(FF) "Information services" means providing conversation, giving consultation or advice, playing or making a voice or other recording, making or keeping a record of the number of callers, and any other service provided to a consumer by means of a nine hundred telephone call, except when the nine hundred telephone call is the means by which the consumer makes a contribution to a recognized charity.

(GG) "Research and development" means designing, creating, or formulating new or enhanced products, equipment, or manufacturing processes, and conducting scientific or technological inquiry and experimentation in the physical sciences with the goal of increasing scientific knowledge which may reveal the bases for new or enhanced products, equipment, or manufacturing processes.

(HH) "Qualified research and development equipment" means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 of the Revised Code, or used for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

(II) "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, "building maintenance and janitorial service" does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.

(JJ) "Employment service" means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service. "Employment service" does not include:

(1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser.

(2) Medical and health care services.

(3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.

(4) Transactions between members of an affiliated group, as defined in division (B)(3)(e) of this section.

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(KK) "Employment placement service" means locating or finding employment for a person or finding or locating an employee to fill an available position.

(LL) "Exterminating service" means eradicating or attempting to eradicate vermin infestations from a building or structure, or the area surrounding a building or structure, and includes activities to inspect, detect, or prevent vermin infestation of a building or structure.

(MM) "Physical fitness facility service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a physical fitness facility such as an athletic club, health spa, or gymnasium, which entitles the member to use the facility for physical exercise.

(NN) "Recreation and sports club service" means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a recreation and sports club, which entitles the member to use the facilities of the organization. "Recreation and sports club" means an organization that has ownership of, or controls or leases on a continuing, long-term basis, the facilities used by its members and includes an aviation club, gun or shooting club, yacht club, card club, swimming club, tennis club, golf club, country club, riding club, amateur sports club, or similar organization.

(OO) "Livestock" means farm animals commonly raised for food or food production, and includes but is not limited to cattle, sheep, goats, swine, and poultry. "Livestock" does not include invertebrates, fish, amphibians, reptiles, horses, domestic pets, animals for use in laboratories or for exhibition, or other animals not commonly raised for food or food production.

(PP) "Livestock structure" means a building or structure used exclusively for the housing, raising, feeding, or sheltering of livestock, and includes feed storage or handling structures and structures for livestock waste handling.

(QQ) "Horticulture" means the growing, cultivation, and production of flowers, fruits, herbs, vegetables, sod, mushrooms, and nursery stock. As used in this division, "nursery stock" has the same meaning as in section 927.51 of the Revised Code.

(RR) "Horticulture structure" means a building or structure used exclusively for the commercial growing, raising, or overwintering of horticultural products, and includes the area used for stocking, storing, and packing horticultural products when done in conjunction with the production of those products.

(SS) "Newspaper" means an unbound publication bearing a title or name that is regularly published, at least as frequently as biweekly, and distributed from a fixed place of business to the public in a specific geographic area, and that contains a substantial amount of news matter of international, national, or local events of interest to the general public.

(TT) "Professional racing team" means a person that employs at least twenty full-time employees for the purpose of conducting a motor vehicle racing business for profit. The person must conduct the business with the purpose of racing one or more motor racing vehicles in at least ten competitive professional racing events each year that comprise all or part of a motor racing series sanctioned by one or more motor racing sanctioning organizations. A "motor racing vehicle" means a vehicle for which the chassis, engine, and parts are designed exclusively for motor racing, and does not include a stock or production model vehicle that may be modified for use in racing. For the purposes of this division:

(1) A "competitive professional racing event" is a motor vehicle racing event sanctioned by one or more motor racing sanctioning organizations, at which aggregate cash prizes in excess of eight hundred thousand dollars are awarded to the competitors.

(2) "Full-time employee" means an individual who is employed for consideration for thirty-five or more hours a week, or who renders any other standard of service generally accepted by custom or specified by contract as full-time employment.

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(UU)(1) "Prepaid authorization number" means a numeric or alphanumeric combination that represents a prepaid account that can be used by the account holder solely to obtain telecommunications service, and includes any renewals or increases in the prepaid account.

(2) "Prepaid telephone calling card" means a tangible item that contains a prepaid authorization number that can be used solely to obtain telecommunications service, and includes any renewals or increases in the prepaid account.

CREDIT(S)

(1998 S 173, eff. 1-1-00; 1997 H 215, eff. 9-29-97; 1996 S 266, eff. 11- 20-96; 1995 H 61, eff. 10-25-95; 1994 H 715, eff. 4-22-94; 1994 H 632, eff. 7- 22-94; 1993 H 152, eff. 7-1-93; 1993 S 122; 1992 H 904, H 791, S 361; 1991 H 298; 1990 H 365, H 531; 1989 H 111; 1988 S 386, H 689; 1987 S 92, H 171, H 274, H 159; 1986 H 54; 1985 H 335; 1984 S 112, H 794; 1983 H 291; 1982 S 530, § 1, 28; 1981 H 671, § 1, 3, H 552, § 1, 25, H 694, § 1, 205, H 275; 1980 H 1032; 1979 H 904, S 16; 1977 H 1; 1976 H 1005, H 1347; 1975 H 1; 1974 S 244, S 544; 1973 S 161, S 241; 132 v S 350, H 919; 129 v 582, 1164; 128 v 421, 1303; 126 v 157; 125 v 305; 1953 H 1; GC 5546-1)

UNCODIFIED LAW

1994 H 715, § 145, eff. 4-22-94, reads: The enactment of division (E)(13) and the repeal of division (D)(4) of section 5739.01 of the Revised Code in this act first apply on and after July 1, 1994.

1993 H 152, § 190, eff. 7-1-93, reads: For sales of services defined under division (MM) or (NN) of section 5739.01 of the Revised Code made on or after January 1, 1993, and before the effective date of this act, where sales tax has been collected based on the entire price of the service, no additional sales tax is due on any payments made toward such purchase after the effective date of this act.

1991 H 298, § 188, eff. 7-26-91, reads: The amendment made by this act to the definition of "consumer" in division (D) of section 5739.01 and division (F) of section 5741.01 of the Revised Code regarding purchases made by persons performing facility management, or similar service contracts does not apply to purchases made by such a contractor after the effective date of this act for use in performing a fixed price contract that was binding on the contractor prior to such effective date, unless the contractor is able to pass on to the contractee any increased expense necessitated by the amendment.

1991 H 298, § 197, eff. 7-26-91, reads: Beginning on August 1, 1991, and continuing through June 30, 1993, the exception from sales and use taxation provided in divisions (E)(2) and (P) of section 5739.01 and division (C)(2) of section 5741.02 of the Revised Code insofar as it applies to purchases of tangible personal property and services "used directly in the rendition of a public utility service" shall have no force or effect as it applies to purchases of tangible personal property and services used in providing cable television service.

HISTORICAL AND STATUTORY NOTES

Ed. Note: 1994 H 715 Effective Date--The Secretary of State Memorandum of 5- 16-94 declared the amendment to this section by 1994 H 715, § 1, to be effective 4-22-94.

Pre-1953 H 1 Amendments: 122 v S 183, H 453; 121 v 247; 119 v 389; 116 v Pt 2, 69, 323; 116 v 41, 248; 115 v Pt 2, 306

Amendment Note: 1998 S 173 inserted "; but does not include transactions by which telecommunications service is paid for by using a prepaid authorization number or prepaid telephone calling card" in division (B)(3)(f); and added divisions (B)(8) and (UU).

Amendment Note: 1997 H 215 added divisions (D)(5), (E)(15), and (TT); and deleted the former second paragraph in division (E)(13), which prior to deletion read:

"As used in division (E) of this section, 'thing' includes all transactions included in divisions (B)(3)(a), (b), and (c) of

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this section."

Amendment Note: 1996 S 266 added divisions (D)(4), (E)(14), and (SS); and made changes to reflect gender neutral language.

Amendment Note: 1995 H 61 added "if one is" and "or the county auditor if the board of county commissioners operates the county transit system" to division (T); and substituted "system" for "board" and "created" for "appointed" in division (U).

Amendment Note: 1994 H 632 designated division (JJ)(4); and added divisions (OO) through (RR).

Amendment Note: 1994 H 715 deleted former division (D)(4); added divisions (E)(12) and (E)(13); and designated division (JJ)(4). Prior to amendment, division (D)(4) read:

"(4) A person who warrants tangible personal property pursuant to a warranty or a maintenance or service contract is the consumer of all tangible personal property and services purchased for use or consumption in the performance of the warranty or contract. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of this section or for incorporation into a product for sale unless the tangible personal property being repaired or replaced is a component part of an item covered under another person's warranty. The disposal or return of tangible personal property by the warrantor to a supplier for repair, replacement, or credit pursuant to the terms of a warranty is not a sale within the meaning of division (B) of this section."

Amendment Note: 1993 S 122 inserted "with stock" in division (B)(3)(e); and added division (JJ)(3).

Amendment Note: 1993 H 152 inserted ", or electronic information services" throughout division (B)(3)(e); added division (D)(4); rewrote division (Y)(1); inserted ", or electronic information services" in the first paragraph of division (Y)(2); added the final sentence in division (II); and added division (JJ)(3). Prior to amendment, division (Y)(1) read:

"(Y)(1)(a) 'Automatic data processing and computer services' means: processing of others' data, including keypunching or similar data entry services together with verification thereof; providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment; and services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems. 'Automatic data processing and computer services' shall not include personal or professional services."

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5739. SALES TAX
LEVY AND COLLECTION

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5739.02 LEVY OF TAX; PURPOSE; RATE; EXEMPTIONS

For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

(A) The tax shall be collected pursuant to the schedules in section 5739.025 of the Revised Code.

The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

In the case of a sale, the price of which consists in whole or in part of rentals for the use of the thing transferred, the tax, as regards such rentals, shall be measured by the installments thereof.

In the case of a sale of a service defined under division (MM) or (NN) of section 5739.01 of the Revised Code, the price of which consists in whole or in part of a membership for the receipt of the benefit of the service, the tax applicable to the sale shall be measured by the installments thereof.

(B) The tax does not apply to the following:

(1) Sales to the state or any of its political subdivisions, or to any other state or its political subdivisions if the laws of that state exempt from taxation sales made to this state and its political subdivisions;

(2) Sales of food for human consumption off the premises where sold;

(3) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;

(4) Sales of newspapers, and of magazine subscriptions shipped by second class mail, and sales or transfers of magazines distributed as controlled circulation publications;

(5) The furnishing, preparing, or serving of meals without charge by an employer to an employee provided the employer records the meals as part compensation for services performed or work done;

(6) Sales of motor fuel upon receipt, use, distribution, or sale of which in this state a tax is imposed by the law of this state, but this exemption shall not apply to the sale of motor fuel on which a refund of the tax is allowable under section 5735.14 of the Revised Code; and the tax commissioner may deduct the amount of tax levied by this section applicable to the price of motor fuel when granting a refund of motor fuel tax pursuant to section 5735.14 of the Revised Code and shall cause the amount deducted to be paid into the general revenue fund of this state;

(7) Sales of natural gas by a natural gas company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through pipes or conduits, and all sales of communications services by a telephone or telegraph company, all terms as defined in section 5727.01 of the Revised Code;

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(8) Casual sales by a person, or auctioneer employed directly by the person to conduct such sales, except as to such sales of motor vehicles, watercraft or outboard motors required to be titled under section 1548.06 of the Revised Code, watercraft documented with the United States coast guard, snowmobiles, and all-purpose vehicles as defined in section 4519.01 of the Revised Code;

(9) Sales of services or tangible personal property, other than motor vehicles, mobile homes, and manufactured homes, by churches or by nonprofit organizations operated exclusively for charitable purposes as defined in division (B)(12) of this section, provided that the number of days on which such tangible personal property or services, other than items never subject to the tax, are sold does not exceed six in any calendar year. If the number of days on which such sales are made exceeds six in any calendar year, the church or organization shall be considered to be engaged in business and all subsequent sales by it shall be subject to the tax. In counting the number of days, all sales by groups within a church or within an organization shall be considered to be sales of that church or organization, except that sales made by separate student clubs and other groups of students of a primary or secondary school, and sales made by a parent-teacher association, booster group, or similar organization that raises money to support or fund curricular or extracurricular activities of a primary or secondary school, shall not be considered to be sales of such school, and sales by each such club, group, association, or organization shall be counted separately for purposes of the six-day limitation. This division does not apply to sales by a noncommercial educational radio or television broadcasting station.

(10) Sales not within the taxing power of this state under the Constitution of the United States;

(11) The transportation of persons or property, unless the transportation is by a private investigation and security service;

(12) Sales of tangible personal property or services to churches, to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, and to any other nonprofit organizations operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation; sales to offices administering one or more homes for the aged or one or more hospital facilities exempt under section 140.08 of the Revised Code; and sales to organizations described in division (D) of section 5709.12 of the Revised Code.

"Charitable purposes" means the relief of poverty; the improvement of health through the alleviation of illness, disease, or injury; the operation of an organization exclusively for the provision of professional, laundry, printing, and purchasing services to hospitals or charitable institutions; the operation of a home for the aged, as defined in section 5701.13 of the Revised Code; the operation of a radio or television broadcasting station that is licensed by the federal communications commission as a noncommercial educational radio or television station; the operation of a nonprofit animal adoption service or a county humane society; the promotion of education by an institution of learning that maintains a faculty of qualified instructors, teaches regular continuous courses of study, and confers a recognized diploma upon completion of a specific curriculum; the operation of a parent-teacher association, booster group, or similar organization primarily engaged in the promotion and support of the curricular or extracurricular activities of a primary or secondary school; the operation of a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein; the production of performances in music, dramatics, and the arts; or the promotion of education by an organization engaged in carrying on research in, or the dissemination of, scientific and technological knowledge and information primarily for the public.

Nothing in this division shall be deemed to exempt sales to any organization for use in the operation or carrying on of a trade or business, or sales to a home for the aged for use in the operation of independent living facilities as defined in division (A) of section 5709.12 of the Revised Code.

(13) Building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract with this state or a political subdivision thereof, or with the United States government or any of its agencies; building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property that are accepted for ownership by this state or any of its political subdivisions, or by the United States government or any of its agencies at the time of completion of such structures or improvements; building and construction materials sold to construction

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contractors for incorporation into a horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock; building materials and services sold to a construction contractor for incorporation into a house of public worship or religious education, or a building used exclusively for charitable purposes under a construction contract with an organization whose purpose is as described in division (B)(12) of this section; building and construction materials sold for incorporation into the original construction of a sports facility under section 307.696 of the Revised Code; and building and construction materials and services sold to a construction contractor for incorporation into real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state;

(14) Sales of ships or vessels or rail rolling stock used or to be used principally in interstate or foreign commerce, and repairs, alterations, fuel, and lubricants for such ships or vessels or rail rolling stock;

(15) Sales to persons engaged in any of the activities mentioned in division (E)(2) or (9) of section 5739.01 of the Revised Code, to persons engaged in making retail sales, or to persons who purchase for sale from a manufacturer tangible personal property that was produced by the manufacturer in accordance with specific designs provided by the purchaser, of packages, including material and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale by or on the order of the person doing the packaging, or sold at retail. "Packages" includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, and "packaging" means placing therein.

(16) Sales of food to persons using food stamp coupons to purchase the food. As used in division (B)(16) of this section, "food" has the same meaning as in the "Food Stamp Act of 1977," 91 Stat. 958, 7 U.S.C. 2012, as amended, and federal regulations adopted pursuant to that act.

(17) Sales to persons engaged in farming, agriculture, horticulture, or floriculture, of tangible personal property for use or consumption directly in the production by farming, agriculture, horticulture, or floriculture of other tangible personal property for use or consumption directly in the production of tangible personal property for sale by farming, agriculture, horticulture, or floriculture; or material and parts for incorporation into any such tangible personal property for use or consumption in production; and of tangible personal property for such use or consumption in the conditioning or holding of products produced by and for such use, consumption, or sale by persons engaged in farming, agriculture, horticulture, or floriculture, except where such property is incorporated into real property;

(18) Sales of drugs dispensed by a licensed pharmacist upon the order of a licensed health professional authorized to prescribe drugs to a human being, as the term "licensed health professional authorized to prescribe drugs" is defined in section 4729.01 of the Revised Code; insulin as recognized in the official United States pharmacopoeia; urine and blood testing materials when used by diabetics or persons with hypoglycemia to test for glucose or acetone; hypodermic syringes and needles when used by diabetics for insulin injections; epoetin alfa when purchased for use in the treatment of persons with end-stage renal disease; hospital beds when purchased for use by persons with medical problems for medical purposes; and oxygen and oxygen-dispensing equipment when purchased for use by persons with medical problems for medical purposes;

(19) Sales of artificial limbs or portion thereof, breast prostheses, and other prosthetic devices for humans; braces or other devices for supporting weakened or nonfunctioning parts of the human body; wheelchairs; devices used to lift wheelchairs into motor vehicles and parts and accessories to such devices; crutches or other devices to aid human perambulation; and items of tangible personal property used to supplement impaired functions of the human body such as respiration, hearing, or elimination. No exemption under this division shall be allowed for nonprescription drugs, medicines, or remedies; items or devices used to supplement vision; items or devices whose function is solely or primarily cosmetic; or physical fitness equipment. This division does not apply to sales to a physician or medical facility for use in the treatment of a patient.

(20) Sales of emergency and fire protection vehicles and equipment to nonprofit organizations for use solely in providing fire protection and emergency services for political subdivisions of the state;

(21) Sales of tangible personal property manufactured in this state, if sold by the manufacturer in this state to a retailer

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for use in the retail business of the retailer outside of this state and if possession is taken from the manufacturer by the purchaser within this state for the sole purpose of immediately removing the same from this state in a vehicle owned by the purchaser;

(22) Sales of services provided by the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities, or by governmental entities of the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities;

(23) Sales of motor vehicles to nonresidents of this state upon the presentation of an affidavit executed in this state by the nonresident purchaser affirming that the purchaser is a nonresident of this state, that possession of the motor vehicle is taken in this state for the sole purpose of immediately removing it from this state, that the motor vehicle will be permanently titled and registered in another state, and that the motor vehicle will not be used in this state;

(24) Sales to persons engaged in the preparation of eggs for sale of tangible personal property used or consumed directly in such preparation, including such tangible personal property used for cleaning, sanitizing, preserving, grading, sorting, and classifying by size; packages, including material and parts for packages, and machinery, equipment, and material for use in packaging eggs for sale; and handling and transportation equipment and parts therefor, except motor vehicles licensed to operate on public highways, used in intraplant or interplant transfers or shipment of eggs in the process of preparation for sale, when the plant or plants within or between which such transfers or shipments occur are operated by the same person. "Packages" includes containers, cases, baskets, flats, fillers, filler flats, cartons, closure materials, labels, and labeling materials, and "packaging" means placing therein.

(25)(a) Sales of water to a consumer for residential use, except the sale of bottled water, distilled water, mineral water, carbonated water, or ice;

(b) Sales of water by a nonprofit corporation engaged exclusively in the treatment, distribution, and sale of water to consumers, if such water is delivered to consumers through pipes or tubing.

(26) Fees charged for inspection or reinspection of motor vehicles under section 3704.14 of the Revised Code;

(27) Sales of solar, wind, or hydrothermal energy systems that meet the guidelines established under division (B) of section 1551.20 of the Revised Code, components of such systems that are identified under division (B) or (D) of that section, or charges for the installation of such systems or components, made during the period from August 14, 1979, through December 31, 1985;

(28) Sales to persons licensed to conduct a food service operation pursuant to section 3717.43 of the Revised Code, of tangible personal property primarily used directly for the following:

(a) To prepare food for human consumption for sale;

(b) To preserve food that has been or will be prepared for human consumption for sale by the food service operator, not including tangible personal property used to display food for selection by the consumer;

(c) To clean tangible personal property used to prepare or serve food for human consumption for sale.

(29) Sales of animals by nonprofit animal adoption services or county humane societies;

(30) Sales of services to a corporation described in division (A) of section 5709.72 of the Revised Code, and sales of tangible personal property that qualifies for exemption from taxation under section 5709.72 of the Revised Code;

(31) Sales and installation of agricultural land tile, as defined in division (B)(5)(a) of section 5739.01 of the Revised Code;

(32) Sales and erection or installation of portable grain bins, as defined in division (B)(5)(b) of section 5739.01 of the Revised Code;

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(33) The sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property by a person engaged in highway transportation for hire;

(34) Sales to the state headquarters of any veterans' organization in Ohio that is either incorporated and issued a charter by the congress of the United States or is recognized by the United States veterans administration, for use by the headquarters;

(35) Sales to a telecommunications service vendor of tangible personal property and services used directly and primarily in transmitting, receiving, switching, or recording any interactive, two-way electromagnetic communications, including voice, image, data, and information, through the use of any medium, including, but not limited to, poles, wires, cables, switching equipment, computers, and record storage devices and media, and component parts for the tangible personal property. The exemption provided in division (B)(35) of this section shall be in lieu of all other exceptions under division (E)(2) of section 5739.01 of the Revised Code to which a telecommunications service vendor may otherwise be entitled based upon the use of the thing purchased in providing the telecommunications service.

(36) Sales of investment metal bullion and investment coins. "Investment metal bullion" means any elementary precious metal that has been put through a process of smelting or refining, including, but not limited to, gold, silver, platinum, and palladium, and which is in such state or condition that its value depends upon its content and not upon its form. "Investment metal bullion" does not include fabricated precious metal that has been processed or manufactured for one or more specific and customary industrial, professional, or artistic uses. "Investment coins" means numismatic coins or other forms of money and legal tender manufactured of gold, silver, platinum, palladium, or other metal under the laws of the United States or any foreign nation with a fair market value greater than any statutory or nominal value of such coins.

(37)(a) Sales where the purpose of the consumer is to use or consume the things transferred in making retail sales and consisting of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale.

(b) Sales to direct marketing vendors of preliminary materials such as photographs, artwork, and typesetting that will be used in printing advertising material; of printed matter that offers free merchandise or chances to win sweepstake prizes and that is mailed to potential customers with advertising material described in division (B)(37)(a) of this section; and of equipment such as telephones, computers, facsimile machines, and similar tangible personal property primarily used to accept orders for direct marketing retail sales.

(c) Sales of automatic food vending machines that preserve food with a shelf life of forty-five days or less by refrigeration and dispense it to the consumer.

For purposes of division (B)(37) of this section, "direct marketing" means the method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility by means of the United States mail, delivery service, or common carrier.

(38) Sales to a person engaged in the business of horticulture or producing livestock of materials to be incorporated into a horticulture structure or livestock structure;

(39) The sale of a motor vehicle that is used exclusively for a vanpool ridesharing arrangement to persons participating in the vanpool ridesharing arrangement when the vendor is selling the vehicle pursuant to a contract between the vendor and the department of transportation;

(40) Sales of personal computers, computer monitors, computer keyboards, modems, and other peripheral computer equipment to an individual who is licensed or certified to teach in an elementary or a secondary school in this state for use by that individual in preparation for teaching elementary or secondary school students;

(41) Sales to a professional racing team of any of the following:

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(a) Motor racing vehicles;

(b) Repair services for motor racing vehicles;

(c) Items of property that are attached to or incorporated in motor racing vehicles, including engines, chassis, and all other components of the vehicles, and all spare, replacement, and rebuilt parts or components of the vehicles; except not including tires, consumable fluids, paint, and accessories consisting of instrumentation sensors and related items added to the vehicle to collect and transmit data by means of telemetry and other forms of communication.

(42) Sales of used manufactured homes and used mobile homes, as defined in section 5739.0210 of the Revised Code, made on or after January 1, 2000;

(43) Sales of tangible personal property and services to a provider of electricity used or consumed directly and primarily in generating, transmitting, or distributing electricity for use by others, including property that is or is to be incorporated into and will become a part of the consumer's production, transmission, or distribution system and that retains its classification as tangible personal property after incorporation; fuel or power used in the production, transmission, or distribution of electricity; and tangible personal property and services used in the repair and maintenance of the production, transmission, or distribution system, including only those motor vehicles as are specially designed and equipped for such use. The exemption provided in this division shall be in lieu of all other exceptions in division (E)(2) of section 5739.01 of the Revised Code to which a provider of electricity may otherwise be entitled based on the use of the tangible personal property or service purchased in generating, transmitting, or distributing electricity.

For the purpose of the proper administration of this chapter, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established.

As used in this section, except in division (B)(16) of this section, "food" includes cereals and cereal products, milk and milk products including ice cream, meat and meat products, fish and fish products, eggs and egg products, vegetables and vegetable products, fruits, fruit products, and pure fruit juices, condiments, sugar and sugar products, coffee and coffee substitutes, tea, and cocoa and cocoa products. It does not include: spirituous or malt liquors; soft drinks; sodas and beverages that are ordinarily dispensed at bars and soda fountains or in connection therewith, other than coffee, tea, and cocoa; root beer and root beer extracts; malt and malt extracts; mineral oils, cod liver oils, and halibut liver oil; medicines, including tonics, vitamin preparations, and other products sold primarily for their medicinal properties; and water, including mineral, bottled, and carbonated waters, and ice.

(C) The levy of an excise tax on transactions by which lodging by a hotel is or is to be furnished to transient guests pursuant to this section and division (B) of section 5739.01 of the Revised Code does not prevent any of the following:

(1) A municipal corporation or township from levying an excise tax for any lawful purpose not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests in addition to the tax levied by this section. If a municipal corporation or township repeals a tax imposed under division (C)(1) of this section and a county in which the municipal corporation or township has territory has a tax imposed under division (C) of section 5739.024 of the Revised Code in effect, the municipal corporation or township may not reimpose its tax as long as that county tax remains in effect. A municipal corporation or township in which a tax is levied under division (B)(2) of section 351.021 of the Revised Code may not increase the rate of its tax levied under division (C)(1) of this section to any rate that would cause the total taxes levied under both of those divisions to exceed three per cent on any lodging transaction within the municipal corporation or township.

(2) A municipal corporation or a township from levying an additional excise tax not to exceed three per cent on such transactions pursuant to division (B) of section 5739.024 of the Revised Code. Such tax is in addition to any tax imposed under division (C)(1) of this section.

(3) A county from levying an excise tax pursuant to division (A) of section 5739.024 of the Revised Code.

(4) A county from levying an excise tax not to exceed three per cent of such transactions pursuant to division (C) of

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section 5739.024 of the Revised Code. Such a tax is in addition to any tax imposed under division (C)(3) of this section.

(5) A convention facilities authority, as defined in division (A) of section 351.01 of the Revised Code, from levying the excise taxes provided for in division (B) of section 351.021 of the Revised Code.

(6) A county from levying an excise tax not to exceed one and one-half per cent of such transactions pursuant to division (D) of section 5739.024 of the Revised Code. Such tax is in addition to any tax imposed under division (C)(3) or (4) of this section.

(7) A county from levying an excise tax not to exceed one and one-half per cent of such transactions pursuant to division (E) of section 5739.024 of the Revised Code. Such a tax is in addition to any tax imposed under division (C)(3), (4), or (6) of this section.

(D) The levy of this tax on retail sales of recreation and sports club service shall not prevent a municipal corporation from levying any tax on recreation and sports club dues or on any income generated by recreation and sports club dues.

CREDIT(S)

(1999 H 223, eff. 11-3-99; 1999 S 3, eff. 10-5-99; 1999 H 163, eff. 3-31- 99; 1998 S 142, eff. 3-30-99; 1998 H 770, eff. 6-17-98; 1998 S 66, eff. 7-22-98; 1997 H 215, eff. 9-29-97; 1997 H 210, eff. 3-31-97; 1996 S 310, eff. 6-20-96; 1995 H 117, eff. 9-29-95; 1995 H 249, eff. 7-17-95; 1994 H 715, eff. 7-22-94; 1994 H 632, eff. 7-22-94; 1994 H 163, eff. 5-10-94; 1993 H 281, eff. 7-2-93; 1993 H 152, H 207, S 18; 1992 S 359, H 904, H 766, S 131; 1991 H 298; 1990 H 365, H 531; 1989 S 156, H 111; 1988 S 386, H 772, H 708; 1987 S 92, S 21, H 171; 1986 H 54, H 500, H 583; 1985 H 335, H 560, H 146; 1984 S 231; 1982 S 530; 1981 H 671, H 694, H 1, H 275; 1980 H 1112, H 703; 1979 H 355, H 1, H 154; 1978 H 8, H 291, H 563, H 635; 1974 S 244, H 1313; 1973 H 3, S 241; 1971 H 475, S 222; 132 v S 474, S 207, S 350, H 519; 131 v H 605, S 203; 130 v H 11, H 1; 129 v 1336, 1301; 128 v 421; 1953 H 1; GC 5546-2)

UNCODIFIED LAW

1998 H 770, § 33, eff. 6-17-98, reads:

The amendments in this act to division (B)(18) of section 5739.02 of the Revised Code first apply on July 22, 1998.

1993 H 281, § 4, eff. 7-2-93, reads: The amendment by this act of section 5739.02 of the Revised Code first applies to sales made on or after the effective date of the act. The amendment by this act of section 5709.12 of the Revised Code first applies to property taxes first payable on or after December 1, 1993.

1993 H 207, § 5, eff. 6-30-93, reads: Sections 133.05, 133.07, 307.672, 5739.02, and 5739.024 of the Revised Code as amended or enacted by this act apply to any proceedings commenced after the effective date of this act and, so far as those amendments and enactments support the actions taken, apply to any proceedings pending or in progress on, or completed prior to, the effective date of this act. The authority provided by the amendment or enactment of those sections is supplemental to and not in derogation of any similar authority provided by, derived from, or implied by any law, charter, resolution, or ordinance, and no inference shall be drawn to negate the authority under such a law, charter, resolution, or ordinance by reason of the express provisions contained in the amendments and enactments to those sections by this act.

1992 S 131, § 6, eff. 5-15-92, reads: The amendment by this act of divisions (B)(13) and (15) of section 5739.02 of the Revised Code first applies to sales described in that amendment occurring on or after July 1, 1993.

1989 S 156, § 5, eff. 11-2-89, reads, in part: The provisions of this act shall first apply to the 1990 tax year.

HISTORICAL AND STATUTORY NOTES

Ed. Note: A special endorsement by the Legislative Service Commission states, "Comparison of these amendments [1999 H 223, eff. 11-3-99 and 1999 S 3, eff. 10-5-99] in pursuance of section 1.52 of the Revised Code discloses that

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they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment." In recognition of this rule of construction, changes made by 1999 H 223, eff. 11-3-99, and 1999 S 3, eff. 10-5-99, have been incorporated in the above amendment. See Baldwin's Ohio Legislative Service Annotated, 1999, pages 8/L-2041 and 7/L-667, or the OH-LEGIS or OH-LEGIS-OLD database on WESTLAW, for original versions of these Acts.

Pre-1953 H 1 Amendments: 123 v S 111; 122 v 912; 117 v 761, § 1; 116 v Pt 2, 323, § 1; 116 v Pt 2, 69, § 1; 116 v 41; 115 v Pt 2, 306, § 2

Amendment Note: 1999 H 223 substituted "3717.43" for "3732.02" in the introductory paragraph in division (B)(28).

Amendment Note: 1999 S 3 deleted "of electricity by an electric company," after "natural gas company," and "wires," before "pipes" in division (B)(7); added division (B)(43); and made other nonsubstantive changes.

Amendment Note: 1999 H 163 inserted ", made on or after January 1, 2000" in division (B)(42).

Amendment Note: 1998 S 66 substituted "Sales of drugs dispensed by a licensed pharmacist upon the order of a health professional authorized to prescribe drugs, as defined in section 4729.01 of the Revised Code;" for "Sales of drugs dispensed by a registered pharmacist upon the order of a practitioner licensed to prescribe, dispense, and administer drugs to a human being in the course of the professional practice;" in division (B)(18).

Amendment Note: 1998 S 142 deleted ", and manufactured homes" from the end of division (B)(8); inserted ", mobile homes," in division (B)(9); added division (B)(42); and made other nonsubstantive changes.

Amendment Note: 1998 H 770 inserted "licensed" before "health professional" and inserted "to a human being" and "the term 'licensed health professional authorized to prescribe drugs' is" in division (B)(18).

Amendment Note: 1997 H 210 substituted "motor fuel tax" for "motor vehicle fuel tax" in division (B)(6); added division (B)(39); and made other nonsubstantive changes.

Amendment Note: 1997 H 215 added divisions (B)(40) and (B)(41), deleted "not to exceed three per cent of such transactions" after "excise tax" in division (C)(3); and made other nonsubstantive changes.

Amendment Note: 1996 S 310 inserted "or rail rolling stock" twice in division (B)(14); and made changes to reflect gender neutral language.

Amendment Note: 1995 H 117 inserted "epoetin alfa when purchased for use in the treatment of persons with end-stage renal disease;" in division (B)(18); added division (D); and made changes to reflect gender neutral language.

Amendment Note: 1995 H 249 deleted "for general assistance in the existing economic crises," after "needs of the state" in the first paragraph.

Amendment Note: 1994 H 163 made certain nonsubstantive changes.

Amendment Note: 1994 H 632 substituted "building and construction materials sold to construction contractors for incorporation into a horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock" for "materials and services sold to a construction contractor during the period from August 14, 1979, through December 31, 1985, under a claim of exemption as sales of solar, wind, or hydrothermal energy systems that meet the guidelines established under division (B) of section 1551.20 of the Revised Code for incorporation into a structure or improvements to real property" in division (B)(13); and added division (B)(38).

Amendment Note: 1994 H 715 inserted ", or to any other state or its political subdivisions if the laws of that state exempt from taxation sales made to this state and its political subdivisions" in division (B)(1); inserted ", to organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986" and "any other" in division (B)(12); and inserted "; of printed matter that offers free merchandise or chances to win sweepstake prizes and that is mailed to potential customers with advertising material described in division (B)(37)(a) of this section;" in

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division (B)(37)(b).

Amendment Note: 1993 S 18 deleted "by a licensee" prior to "for inspection" in division (B)(26).

Amendment Note: 1993 H 152 added the final paragraph in division (A); inserted ", except that sales made by separate student clubs and other groups of students of a primary or secondary school, and sales made by a parent-teacher association, booster group, or similar organization that raises money to support or fund curricular or extracurricular activities of a primary or secondary school, shall not be considered to be sales of such school and sales by each such club, group, association, or organization shall be counted separately for purposes of the six-day limitation" in division (B)(9); and added division (B)(37)(c).

Amendment Note: 1993 H 207 added division (C)(7).

Amendment Note: 1993 H 281 added "; and sales to organizations described in division (D) of section 5709.12 of the Revised Code" at the end of the first paragraph of division (B)(12).

CROSS REFERENCES

Penalty: 5739.99(E)

Prohibition: 5739.26

Administrative services department, purchases of supplies and equipment, 125.02

Agricultural financing, taxes on and regulation of real and personal property, 902.11

Beverage tax, beverage defined, 5753.01

Bond retirement fund; insufficient funds; transfers, 129.55

Certification to state treasurer of insufficient moneys of highway department, 5528.36

Charitable organization defined, 1716.01

Coal research and development, distribution of tax revenues for bond payment, 1555.12

Controlled substances, 3719.01 et seq.

Convention facilities authorities, levy of additional excise taxes, 351.021

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5739. SALES TAX
LEVY AND COLLECTION

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5739.03 CONSUMER TO PAY TAX; COLLECTION AND REPORTING OF TAX BY VENDOR; EXEMPTION CERTIFICATE; ADDITIONAL EVIDENCE MAY BE PRESENTED IN SUPPORT OF CLAIMED EXEMPTION UPON A PETITION FOR REASSESSMENT

Except as provided in section 5739.05 of the Revised Code, the tax imposed by or pursuant to section 5739.02, 5739.021, 5739.023, or 5739.026 of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, in the manner and at the times provided as follows:

(A) If the price is, at or prior to the provision of the service or the delivery of possession of the thing sold to the consumer, paid in currency passed from hand to hand by the consumer or his agent to the vendor or his agent, the vendor or his agent shall collect the tax with and at the same time as the price;

(B) If the price is otherwise paid or to be paid, the vendor or his agent shall, at or prior to the provision of the service or the delivery of possession of the thing sold to the consumer, charge the tax imposed by or pursuant to section 5739.02, 5739.021, 5739.023, or 5739.026 of the Revised Code to the account of the consumer, which amount shall be collected by the vendor from the consumer in addition to the price. Such sale shall be reported on and the amount of the tax applicable thereto shall be remitted with the return for the period in which the sale is made, and the amount of the tax shall become a legal charge in favor of the vendor and against the consumer.

If any sale is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B)(1) to (11) or (29) of section 5739.02 of the Revised Code, the consumer must furnish to the vendor, and the vendor must obtain from the consumer, a certificate specifying the reason that the sale is not legally subject to the tax. If the transaction is claimed to be exempt under division (B)(13) of section 5739.02 of the Revised Code, the exemption certificate shall be signed by both the contractor and his contractee and such contractee shall be deemed to be the consumer of all items purchased under such claim of exemption in the event it is subsequently determined that the exemption is not properly claimed. The certificate shall be in such form as the tax commissioner by regulation prescribes. If no certificate is furnished or obtained within the period for filing the return for the period in which such sale is consummated, it shall be presumed that the tax applies. The failure to have so furnished, or to have so obtained, a certificate shall not prevent a vendor or consumer from establishing that the sale is not subject to the tax within sixty days of the giving of notice by the commissioner of intention to levy an assessment, in which event the tax shall not apply.

Certificates need not be obtained nor furnished where the identity of the consumer is such that the transaction is never subject to the tax imposed or where the item of tangible personal property sold or the service provided is never subject to the tax imposed, regardless of use, or when the sale is in interstate commerce.

(C) As used in this division, "contractee" means a person who seeks to enter or enters into a contract or agreement with a contractor or vendor for the construction of real property or for the sale and installation onto real property of tangible personal property.

Any contractor or vendor may request from any contractee a certification of what portion of the property to be transferred under such contract or agreement is to be incorporated into the realty and what portion will retain its status as tangible personal property after installation is completed. The contractor or vendor shall request the certification by certified mail delivered to the contractee, return receipt requested. Upon receipt of such request and prior to entering into the contract or agreement, the contractee shall furnish to the contractor or vendor a certification sufficiently detailed to enable the contractor or vendor to ascertain the resulting classification of all materials purchased or

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fabricated by the contractor or vendor and transferred to the contractee. This requirement applies to a contractee regardless of whether the contractee holds a direct payment permit under section 5739.031 of the Revised Code or furnishes to the contractor or vendor an exemption certificate as provided under this section.

For the purposes of the taxes levied by this chapter and Chapter 5741. of the Revised Code, the contractor or vendor may in good faith rely on the contractee's certification. Notwithstanding division (B) of section 5739.01 of the Revised Code, if the tax commissioner determines that certain property certified by the contractee as tangible personal property pursuant to this division is, in fact, real property, the contractee shall be considered to be the consumer of all materials so incorporated into that real property and shall be liable for the applicable tax, and the contractor or vendor shall be excused from any liability on those materials.

If a contractee fails to provide such certification upon the request of the contractor or vendor, the contractor or vendor shall comply with the provisions of this chapter and Chapter 5741. of the Revised Code without the certification. If the tax commissioner determines that such compliance has been performed in good faith and that certain property treated as tangible personal property by the contractor or vendor is, in fact, real property, the contractee shall be considered to be the consumer of all materials so incorporated into that real property and shall be liable for the applicable tax and the construction contractor or vendor shall be excused from any liability on those materials.

This division does not apply to any contract or agreement where the tax commissioner determines as a fact that a certification under this division was made solely on the decision or advice of the contractor or vendor.

(D) Notwithstanding division (B) of section 5739.01 of the Revised Code, whenever the total rate of tax imposed under this chapter is increased after the date after a construction contract is entered into, the contractee shall reimburse the construction contractor for any additional tax paid on tangible property consumed or services received pursuant to the contract.

(E) A vendor who files a petition for reassessment contesing [sic] the assessment of tax on sales for which the vendor obtained no valid exemption certificates and for which the vendor failed to establish that the sales were properly not subject to the tax during the sixty-day period allowed under division (B) of this section, may present to the tax commissioner additional evidence to prove that the sales were properly subject to a claim of exception or exemption. The vendor shall file such evidence within ninety days of the receipt by the vendor of the notice of assessment, except that, upon application and for reasonable cause, the period for submitting such evidence shall be extended thirty days.

The commissioner shall consider such additional evidence in reaching the final determination on the assessment and petition for reassessment.

(F) Whenever a vendor refunds to the consumer the full price of an item of tangible personal property on which the tax imposed under this chapter has been paid, he shall also refund the full amount of the tax paid.

CREDIT(S)

(1986 H 583, eff. 2-20-86; 1984 H 794, § 1, 7, H 37, § 1, 3, S 298, § 1, 3, H 374, § 1, 3; 1982 H 358, § 1, 3, S 550; 1981 H 694; 1974 S 544; 132 v H 919, S 350, S 319; 129 v 1336, 1164, 582; 128 v 421; 126 v 723; 125 v 308; 1953 H 1; GC 5546-3)

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 116 v Pt 2, 69, 323; 115 v Pt 2, 306, § 3

CROSS REFERENCES

Penalty: 5739.99(D)

Prohibition: 5739.26, 5739.29

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Application for certificate of title for a watercraft; payment of sales tax; proof, 1548.06

False certificates, 5739.26

Motor vehicle title law, certificate, fees, mileage, 4505.06

OHIO ADMINISTRATIVE CODE REFERENCES

Alleged exempt sales, submission of additional evidence, OAC 5703-9-45

Authority to prepay (predetermine) or prearrange sales tax, OAC 5703-9-08

Sales and use tax; construction contracts; exemption certificates, OAC 5703- 9-14

Sales and use tax; exemption certificate forms, OAC 5703-9-03

Sales of personalty belonging to another, OAC 5703-9-40

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5741. USE TAX; STORAGE TAX
DEFINITIONS

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5741.01 DEFINITIONS

As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, business trusts, governments, and combinations of individuals of any form.

(B) "Storage" means and includes any keeping or retention in this state for use or other consumption in this state.

(C) "Use" means and includes the exercise of any right or power incidental to the ownership of the thing used. A thing is also "used" in this state if its consumer gives or otherwise distributes it, without charge, to recipients in this state.

(D) "Purchase" means acquired or received for a consideration, whether such acquisition or receipt was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer was absolute or conditional, and by whatever means the transfer was effected; and whether the consideration was money, credit, barter, or exchange. Purchase includes production, even though the article produced was used, stored, or consumed by the producer. The transfer of copyrighted motion picture films for exhibition purposes is not a purchase, except such films as are used solely for advertising purposes.

(E) "Seller" means the person from whom a purchase is made, and includes every person engaged in this state or elsewhere in the business of selling tangible personal property or providing a service for storage, use, or other consumption or benefit in this state; and when, in the opinion of the tax commissioner, it is necessary for the efficient administration of this chapter, to regard any salesman, representative, peddler, or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates, or from whom he obtains tangible personal property, sold by him for storage, use, or other consumption in this state, irrespective of whether or not he is making such sales on his own behalf, or on behalf of such dealer, distributor, supervisor, or employer, the commissioner may regard him as such agent, and may regard such dealer, distributor, supervisor, or employer as the seller. "Seller" does not include any person to the extent the person provides a communications medium, such as, but not limited to, newspapers, magazines, radio, television, or cable television, by means of which sellers solicit purchases of their goods or services.

(F) "Consumer" means any person who has purchased tangible personal property or has been provided a service for storage, use, or other consumption or benefit in this state. "Consumer" does not include a person who receives, without charge, tangible personal property or a service.

A person who performs a facility management or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of section 5739.01 of the Revised Code.

(G)(1) "Price," except in the case of watercraft, outboard motors, or new motor vehicles, means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, by a consumer to a seller in the complete performance of the transaction by which tangible personal property has been purchased or a service has been provided for storage, use, or other consumption or benefit in this state, without any deduction or exclusion on account of the cost of the property sold, cost of materials used, labor or service cost, interest, discount paid or allowed after the sale is consummated, or any other expense. If the transaction consists of the rental or lease of tangible personal property, "price" means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered by the

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lessee to the lessor, in the complete performance of the rental or lease, without any deduction or exclusion of tax, interest, labor or service charge, damage liability waiver, termination or damage charge, discount paid or allowed after the lease is consummated, or any other expense. The tax shall be calculated and collected by the lessor on each payment made by the lessee. If a consumer produces the tangible personal property used by him, the price is the produced cost of such tangible personal property. The tax collected by the seller from the consumer under such sections is not a part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional use tax pursuant to section 5741.021 or 5741.023 of the Revised Code and of transit authorities levying an additional use tax pursuant to section 5741.022 of the Revised Code and, except for the discount authorized under section 5741.12 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of such tax.

(2) In the case of watercraft, outboard motors, or new motor vehicles, "price" has the same meaning as in division (H) of section 5739.01 of the Revised Code.

(3) In the case of a nonresident business consumer that purchases and uses tangible personal property outside this state and subsequently temporarily stores, uses, or otherwise consumes such tangible personal property in the conduct of business in this state, the consumer or the tax commissioner may determine the price based on the value of the temporary storage, use, or other consumption, in lieu of determining the price pursuant to division (G)(1) of this section. A price determination made by the consumer is subject to review and redetermination by the commissioner.

(4) In the case of tangible personal property held in this state as inventory for sale or lease, and that is temporarily stored, used, or otherwise consumed in a taxable manner, the price is the value of the temporary use. A price determination made by the consumer is subject to review and redetermination by the commissioner.

(5) In the case of tangible personal property originally purchased and used by the consumer outside this state, and that becomes permanently stored, used, or otherwise consumed in this state more than six months after its acquisition by the consumer, the consumer or the tax commissioner may determine the price based on the current value of such tangible personal property, in lieu of determining the price pursuant to division (G)(1) of this section. A price determination made by the consumer is subject to review and redetermination by the commissioner.

(H) "Nexus with this state" means that the seller engages in continuous and widespread solicitation of purchases from residents of this state or otherwise purposefully directs its business activities at residents of this state.

(I) "Substantial nexus with this state" means that the seller has sufficient contact with this state, in accordance with Section 8 of Article I of the Constitution of the United States, to allow the state to require the seller to collect and remit use tax on sales of tangible personal property or services made to consumers in this state. "Substantial nexus with this state" exists when the seller does any of the following:

(1) Maintains a place of business within this state, whether operated by employees or agents of the seller, by a member of an affiliated group, as described in division (B)(3)(e) of section 5739.01 of the Revised Code, of which the seller is a member, or by a franchisee using a trade name of the seller;

(2) Regularly has employees, agents, representatives, solicitors, installers, repairmen, salesmen, or other individuals in this state for the purpose of conducting the business of the seller;

(3) Uses a person in this state for the purpose of receiving or processing orders of the seller's goods or services;

(4) Makes regular deliveries of tangible personal property into this state by means other than common carrier;

(5) Has membership in an affiliated group, as described in division (B)(3)(e) of section 5739.01 of the Revised Code, at least one other member of which has substantial nexus with this state;

(6) Owns tangible personal property that is rented or leased to a consumer in this state, or offers tangible personal property, on approval, to consumers in this state;

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(7) Is registered with the secretary of state to do business in this state or is registered or licensed by any state agency, board, or commission to transact business in this state or to make sales to persons in this state;

(8) Has any other contact with this state that would allow this state to require the seller to collect and remit use tax under Section 8 of Article I of the Constitution of the United States.

(J) "Fiscal officer" means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county which is a transit authority, the fiscal officer of the county transit board appointed pursuant to section 306.03 of the Revised Code or, if the board of county commissioners operates the county transit system, the county auditor.

(K) "Territory of the transit authority" means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(L) "Transit authority" means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit system is created pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority which includes territory in more than one county must include all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(M) "Providing a service" has the same meaning as in division (X) of section 5739.01 of the Revised Code.

(N) "Other consumption" includes receiving the benefits of a service.

CREDIT(S)

(1995 H 61, eff. 10-25-95; 1993 H 152, eff. 7-1-93; 1991 H 298; 1990 S 303, H 365; 1987 H 231; 1986 H 583; 1981 H 671, § 1, 3, H 694, § 1, 205, H 275; 1975 H 1; 1974 S 544; 132 v H 919; 129 v 1164; 128 v 421; 127 v 133; 126 v 157; 1953 H 1; GC 5546-25)

UNCODIFIED LAW

1991 H 298, § 188, eff. 7-26-91, reads: The amendment made by this act to the definition of "consumer" in division (D) of section 5739.01 and division (F) of section 5741.01 of the Revised Code regarding purchases made by persons performing facility management, or similar service contracts does not apply to purchases made by such a contractor after the effective date of this act for use in performing a fixed price contract that was binding on the contractor prior to such effective date, unless the contractor is able to pass on to the contractee any increased expense necessitated by the amendment.

HISTORICAL AND STATUTORY NOTES

Pre-1953 H 1 Amendments: 122 v H 453; 121 v 247; 119 v 389; 117 v 751; 116 v Pt 2, 101, 346

Amendment Note: 1995 H 61 added "or, if the board of county commissioners operates the county transit system, the county auditor" to division (J); and substituted "system" for "board" and "created" for "appointed" in division (L).

Amendment Note: 1993 H 152 rewrote this section, which previously read:

"As used in sections 5741.01 to 5741.22 of the Revised Code:

"(A) 'Person' includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, and combinations of individuals of any form.

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"(B) 'Storage' means and includes any keeping or retention in this state for use or other consumption in this state.

"(C) 'Use' means and includes the exercise of any right or power incidental to the ownership of the thing used. A thing is also 'used' in this state if its consumer gives or otherwise distributes it, without charge, to recipients in this state.

"(D) 'Purchase' means acquired for a consideration, whether such acquisition was effected by a transfer of title, or of possession, or of both, or a license to use or consume; whether such transfer was absolute or conditional, and by whatever means the transfer was effected; and whether the consideration was a price, rental in money, or exchange. Purchase includes production, even though the article produced or service provided was used, stored, or consumed by the producer. The transfer of copyrighted motion picture films for exhibition purposes is not a purchase, except such films as are used solely for advertising purposes.

"(E) 'Seller' means the person from whom a purchase is made, and includes every person engaged in this state or elsewhere in the business of selling tangible personal property or providing a service for storage, use, or other consumption or benefit in this state; and when, in the opinion of the tax commissioner, it is necessary for the efficient administration of sections 5741.01 to 5741.22 of the Revised Code, to regard any salesman, representative, peddler, or canvasser as the agent of a dealer, distributor, supervisor, or employer under whom he operates, or from whom he obtains tangible personal property, sold by him for storage, use, or other consumption in this state, irrespective of whether or not he is making such sales on his own behalf, or on behalf of such dealer, distributor, supervisor, or employer, the commissioner may regard him as such agent, and may regard such dealer, distributor, supervisor, or employer as the seller. 'Seller' does not include any person to the extent the person provides a communications medium, such as, but not limited to, newspapers, magazines, radio, television, or cable television, by means of which sellers solicit purchases of their goods or services.

"(F) 'Consumer' means any person who has purchased tangible personal property or has been provided a service for storage, use, or other consumption or benefit in this state. 'Consumer' does not include a person who receives, without charge, tangible personal property or a service.

"A person who performs a facility management, or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of section 5739.01 of the Revised Code.

"(G)(1) 'Price,' except in the case of watercraft, outboard motors, or new motor vehicles, means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, by a consumer to a seller in the complete performance of the transaction by which tangible personal property has been purchased or a service has been provided for storage, use, or other consumption in this state, without any deduction on account of the cost of the property sold, cost of materials used, labor or service cost, interest, discount paid, or any other expense. If the transaction consists of the rental or lease of tangible personal property, 'price' means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered by the lessee to the lessor, in the complete performance of the rental or lease, without any deduction for tax, interest, labor or service charge, damage liability waiver, termination or damage charge, discount paid or allowed after the lease is consummated, or any other expense. The tax shall be calculated and collected by the lessor on each payment made by the lessee. If a consumer produces the tangible personal property used by him, the price is the produced cost of such tangible personal property. The tax collected by the seller from the consumer under such sections is not a part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional use tax pursuant to section 5741.021 or 5741.023 of the Revised Code and of transit authorities levying an additional use tax pursuant to section 5741.022 of the Revised Code and, except for the discount authorized under section 5741.12 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of such tax.

"(2) In the case of watercraft, outboard motors, or new motor vehicles, ' price' has the meaning as in division (H) of section 5739.01 of the Revised Code.

"(3) In the case of a nonresident business consumer that purchases and uses tangible personal property outside this state and subsequently temporarily stores, uses, or otherwise consumes such tangible personal property in the conduct of

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business in this state, the consumer or the tax commissioner may determine the price based on the value of the temporary storage, use, or other consumption, in lieu of determining the price pursuant to division (G)(1) of this section. A price determination made by the consumer is subject to review and redetermination by the commissioner.

"(4) In the case of tangible personal property held in this state as inventory for sale or lease, and that is temporarily stored, used, or otherwise consumed in a taxable manner, the price is the value of the temporary use.

"(5) In the case of tangible personal property originally purchased and used by the consumer outside this state, and that becomes permanently stored, used, or otherwise consumed in this state more than six months after its acquisition by the consumer, the consumer or the tax commissioner may determine the price based on the current value of such tangible personal property, in lieu of determining the price pursuant to division (G)(1) of this section. A price determination made by the consumer is subject to review and redetermination by the commissioner.

"(H) 'Nexus with this state' means that the seller has sufficient contact with this state, in accordance with the Constitution and laws of the United States, to allow the state to require the seller to collect and remit use tax on sales of tangible personal property or services made to consumers in this state. Nexus with this state exists when the seller does any of the following:

"(1) Maintains a place of business within this state, whether operated by employees or agents of the seller, by a member of an affiliated group, as described in division (B)(3)(e) of section 5739.01 of the Revised Code, of which the seller is a member, or by a franchisee using a trade name of the seller;

"(2) Regularly has employees, agents, installers, repairmen, salesmen, or other individuals in this state for the purpose of conducting the business of the seller;

"(3) Conducts a continuing pattern of advertising in this state by means of billboards, flyers, locally received newspapers or magazines, locally received television or radio broadcasts, locally received cable television transmissions, mail, or other media directed specifically to residents of this state for the purpose of soliciting purchase of the seller's goods or services, but by mail only if the seller also benefits from banking, financing, debt collection, telecommunication, or marketing activities occurring in this state or from the location in this state of authorized installation, servicing, or repair facilities;

"(4) Uses an agent in this state for the purpose of receiving or processing orders of the seller's goods or services;

"(5) Makes regular deliveries of tangible personal property into this state by means other than common carrier;

"(6) Solicits orders for the seller's goods or services by means of a telecommunication shopping system that utilizes a toll-free telephone number and is intended by the seller to be broadcast or transmitted to consumers located in this state;

"(7) Has membership in an affiliated group, as described in division (B)(3)(e) of section 5739.01 of the Revised Code, at least one other member of which has nexus with this state;

"(8) Owns tangible personal property that is rented or leased to a consumer in this state, or offers tangible personal property, on approval, to consumers in this state;

"(9) Arranges for a telephone company or interexchange telecommunications company doing business in this state to collect the consideration for purchases of tangible personal property or services by consumers in this state;

"(10) Has any other contact with this state that would allow this state to require the seller to collect and remit use tax under the provisions of the Constitution and laws of the United States.

"(I) 'Fiscal officer' means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county which is a transit authority, the fiscal officer of the county transit board appointed pursuant to section 306.03 of the Revised Code.

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"(J) 'Territory of the transit authority' means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

"(K) 'Transit authority' means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit board is appointed pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority which includes territory in more than one county must include all the area of the most populous county which is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

"(L) 'Providing a service' has the same meaning as in division (X) of section 5739.01 of the Revised Code.

"(M) 'Tangible personal property or property' includes transactions included in division (B)(3) of section 5739.01 of the Revised Code.

"(N) 'Other consumption' includes receiving the benefits of a service by the person who purchased the service."

CROSS REFERENCES

Application for certificate of title, certification regarding mileage, fees, 4505.06

Excise tax on tobacco products levied on sellers, 5743.62

Sales tax, definitions, exceptions, 5739.01, 5739.02

Sales tax, determination of price of tangible personal property, 5739.031

OHIO ADMINISTRATIVE CODE REFERENCES

Information exchange with other states, OAC 5703-1-01

Interstate commerce, OAC 5703-9-39

Sales and use tax; manufacturing, OAC 5703-9-21

LIBRARY REFERENCES

Taxation ⚷1202, 1220, 1262, 1264, 1282.1.
WESTLAW Topic No. 371.
C.J.S. Licenses §§ 1 to 3, 20, 47.

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BALDWIN'S OHIO REVISED CODE ANNOTATED
TITLE LVII. TAXATION
CHAPTER 5741. USE TAX; STORAGE TAX
LEVY AND COLLECTION

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5741.02 LEVY OF TAX; RATE; EXEMPTIONS

<Note: See also following version of this section, eff. 7-1-01>

(A) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided. The tax shall be collected pursuant to the schedules in section 5739.025 of the Revised Code.

(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property or realizing in this state the benefit of any service provided, shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided, that the consumer shall be relieved from further liability for the tax if the tax has been paid to a seller in accordance with section 5741.04 of the Revised Code or prepaid by the seller in accordance with section 5741.06 of the Revised Code.

(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property or services, nor to the storage, use, or consumption or benefit in this state of tangible personal property or services purchased under the following described circumstances:

(1) When the sale of property or service in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid;

(2) Except as provided in division (D) of this section, tangible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code;

(3) Property or services, the storage, use, or other consumption of or benefit from which this state is prohibited from taxing by the Constitution of the United States, laws of the United States, or the Constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property that was purchased in interstate commerce, but that has come to rest in this state, provided that fuel to be used or transported in carrying on interstate commerce that is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;

(4) Transient use of tangible personal property in this state by a nonresident tourist or vacationer, or a non-business use within this state by a nonresident of this state, if the property so used was purchased outside this state for use outside this state and is not required to be registered or licensed under the laws of this state;

(5) Tangible personal property or services rendered upon which taxes have been paid to another jurisdiction to the extent of the amount of the tax paid to such other jurisdiction. Where the amount of the tax imposed by this section and imposed pursuant to section 5741.021, 5741.022, or 5741.023 of the Revised Code exceeds the amount paid to another jurisdiction, the difference shall be allocated between the tax imposed by this section and any tax imposed by a county or a transit authority pursuant to section 5741.021, 5741.022, or 5741.023 of the Revised Code, in proportion to the respective rates of such taxes.

As used in this subdivision, "taxes paid to another jurisdiction" means the total amount of retail sales or use tax or similar tax based upon the sale, purchase, or use of tangible personal property or services rendered legally, levied by and paid to another state or political subdivision thereof, or to the District of Columbia, where the payment of such tax does not entitle the taxpayer to any refund or credit for such payment.

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(6) The transfer of a used manufactured home or used mobile home, as defined by section 5739.0210 of the Revised Code, made on or after January 1, 2000.

(D) The tax applies to the storage, use, or other consumption in this state of tangible personal property or services, the acquisition of which at the time of sale was excepted under division (E)(1) of section 5739.01 of the Revised Code from the tax imposed by section 5739.02 of the Revised Code, but which has subsequently been temporarily or permanently stored, used, or otherwise consumed in a taxable manner.

(E) For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established.

CREDIT(S)

(1999 H 163, eff. 3-31-99; 1998 S 142, eff. 3-30-99; 1991 H 298, eff. 8-1- 91; 1986 H 583; 1981 H 694; 1974 S 544; 1971 H 439; 132 v S 350; 129 v 1164; 128 v 421; 1953 H 1; GC 5546-26)

<Note: See also following version of this section, eff. 7-1-01>

R.C. § 5741.02

OH ST § 5741.02

END OF DOCUMENT

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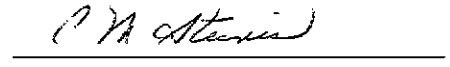
CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Brief of Appellant (with the Appendix separately bound) was served on counsel for the Tax Commissioner, this 8th day of January, 2007 by inserting a copy in an envelope addressed to Cheryl Pokorny, Deputy Attorney General, 30 East Broad Street, Columbus, Ohio 43215, and depositing the envelope in the United States mail for delivery.



Charles M. Steines