

In the
Supreme Court of Ohio

07-0328

MARC GLASSMAN, INC.,

Relator-Appellee,

v.

WILLIAM W. WILKINS
[RICHARD A. LEVIN],
TAX COMMISSIONER OF OHIO,

Respondent-Appellant.

Case No.

On Appeal from the
Cuyahoga County
Court of Appeals,
Eighth Appellate District

Court of Appeals Case
No. CA-06-087766

MEMORANDUM IN SUPPORT OF JURISDICTION OF APPELLANT, RICHARD A. LEVIN, SUCCESSOR TO WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO

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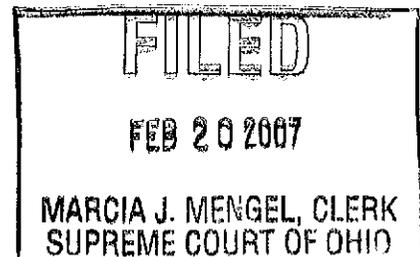


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INTRODUCTION

This case affects virtually every business operating in Ohio that, to complete its transactions, needs to access information stored on a computer. It involves the tax status of services for data processing and electronic information transmission—the type of service required to verify a credit card number or determine if a customer has insurance for a prescription drug. It would also affect purchases or sales of services to access web-based information sources. The decision below has undermined the General Assembly's intent, ignored the Court's precedent, and badly confused the law in this area—potentially costing the State millions in tax revenue. The Court should take this case to clarify the tax status of the purchase of these vital services.

Starting in 1983, the General Assembly has passed laws designed to capture, for purposes of taxation, the growing business of data processing services and electronic information transmission. In the most recent version of the law, passed in 1993, the General Assembly separated out the term “electronic information services” from the rest of the data processing services.

The 1993 legislative carve-out of the term “electronic information services” and its definition were designed to emphasize that when someone purchases the service of providing electronic information retrieval for commercial purposes. The current definition of “electronic information services” provided in R.C. 5701(Y)(1)(c) is not radically different from that in the previous version of the law. However, when carving out the definition, the General Assembly simultaneously created a partial reduction in sales or use tax for the purchase of equipment used in the provision of electronic information services. R.C. 5739.071. This new scheme emphasizes the General Assembly's intent to tax this increasingly important service.

In its decision in *Marc Glassman v. Wilkins*¹, the Eighth District Court of Appeals undermined the intent of the General Assembly to tax “electronic information services.” The court below ruled that Marc Glassman, Inc.’s (“MGI”) purchase of a computer service used to retrieve information from insurance company computers did not qualify as taxable “electronic information services.” The purchased service linked MGI’s computers and those of insurance companies. The computer services served as a conduit—it sent a question about insurance coverage of an MGI customer from MGI through MGI’s computer system to the customer’s insurance company computer and then returned the answer. MGI needs this information to complete its sales of pharmaceutical items.

Although MGI used a service to electronically ask a question and receive an answer necessary to complete a sale to its customer, the court below held that there were no “data” transmitted and there was no “access” to the insurance company’s computer, and therefore that the purchase of the service was not taxable.

The decision below could cost the State hundreds of millions of dollars, as it will totally exclude from taxation the purchase of a growing segment of computer/electronic information retrieval systems, potentially including, among others, credit card verification and Internet access for businesses. At the same time, it will leave intact the tax break for the purchase of equipment to be used in providing an electronic information service.

In addition, the court below failed to follow or even discuss two of this Court’s decisions, *Quotron Systems v. Limbach* (1992), 62 Ohio St. 3d 447 and *MIB, Inc. v. Tracy* (1998), 83 Ohio St. 3d 154, which should have been controlling precedent. The *Quotron* and *MIB* decisions both held services similar to the one here are taxable: in both *Quotron* and *MIB*, the services

¹ Richard A. Levin became Tax Commissioner in January, 2007, replacing William A. Wilkins.

transferred simple information through a series of computers not directly connected to the information-holding computer.

The Court should take this case to clarify this important area of tax law.

STATEMENT OF THE CASE AND FACTS

MGI owns and operates pharmacies that also sell items at bargain and reduced prices. R., ST.² 60. To complete a sale of prescription items, MGI must determine whether the item is covered by the customer's insurance policy and to what extent the insurance will pay for the transaction. R., Tr. 18-20, 45, 49.

During the tax audit period of January 1, 1991 through September 30, 2001, MGI purchased a computer service from Envoy Corporation ("Envoy"). R., ST. 1-2, 9; Tr. 43-45. Later in the audit period, MGI purchased the same service from NDC Health ("NDC"). R., ST. 1-2, 9; Tr. 43-45. Both systems electronically connected to the computers of insurance companies. R., Tr. 19-20; 32, 45.

To determine the extent of insurance coverage its customers have, MGI used the providers to transmit a question about the insurance coverage to the appropriate insurance company computer. R., Tr. 18-20, 45, 49. Once the service provider reached the correct computer, it would access the insurance information required to make a sale and send it back to MGI. Using the information it obtained through this transaction, MGI was then able to complete the sale of its products. R., Tr. 45-47.

² The record ("R.") in this case consists of the statutory transcript ("ST.") referring to the statutory transcript that the Tax Commissioner prepared for the Board of Tax Appeals ("BTA") and which consists of all evidence considered by the Tax Commissioner in writing the Final Determination; the record of the hearing before the BTA ("Tr.") and the exhibits ("EX.") submitted into the BTA hearing record.

MGI's purchase of this service was far more efficient and far less expensive than it would have been for MGI to connect its computers directly with those of the insurance companies. Given the number of pharmacies that need information from insurers, it probably was not practicable to connect MGI's computer system directly to all the insurers used by its customers. While the service was not legally able to access all of a patient's information contained in the computers of an insurance company, it was able to obtain and transmit sufficient data from the computers to permit MGI to complete a sale of prescription items to its customers.

Based on the facts and the law, both the Tax Commissioner and the BTA found that "acquiring data stored in . . . computer equipment" occurred during the MGI/NDC/insurance company transactions. R., ST. 1-3; Decision and Order at 9-11. The BTA defined "data" by construing words and phrases according to the rules of grammar and common usage as mandated by R.C. 1.42. Quoting Webster's Third New International Dictionary, the BTA concluded that "data" is "a fact or principle granted or presented: something upon which an inference or an argument is based . . . detailed information of any kind." Under this definition, the BTA decided that the information transmitted by NDC Health and Envoy constituted "data" as contemplated by R.C. 5739.01(Y)(1)(c). BTA Decision and Order at 9. Based on the facts, the BTA found, as had the Tax Commissioner, that MGI had benefited from the computer service provided by NDC and Envoy, and that the purchase was taxable under R.C. 5741.02 (A). MGI appealed this decision to the Eighth District Court of Appeals.

The Court of Appeals, following an old BTA decision in *PNC Bank, Inc. v. Tracy* (1995), BTA No. 93-T-1316, compared the current definition of "electronic information services" to a pre-1993 definition of "automatic data processing and computer services." Court of Appeals Decision at 7. The appellate court then held that neither MGI nor its customers could "access"

the computer systems of the insurance companies, and that the information that MGI used to complete its sales of pharmaceutical products did not meet the definition of "data." Court of Appeals Decision at 8-9. The lower court did not discuss, cite, or attempt to distinguish this Court's decisions in *Quotron* and *MIB*.

The Tax Commissioner appeals the Eighth District's judgment.

THIS CASE IS OF PUBLIC AND GREAT GENERAL INTEREST

Not only pharmacies, but almost all businesses needing to retrieve information stored in an unrelated business's computers, need to purchase a computer service to do so. Because this includes many electronic transactions, including many credit card purchases, the decision in this case affects almost every commercial transaction in twenty-first century Ohio. If the lower court's decision is permitted to stand, it will limit the State's ability to tax the purchase of those computer services transferring information used in business, and the financial impact on the State could be enormous.

A rough estimate of the cost illustrates the financial impact. MGI's pharmacies alone owed \$161,502.43 in use tax on the purchases of services from two companies over a two and a half year period. Assuming that all of the forty-five stores owned by MGI during the audit period had pharmacies, each store would have owed approximately \$3600 in taxes for the purchase of the computer services. Multiply that by the 2,157 retail pharmacies in Ohio, and the amount is roughly \$7,800,000. And retail pharmacies are only a part of the 12,398 non-wholesale pharmacies in the State, including the pharmacies in hospitals, and in nursing homes and other institutions that may also need to use a computer server "link" to access patient insurance or other information to complete their transactions.

Equally important, the decision below affects similar data service arrangements outside the pharmacy context, and that broader effect is massive. Credit card use alone may be worth more millions in tax dollars. The purchases of information searches through Internet servers will also be affected—searches that no modern business can function without. In short, “electronic information services” are used in many facets of modern business and the statute was written to tax the purchase of those services. If the decision below stands, the State’s financial losses from sales and use tax on these transactions could be enormous.

Further, if left uncorrected, the lower appellate court’s decision renders the tax law in this area deeply confused. Vendors and consumers of “electronic information services” will struggle to figure out what fits the definition of taxable “electronic information services” and what is excluded. The confusion created by the Court of Appeals’ definition of “data” and “access,” means that it is more difficult to determine what is “electronic information services” and therefore taxable. Without clarification of the law, there will be more litigation as both businesses and the Department of Taxation struggle to determine what is taxable.

Moreover, confusion in the law of tax encourages evaders. This will cause enforcement problems for the Department of Taxation. It will substantially undermine the administration and efficacy of the sales tax as a revenue source at a time when Ohio is particularly dependent on sales tax.

The Court should take this case to clarify the definition of “electronic information services.”

ARGUMENT

Appellant Tax Commissioner's Proposition of Law:

A computer service that links unrelated computers to each other for purposes of accessing data to use in business provides "electronic information services" as defined in R.C. 5739.01(Y)(1)(c), and the purchase of such a service is a taxable transaction under R.C. 5739.01.(B)(3)(e).

- A. The history of use tax for computer services in Ohio indicates that purchase of a service that retrieves by computer insurance information for a pharmacy is taxable as an "electronic information service."**

For purposes of taxation, the Ohio Revised Code began taxing those computer and data services in which the primary object sought was tangible personal property—for example computer printouts—in the early 1970's under R.C. 5739.01(B)(1). See, e.g. *Accountants Computer Services, Inc. v. Kosydar* (1973), 35 Ohio St. 2d 120. The law was general, stating that the tax would be on "all transactions by which the title or possession 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." Then, the issues revolved around whether the transaction involved the transfer of personal property or a service.

R.C. 5739.01 was amended in 1983 to include an additional provision under subsection (B) of the statute, and a new definition under subsection (Y). The additional language was refined the following year. These statutory changes resulted in the clear inclusion of "automatic data processing and computer services" within the definition of a sale to which sales tax is applicable. Coupled with the new provisions for taxation, the nontaxable aspects of "personal and professional services" were also now more plainly defined. At approximately the same time the changes in the law were made, businesses were using more automatic data processing services and becoming more dependent on computers and on their ability to access and store information.

Until January 10, 1985, R.C. 5739.01(Y) defined “automatic data processing and computer services,” to include “. . . providing direct access to computer equipment by remote or proximate access for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment . . .” Am.Sub.H.B. No. 291, 140 Ohio Laws, Part II, 2872, 3220. After that date, the definition included “. . . providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment . . .” Sub.S.B. No. 112, 140 Ohio Laws, Part I, 225, 233.

These definitions were the subject of two cases involving information-providing-services accessed through multiple computers, facts closely parallel to the case at issue, and in both instances the Court held the services were taxable. In *Quotron*, 62 Ohio St. 3d at 447, this Court held that a multi-computer service used to access simple information such as a price quote was a taxable service. A few years later, this Court found a simple set of questions sent through a series of computers was a taxable automatic data processing and computer service even though there had been no direct access to the computer holding the information. *MIB*, 83 Ohio St. 3d 154. Ohio law, at the time the Tax Commissioner assessed MIB for use tax included in the definition of “taxable sale,” all transactions for consideration involving “[a]utomatic data processing or computer 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 or computer services.” R.C. 5739.01(B)(3)(e). The definition of the “automatic data processing and computer services” found in R.C. 5739.01(Y)(1) included the words “providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment . . .” The *MIB* Court stressed that direct access to the computer providing information was not necessary, saying “the wording of the statute does not

require that the members have direct access to search MIB's host computer before their transactions can be taxed.”

In the early 1990s, the Internet and electronic information transfers began to play an increasingly more important role in business. Significantly, in Amended Substitute House Bill Number 152, effective July 1, 1993, the 120th General Assembly added the term “electronic information service” to R.C. 5739.01(B)(3)(e), separating it out from “automatic data processing” and “computer services.” At the same time, the General Assembly also added a definition for “electronic information services” into the law in R.C. 5739.01(Y)(1)(a). “Electronic information services” was defined as “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.”

While the current law is essentially the same as the one under which *MIB* was decided, splitting out electronic information services from the rest of “automatic data processing or computer services” in R.C. 5739.01(B)(3)(e), with a separate definition in R.C. 5739.01(Y)(1)(c), emphasizes its taxability. Thus, the intent of R.C. 5739.01(B)(3)(e) was to tax any service used in business that provided access to information housed in computers: “examining or acquiring data stored in or accessible to the computer equipment or placing data into the computer.”

The Ohio Legislative Service Commission’s comments analyzing Amended Substitute House Bill Number 152 specifically pointed out that “[t]he act specifies that the sales and use tax is levied on the sale or use of electronic information services used in business.” 1992, Ohio

Legis. Serv. Comm. Preliminary Analysis, Am.Sub.H.B. 152, 298-299. Further, under R.C. 5739.071—passed when “electronic information services” was separated from other computer services—the provider of an electronic information service is refunded twenty-five percent of the tax it pays under either Chapter 5739 or Chapter 5741 on tangible personal property used to perform the service.

Other evidence that the definition of “electronic information service” should be interpreted broadly can be found in Ohio Adm. Code 5703-9-46 (A) (1). That provision clearly states that “electronic information services” has the same meaning as in division (Y)(1)(c) of section 5739.01 of the Revised Code. The rule goes further, stating that the definition of “[e]lectronic information service” includes such services as providing Internet access, providing access to database information, and providing access to electronic mail systems. H.B. 152 reflects the General Assembly’s wish to emphasize as taxable sales the purchases of newly developed services by which computers connected to other computers and perhaps linked to still other computers are able to rapidly search through data stored in those computers, “examine or access” pertinent gems of information, and quickly relay that information back to the purchaser of the service.

The Appellate Court’s decision severely limits the State’s ability to tax the sale or purchase of “electronic information services.” Its decision to exclude simple questions and answers retrieved from computers blurs the definition of “electronic information services,” and opens the door to confusion and further litigation. The court below ignored the precedent of this Court, which, in *Quotron* and *MIB*, plainly indicated that a “link” between computers was a critical part of the accessing of data for use in business and that the data accessed could be as simple as a price quote or basic insurance information.

B. The service purchased by MGI is an “electronic information service,” and is therefore taxable.

MGI received information electronically from NDC’s and Envoy’s computers. MGI used that information to consummate the sale of prescription items. A straightforward reading of R.C. 5739.01(B)(3)(e) indicates that the purchase of the ability to receive that information constituted a “taxable use or sale” of “electronic information services” as that term was defined in R.C. 5739.01(Y)(1)(c).

During the audit period of January 1, 1999 through September 30, 2001, Ohio law included in the definition of “taxable sale” all transactions for consideration involving automatic data processing, computer services, or electronic information services. R.C. 5739.01(B)(3)(e). At that time, R.C. 5739.01(B)(3)(e) read, in pertinent part, as follows:

B. ‘Sale’ and ‘selling’ include all of the following transactions for a consideration in any manner . . .

3. All transactions by which:

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. . . .

For purposes of R.C. 5739.01(B)(3)(e), the law defined “electronic information services” as providing access to computer equipment for either acquiring data from or placing data into a computer:

[P]roviding 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.

R.C. 5739.01(Y)(1)(c). Personal and professional services were specifically excluded from the definition of either “automatic data processing,” “computer services” or “electronic information services.” R.C. 5739.01(Y)(1)(d). R.C. 5739.01(Y)(2) defined “personal and professional services” as “all services other than automatic data processing, computer services, or electronic information services.”

Nothing in R.C. 5739.01(B)(3)(e) indicates that the computers involved in accessing information for a provider of “electronic information services” must belong to only one company. In addition, nothing in the statute defines or limits the quantity and type of information/data required. Nor is there a definition of “accessed” that would limit its meaning only to a thorough search of all information in the computer.

Ohio Adm. Code 5703-9-46, based on the law after the 1993 changes, includes Internet access, something that requires several computers to connect to each other to retrieve information, in the definition of “electronic information service.” The definition of “electronic information services” under the rule therefore includes a service that asks a question of one set of computers and returns an answer to another set of computers. The computer service purchased by MGI, therefore, fits the definition of “electronic information services.”

Even before the law was changed to emphasize “electronic information services,” this Court recognized a service was taxable if it transferred information through a series of computers. In *Quotron*, 62 Ohio St. 3d at 447, the Court found a service taxable when a subscriber accessed information via “concentrators”—computers used to connect subscribers’ terminals to separately owned computers holding pertinent information. Quotron’s system included a series of computers linked to communication concentrators in different states on one

end and to the securities and exchange computer systems in New York on the other end to obtain stock and commodities price quotes.

The Quotron subscribers were using the service to find the price of stock, certainly not a detailed form of “information.” The computer system did not extensively probe into the stock market’s computers by the computers of Quotron. The search was for a simple answer to the question, “what is the price of stock X?” The information—“data”—obtained was simply a price.

In *MIB*, also based on the law before the 1993 change, the Court found a transaction taxable when a stand-alone computer was contacted by the computer of a member of the Medical Information Bureau (“MIB”). 83 Ohio St. 3d at 155. The stand-alone computer would terminate the communication with the first computer after it received a request to input information into or retrieve information from a member’s account. The stand-alone computer would then access the computer that housed the pertinent information, and then re-establish contact and return the information to the member computer. The member’s computer never “accessed” the information-housing-computer. It was linked to the computer by the stand-alone computer that then obtained answers to simple questions asked by MIB’s members.

The *MIB* Court held that even though no member could directly contact the computer containing information by means of electronic transmission, the members of MIB had “access” to computer equipment that “acquired” information through the “provider”—the front end computer. *Id.* at 157-158. Again, the information consisted of simple answers to questions; instead of answers about the price of stock as in *Quotron*, MIB provided answers about insurance coverage and accepted information about insurance.

The situation here is no different from that in *MIB*. The stand-alone computer in MIB was a “link,” just as NDC and Envoy served as essential “links” in the chain relaying information to

and from MGI's computer system and the insurance companies' computers. NDC served as an information conduit, linking MGI's computer to those of the insurance companies. The information provided to MGI via this link allowed MGI to know how to correctly charge its customer for prescription items.

The only difference between *MIB* and this case is that NDC belonged to a separate company. The purpose and the function of the system was the same—to enable MGI, like *MIB*'s members, to access information/data necessary to complete a business transaction. The *MIB* Court's discussion of the terms "access" and "acquiring" is applicable to the facts in either case.

And, after the time period in which *MIB* was assessed for tax, the General Assembly changed R.C. 5739.01(B)(3)(e) to emphasize the taxability of "electronic information services." The definition of "electronic information services" in Ohio Adm. Code 5703-9-46(A) that included the provision of Internet access further strengthened the idea that computers linked to each other and accessing information to be used in business were providing a taxable service.

And even under the dictionary definitions of "data" and "access," the computer service purchased by MGI had "accessed data" in the insurance company's computers and had returned it to MGI. The American Heritage Dictionary, Second College Ed. (Boston, Mass. 1985), defines "data" as "information, esp. information organized for analysis or used as the basis for a decision." The same dictionary defines "acquire" as "to gain possession of." As noted in *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St. 3d 11, 14, a case based upon the provision of electronic information service, the word "provide" means "to supply for use" and "provider" then is defined as "one that provides."

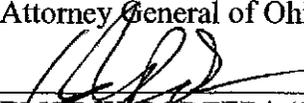
MGI has used its purchase of electronic information from NDC in business, and NDC has provided an electronic information service to MGI. For that reason and all of the above reasons, the Tax Commissioner respectfully requests that this Court accept jurisdiction and reverse.

CONCLUSION

For the above reasons, the Court should review this case and reverse the decision of the court below.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Memorandum in Support of Jurisdiction was served by U.S. mail this 20th day of February, 2007, upon the following counsel:

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A handwritten signature in black ink, appearing to read 'E. Porter', is written over a horizontal line.

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JAN - 4 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87766

MARC GLASSMAN, INC.

PLAINTIFF-APPELLANT

vs.

WILLIAM W. WILKINS, TAX COMMISSIONER

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED**

Civil Appeal from the
Board of Tax Appeals
Case No. 2005-K-82

BEFORE: Dyke, A.J., Kilbane, J., Blackmon, J.

RELEASED: December 14, 2006

JOURNALIZED: JAN - 4 2007

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**FILED AND JOURNALIZED
PER APP. R. 22(E)**

JAN - 4 2007

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

**ANNOUNCEMENT OF DECISION
PER APP. R. 22(B), 22(D) AND 26(A)
RECEIVED**

DEC 14 2006

**GERALD E. FUERST
CLERK OF THE COURT OF APPEALS
BY [Signature] DEP.**

CA06087766

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N.B. This entry is an announcement of the court's decision. See App.R. 22(B), 22(D) and 26(A); Loc.App.R. 22. This decision will be journalized and will become the judgment and order of the court pursuant to App.R. 22(E) unless a motion for reconsideration with supporting brief, per App.R. 26(A), is filed within ten (10) days of the announcement of the court's decision. The time period for review by the Supreme Court of Ohio shall begin to run upon the journalization of this court's announcement of decision by the clerk per App.R. 22(E). See, also, S.Ct. Prac.R. II, Section 2(A)(1).

NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED

NDC then routes this information back to MGI via the dedicated private communication line. The entire transaction, beginning with the pharmacist inputting the information into the MGI computer, takes an average of four seconds.

NDC charges MGI a per transaction fee for its service, as well as a monthly fixed charged for a private communication channel between MGI and NDC.

On January 20, 2006, the BTA issued a Decision and Order, finding that MGI used "electronic information services" to determine the insurance eligibility, amount of co-pay, and an authorization number of those customers seeking to purchase prescription items.

MGI now appeals the BTA's ruling and submits four assignments of error for our review. In the interests of convenience, we will address MGI's first and second assignments of error collectively.

MGI's first assignment of error states:

"The Board's decision is contrary to the evidence and is unlawful because MGI did not receive or acquire data from NDC or Envoy, a necessary finding for the Tax Commissioner to assess a use tax under R.C. 5739.01(B)(3)(e) as an electronic information services as described in R.C. 5739.01(Y)(1)(c)."

MGI's second assignment of error states:

“The Board’s decision is contrary to the evidence and is unlawful because MGI did not have access to computer equipment of NDC or Envoy for the purpose of acquiring data stored in or accessible to such equipment, a necessary finding for the Tax Commissioner to assess a use tax under R.C. 5739.01(B)(3)(e) as an electronic information services as required in R.C. 5739.014(Y)(1)(c).”

The standard of review applicable to BTA rulings is whether the decision is unreasonable or unlawful. See *Galvin v. Masonic Toledo Trust* (1973), 34 Ohio St.2d 157, 296 N.E.2d 542; *Cincinnati Nature Center v. Bd. of Tax Appeals* (1976), 48 Ohio St.2d 122, 357 N.E.2d 381. For the following reasons, we find that the decision of the BTA is unlawful and unreasonable.

In the instant matter, the Tax Commissioner assessed MGI for certain payments made to NDC for insurance authorizations because he found that the services rendered by NDC fell within the class of transactions made taxable as sales of “electronic information systems” under R.C. 5739.01(B)(3)(e). For the following reasons, we reverse.

R.C. 5741.02(A) imposes a tax 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 consumer that benefits from the service is responsible for use tax on the price of that service. R.C. 5741.02(B). Under R.C. 5741.01(M) and 5739.01(X), the only services taxable in Ohio are those proffered

in R.C. 5739.01(B)(3). *Ameritech Publishing, Inc. v. Wilkins*, 111 Ohio St.3d 114, 2006-Ohio-5337.

R.C. 5739.01(B) states, in pertinent part, as follows:

“(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:

“* * * (3) All transactions by which:

“* * * (e) Automatic data processing, computer services, or electronic information services 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. * * *”

R.C. 5739.01(Y)(1)(c) defines “electronic information services” as follows:

“(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[.] * * *”

For purposes of this appeal, the definition of “electronic information services” is nearly identical to the definition previously provided under former R.C. 5739.01(Y)(1) for “automatic data processing and computer services.”² Former R.C. 5739.01(Y)(1) defined automatic data processing and computer services as follows:

“(Y)(1) ‘Automatic data processing and computer services’ means: processing of other’s data, including keypunching or similar data entry services together with verification thereof; providing access to computer equipment for

²In 1993, R.C. 5739.01(B)(3)(e) was amended to include “electronic information services” as one of the transactions subject to taxation. Previously, “automatic data processing and computer services” were the only services listed as taxable.

Additionally, that same year, R.C. 5739.01(Y)(1) was amended to include a definition of “electronic information services.” This definition included a portion of the definition previously provided for “automatic data processing and computer services” with minor changes.

the purpose of processing data or examining or acquiring data stored in or accessible to such computer.”

As we find the statute’s previous definition of “automatic data processing and computer services” similar to the current definition of “electronic information services” for purposes of this appeal, we find the BTA’s decision in *PNC Bank, Inc. v. Tracy* (1995), BTA No. 93-T-1316 persuasive authority in the instant matter.

In *PNC Bank, Inc.*, supra, the BTA was concerned with former R.C. 5739.01(B)(3)(e), which imposed use taxes for services that constituted “automatic data processing or computer services,” previously defined above.

In that case, a merchant supplied an NDC operator with confidential credit card information. The NDC operator then transmitted this information, via computer to PNC, the bank that issued the credit card.

Once PNC received the request, the information was processed and a decision was made whether to authorize the transaction. PNC then transmitted the response back to NDC’s computer. In turn, NDC then transmitted the response back to the merchant, which acted accordingly.

NDC charged PNC a per transaction fee for forwarding a confidential credit authorization request and relaying PNC’s response to the merchant.

In *PNC Bank Inc.*, supra, the BTA determined that these transactions are not taxable. In so finding, the BTA reasoned that:

“* * * [PNC’s] merchant customers do not receive access to [PNC’s] computers through NDC. Consequently, the merchant cannot examine or acquire any credit card information stored in or available to [PNC’s] computers. Additionally, NDC lacks access to [PNC’s] computers. NDC is limited to sending off a specific inquiry and receiving a specific answer. NDC does not determine the credit worthiness of any account, nor can it access [PNC’s] computers to inquire into the details of any account. Moreover, since [PNC’s] response to a request is not generated until the request is received, NDC has no access to any information stored in [PNC’s] computer which can be used by NDC to authorize the transaction. In short, [PNC] performs the actual data processing, while NDC acts as an electronic intermediary, channeling requests to their proper destination and relaying the appropriate response. This service does not provide ‘access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment,’ and hence does not constitute automatic data processing.”

We find the holding in *PNC Bank, Inc.*, supra, applicable to the instant matter. As in *PNC Bank, Inc.*, supra, MGI’s customers do not receive access to the insurance company’s computer through NDC. Therefore, MGI cannot

examine or acquire any insurance information stored in or available to the insurance company's computers. Additionally, NDC lacks access to the insurance company's computers. NDC merely transmits a specific inquiry and receives a specific answer. NDC does not determine the eligibility of coverage, nor can it access the insurance company's computers to inquire into the details of the coverage. Moreover, since the insurance company's response to a request is not generated until the request is received, NDC has no access to any information stored in insurance company's computer which can be used by NDC to authorize insurance coverage. This service does not provide "access to computer equipment by means of telecommunications equipment for the purpose of examining or acquiring data stored in or accessible to such computer equipment." Therefore, the services provided by NDC do not constitute "electronic information systems," and thus, are not services subject to use tax. Consequently, the Tax Commissioner's determination with respect to these transactions is unreasonable and unlawful and must be reversed.

Our determination as to MGI's first and second assignments of error are dispositive of this appeal. Thus, we decline to address its remaining

assignments of error³ as moot. App.R. 12(A)(1)(c). Accordingly, this matter is reversed.

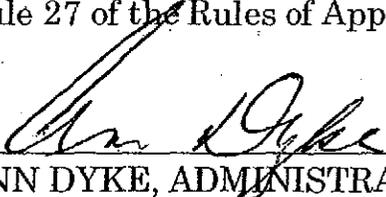
Judgment reversed.

This cause is reversed and remanded to the lower court for further proceedings consistent with this opinion.

It is, therefore, considered that said appellant recover of said appellee their costs herein.

It is ordered that a special mandate be sent to said court to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.


ANN DYKE, ADMINISTRATIVE JUDGE

MARY EILEEN KILBANE, J., and
PATRICIA ANN BLACKMON, J., CONCUR

³ "III. The Board's decision is against the manifest weight of the evidence because the authorizations received from NDC and Envoy were personal services for the customer and simply sent to MGI, as agent for customers, and the authorizations were not provided for use in MGI's business, and thus, did not constitute an electronic information services as required by R.C. 5739.01(Y)(1)(c)."

"IV. The transactions are not electronic information services as described in R.C. 5739.01(Y)(1)(c) or otherwise taxable services."

OHIO BOARD OF TAX APPEALS

Marc Glassman, Inc.,)
)
 Appellant,) (USE TAX)
)
 vs.) DECISION AND ORDER
)
 William W. Wilkins, Tax Commissioner)
 of Ohio,)
)
) Appeal Filed Feb. 10, 2006
 Appellee.) Cuyahoga County Court of Appeals

APPEARANCES:

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Entered January 20, 2006

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

On January 14, 2005, appellant, Marc Glassman, Inc., filed the present appeal with this board through which it challenges the Tax Commissioner's November 17, 2004 final determination denying its petition for reassessment. In doing so, the commissioner affirmed a use tax assessment, with preassessment interest, for the period of January 1,



1999 through September 30, 2001 which totaled \$184,389.57.¹ We proceed to consider this matter based upon appellant's notice of appeal, the statutory transcript certified by the Tax Commissioner, the evidence presented during this board's hearing, and the post-hearing briefs which have been submitted on behalf of the parties. The only witness to testify at this board's hearing was Brian Kendro, appellant's vice president of information systems.

Appellant is an Ohio corporation which operates several retail stores in the northern portion of the state. During the period in question, several of appellant's stores had in-store pharmacies which sold both prescription and non-prescription items. With respect to those items sold pursuant to a physician's prescription, a customer would provide appellant's pharmacist with the prescription and, if the person had insurance, his/her insurance card which typically disclosed the member's name and member number, the name of the insurance provider, and the plan name. Using a computer owned or leased by appellant, the pharmacist would enter into its system the customer's personal information, e.g., name and address, the prescription information, i.e., drug name and strength, and the aforementioned insurance information. This information would be transmitted via dedicated private communications lines to NDCHealth² and/or Envoy Corporation³ which

¹ Of the total assessment, \$161,502.43 was attributable to the use tax assessed, with the remaining \$22,887.14 constituting the preassessment interest which was imposed. Additionally, we note that in his final determination the commissioner acknowledged that then current records reflected \$165,831.52 had been paid toward the assessment.

² Although the record in this appeal contains varying references to this entity, i.e., NDCHealth, National Data Corporation, NDC Pharmacy, it appears that all references are to the same company.

³ Appellant's witness described the transactions and relationships between appellant and NDCHealth and Envoy as being essentially the same, the primary differences being the fact that it had a written contract and a direct communications connection with NDCHealth, while it had an oral agreement with Envoy, connecting to it via dial-up since it employed older technology.

would then transmit appellant's customer's information to the insurance company providing coverage. The insurance companies would respond regarding insurance eligibility, amount of co-pay, and an authorization number to NDCHealth and/or Envoy, with this information, in turn, being relayed to appellant.

In issue in this appeal is the taxability of the services purchased by appellant from NDCHealth and Envoy. The agreement which appellant had with Envoy was an oral one. However, appellant had a written contract with NDCHealth, indicating in section 1 of the service agreement that appellant was placing an "order for NDC's electronic data processing Services or System for an initial term of five (5) years." Ex. B at 1. Continuing, the contract provided that "[i]t is agreed that, during the initial and any renewal term of this Agreement, NDC will be the exclusive provider of such electronic data processing services provided hereunder, i.e., Subscriber shall transmit through NDC's network no less than 100% of Subscriber's then-current volume of transactions." Id. Under section 2 of the agreement, NDCHealth agreed to furnish "data processing services described in Section 3." Ex. B at 2. Section 3, entitled "service description," reads as follows:

"NDC will provide the following services to the Subscriber:

"1. Provide all transaction processing and network services to transmit pharmacy claims directly and electronically, switch to payers as required, in the communication protocol that is mutually agreed to between the payer and NDC.

"2. Provide use of the NDC communications network to the Subscriber on a 24 hour day, 7 day a week basis.

"3. Return payer approved, appropriate response messages to Subscriber pharmacies on a real time basis.

“4. Provide to payers all captured Subscriber claims on a real-time basis as required by the payer.

“5. Provide reports to the Subscriber on a monthly basis, which show all Subscriber transaction activity for billing purposes.

“6. Provide customer support and pre-implementation support services to designated Subscriber corporate staff personnel.”
Ex. B. at 7.

Before the Tax Commissioner, appellant claimed the services provided by NDCHealth and Envoy were either personal or professional services not subject to tax. Rejecting these arguments, the commissioner concluded in his final determination that the services constituted taxable “electronic information services”:

“The petitioner contends that it does not manipulate or process in any way the information received from the insurance companies, and that the data line used is a dedicated private line. However, based on the description above,⁴ it is more accurate to look at these transaction in the context of them being electronic information services. ***

“***

“Perhaps the most commonly known type of electronic information services are the services offered by internet service providers, which connect users to the internet using several different technologies, but most commonly either telephone connections or various types of data lines through a server, which provides access to information from other computers. It should be noted that the access services provided by internet service providers are taxable under Ohio law when the customer uses the services in business. The petitioner’s description of the services provided by NDC or Envoy are quite similar to internet access services, in that NDC and Envoy provided an electronic conduit through

⁴ In his final determination, the commissioner quoted from appellant’s memorandum in support of its petition for reassessment. See S.T. at 1-2, 9.

which information flowed from computers that they had access to by way of telecommunications equipment. Accordingly, the transactions are taxable electronic information services and the objection is denied.” S.T. at 2.

From the foregoing, appellant appealed to this board, specifying the following as error:

“1. The Services [purchased from NDC Pharmacy and Envoy Corporation] are personal or professional service transactions or otherwise nontaxable services. The transactions are not electronic information services as described in R.C. 5739.01(Y)(1)(c).

“2. The Tax Commissioner overstated the level of the Taxpayer’s purchased Services.

“***

“4. The determination of the Tax Commissioner is not based on evidence and is contrary to law.”⁵

⁵ In addition to the errors quoted above, appellant also specified the following in its notice of appeal:

“3. The Tax Commissioner’s [sic] imposes tax on costs associated with property and services which are not subject to tax pursuant to R.C. 5739.01(B) and 5739.02(B).

“***

“5. The Taxpayer resold the benefit of the Services which would make the Services exempt from tax even if they were otherwise taxable. See R.C. 5739.01(E).”

In his post-hearing brief, the commissioner questioned this board’s ability to consider these specifications on the basis that they had not previously been raised when the matter was pending before him. The procedures governing the issuance of a use tax assessment and the challenges which may be made thereto are consistent with those prescribed for assessments involving sales tax. R.C. 5741.14. In discussing former R.C. 5739.13 (subsequently modified effective January 15, 1993 by Am.S.B. No. 358, 144 Ohio Laws, Part II, 2370), the court in *CNG Dev. Co. v. Limbach* (1992), 63 Ohio St.3d 28, 32, held that a taxpayer may not claim as error on appeal an issue not raised in writing before the commissioner. See, also, *Shugarman Surgical Supply, Inc. v. Zaino* (2002), 97 Ohio St.3d 183, 2002-Ohio-5809. In response to the commissioner’s argument, appellant responded in its reply brief:

“To set the record straight, MGI concedes that it is not relying upon a resale exception. (Assignment of Error No. 5.) Further, Assignment of Error No. 3 in the notice of appeal simply reasserts, in broader terms,

In reviewing appellant's appeal, we must acknowledge the Supreme Court's consistent admonition that findings made by the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp v. Limbach* (1989), 42 Ohio St.3d 121, 124. It is therefore incumbent upon an appellant to demonstrate, with competent and probative evidence, that the commissioner's findings are in error and that it is entitled to the relief requested. *Id.*; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215; *Standards Testing Laboratories, Inc. v. Tracy*, 100 Ohio St.3d 240, 2003-Ohio-5804; *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 corresponding ("use") tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided. Given the complementary nature of these taxes, we will refer to the applicable sales tax provisions in considering the instant appeal. In doing so, we begin with R.C. 5739.01(B)(3)(e) which expressly includes within the definitions of "sale" and "selling," thereby subjecting to tax, all transactions for a consideration by which:

"Automatic data processing, computer services,⁶ or electronic information services are or are to be provided for use in

Footnote contd. _____

Assignments of Error Nos. 1 and 2. Thus, MGI agrees that Assignment of Error No. 3 is superfluous." *Id.* at 8.

Given appellant's concession, we will restrict our consideration to the errors quoted in the body of our decision.

⁶ In comparison, R.C. 5739.01(Y)(1) provides the following definitions of automatic data processing and computer services:

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. ***”

Pertinent to the commissioner’s findings in this instance, the General Assembly defined “electronic information services” in R.C. 5739.01(Y)(1)(c) as follows:

“‘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.”

Appellant advances three arguments in support of its claim that the services in issue do not constitute electronic information services, i.e., the information transmitted to appellant is not “data,” appellant did not have access to such information stored on the NDCHealth’s or Envoy’s computer equipment, and the information received by appellant is

Footnote contd. _____

“(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.”

R.C. 5739.01(Y)(1)(d) also provides the caveat that “[a]utomatic data processing, computer services, or electronic information services’ shall not include personal or professional services,” for which a non-

not provided for use in appellant's business. We will address each of these arguments in turn.

Initially, appellant asserts that the services provided by NDCHealth and Envoy do not constitute electronic information services because no "data" is examined or acquired by appellant. Since the term is not defined in the preceding statutes, appellant posits that data constitutes "factual information used as a basis for reasoning, discussion or calculation." Appellant's brief at 4 (citing Merriam-Webster Online Dictionary). In an effort to further bolster its position, appellant relies upon several prior decisions which it suggests indicate that only that information used as a basis for reasoned judgment constitutes data. See, generally, *MIB, Inc. v. Tracy* (1998), 83 Ohio St.3d 154; *Amerestate, Inc. v. Tracy* (1995), 72 Ohio St.3d 222; *Quotron Systems, Inc. v. Limbach* (1992), 62 Ohio St.3d 447; *PNC Bank, Ohio, N.A. v. Tracy* (July 7, 1995), BTA No. 1993-T-1316, unreported.⁷ A theme running throughout appellant's arguments, it insists NDCHealth and Envoy serve as electronic conduits transmitting messages, simply a yes or no response regarding customer insurance coverage, which is not used by appellant for any type of reasoned judgment. Instead, appellant simply seeks payment from the customer in an amount which corresponds with the coverage response provided.

R.C. 1.42 provides that "words and phrases shall be read in context and construed according to the rules of grammar and common usage." Webster's Third New

Footnote contd. _____

exhaustive list of examples is provided in R.C. 5739.01(Y)(2), none of which are argued to be expressly comparable to the services at issue herein.

⁷ In *Key Serv. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, the court did not address the issue of whether the services in issue constituted electronic information services, but instead considered whether the appellant was a "provider" of such services when furnishing them to a member of an affiliated group.

International Dictionary (2002) defines “datum,” the singular of data, as “a fact or principle granted or presented : something upon which an inference or an argument is based ***: detailed information of any kind.” Under this definition, one broader than that advocated by appellant, we find that the information transmitted by NDCHealth and Envoy indeed constitutes data as contemplated by R.C. 5739.01(Y)(1)(c) as it delineates the extent of a customer’s coverage upon which appellant relies in promptly providing the requested product and in collecting payment, either full or a co-pay amount, from its customers. Of the cases cited by appellant in support of its argument, we acknowledge *PNC Bank, Ohio*, supra, is factually similar to this matter.⁸ However, this decision, as well as the remainder of the cases cited, involved consideration of whether the services provided were taxable automatic data processing or computer services and predated the General Assembly’s amendment of R.C. 5739.01(B)(3)(e) so as to include with taxable transactions those involving the sale of electronic information services.

Alternatively, appellant argues that it did not have “access” to such data. In advancing this claim, appellant acknowledges that “[w]hile MGI could not search or examine NDC’s computer equipment, it most likely did have statutory ‘access’ to NDC’s computer equipment under the standard for access set forth by the Ohio State Supreme Court.” Appellant’s brief at 1. Appellant nevertheless asserts that such access was not provided for the purpose of acquiring data *stored in or accessible to* such equipment.

⁸ At issue in *PNC Bank, Ohio*, supra, was the taxability of certain services provided by National Data Corporation wherein it transmitted information between a merchant and issuing banks involving the authorization of purchases by customers who used Visa and MasterCard credit cards. However, as noted above, the period in issue in that case predated the inclusion of electronic information services in the definition of R.C. 5739.01(B)(3)(e), a factor which we find significant.

Appellant maintains that NDCHealth and Envoy did not store the information since it was transmitted instantaneously nor was such information accessible to these companies from the insurance providers with which they were in contact since to do so would likely be in contravention of privacy interests.

Once again, we find appellant's reading of the statute to be unduly narrow, particularly in light of the court's discussion in *MIB, Inc.*, supra:

"The two words in R.C. 5739.01(Y)(1) that are key to our decision are 'access' and 'acquiring.' R.C. 1.42 provides that '[w]ords and phrases shall be read in context and construed according to the rules of grammar and common usage. Words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly.'

"The word 'access,' as defined in Webster's Third New International Dictionary (1986), at 11, has several meanings, but the ones most appropriate to the context of this statute are 'permission, liberty, or ability to enter, approach, communicate with' and 'freedom or ability to obtain or make use of.' According to these definitions of 'access,' MIB's members had 'access' to MIB's computer because they had the ability to communicate with and enter and make use of MIB's computer equipment to retrieve the data stored therein." *Id.* at 157.

Appellant focuses upon the length of time it takes for such information to be stored or accessed. However, the statute does not draw such a distinction, one which, given the state of technology, would make little sense to employ since it is the instant communication and access which renders such service desirable.

Finally, appellant argues that the services provided by NDCHealth and Envoy were not provided for use in appellant's business. Appellant indicates that it does not benefit from such services and that it instead simply acts as an agent for its customers who

are the beneficiaries of such services. We disagree. Although appellant claims otherwise, it does indeed benefit from its acquisition of the services provided by NDCHealth and Envoy in that they allow appellant to conduct retail pharmaceutical sales on a timely and accurate basis by determining the nature and extent of customer insurance coverage, thereby resulting in customer satisfaction and retention.

Based upon the foregoing, it is the decision of the Board of Tax Appeals that appellant's claimed errors are not well taken. Accordingly, the Tax Commissioner's final determination must be, and hereby is, affirmed.

Mr. Dunlap, dissenting.

As I believe the foregoing decision and order departs from a fundamental rule of statutory construction, I must respectfully dissent.

This appeal presents an issue of first impression and in resolving it, in my view, the majority has utilized an overly broad definition of a technical term which conflicts with principles underlying prior case law. While it may occasionally be necessary to infer or opine meaning to terms appearing within a statute, this board must nevertheless remain mindful that when the language of a taxing statute is ambiguous, such ambiguity must be interpreted and resolved in favor of the taxpayer. *B.F. Goodrich Co. v. Peck* (1954), 161 Ohio St. 202, paragraph three of the syllabus. See, also, *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St.2d 208, paragraph one of the syllabus ("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."). Thus, "[w]hen faced with the General Assembly's selection of an in-artful word, we must opt for the

meaning that favors the taxpayer.” *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St. 3d 193, 195.

Neither appellant nor the companies with which it contracts, gain access to insurers’ “data” which actually serves as the basis of the informed decision regarding the extent or nature of customer insurance coverage. Instead, appellant simply submits its customer information to NDCHealth and receives an authorization in return. It does not utilize this information in any manner other than to collect the appropriate co-pay amount from its customers. In *PNC Bank, Ohio, N.A. v. Tracy* (July 7, 1995), BTA No. 1993-T-1316, unreported, this board found the rendition of similar services involving credit card approval to be equivalent to that provided by an “electronic intermediary,” or messenger, and not taxable as automatic data processing. As appellant’s proposed definition of data is reasonable and seems supported by prior case law, I would reverse the Tax Commissioner’s final determination and find the services in issue not taxable.

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FINAL DETERMINATION

Date: NOV 17 2004

Marc Glassman Inc.
5841 W. 130th St.
Middleburgh Hts., OH 44130-1039

Re: Assessment No. 8020402334
Use Tax
Account No. 97-135391

This is the final determination of the Tax Commissioner on a petition for reassessment under R.C. 5739.13 and R.C. 5741.14 concerning the following use tax assessment:

	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Use Tax	\$161,502.43	\$0.00	\$161,502.43
Preassessment Interest	22,887.14	0.00	<u>22,887.14</u>
		Total	\$184,389.57

This assessment resulted from an audit of the taxpayer's purchases made over the period from January 1, 1999 through September 30, 2001. The petitioner, which operates a number of retail stores, objected to a portion of the assessment and filed a petition for reassessment. The objections are addressed below.

Pharmacy purchases

The petitioner contends that the transactions with NDC Pharmacy and Envoy are personal or professional transactions not subject to the tax and that they are not data processing services under R.C. 5739.01(Y)(1). The contract with NDC admittedly refers to the transactions as data processing, and the agent picked up that description for the audit. The petitioner describes the transactions as follows:

"A customer needing a prescription to be filled will go to a Marc's in-store pharmacy. The customer provides the pharmacist with the prescription and information relative to the customer's medical insurance. Generally this is a card containing the insurance company name, perhaps the plan name, member name, member number, etc. The pharmacist then enters the specific information into a computer terminal either owned or leased by Marc's. Via a private dedicated communication line and modem, this information is transmitted directly to a frame relay network operated by a telecommunications company. The information is then routed via the frame relay network directly to NDC [or Envoy] who is likewise connected to the frame relay network via a dedicated

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- 2 -

private communication line. Upon receipt of the information NDC, who is connected to a vast array of insurance companies through various individual private communication lines, routes the information directly to the specific insurance company. At this time, NDC simply waits for an authorization response from the insurance company. In the event a response is not received within fifteen seconds, NDC sends a notification that the [sic] there is no response and terminates the transaction.

“Once the insurance company has made a decision on the prescription coverage, specific information will be sent from the insurance company back to NDC. For instance, if the prescription is approved, information such as eligibility, the amount of co-pay for the prescription, an authorization number for reimbursement to the pharmacy, etc., will be sent to NDC. NDC then routes this information back to the frame-relay network via the dedicated private communication line and modem.”

The petitioner contends that it does not manipulate or process in any way the information received from the insurance companies, and that the data line used is a dedicated private line. However, based on the description above, it is more accurate to look at these transactions in the context of them being electronic information services. R.C. 5739.01(Y)(1)(c) provides the following:

“Electronic information service’ 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.”

Perhaps the most commonly known type of electronic information services are the services offered by internet service providers, which connect users to the internet using several different technologies, but most commonly either telephone connections or various types of data lines through a server, which provides access to information from other computers. It should be noted that the access services provided by internet service providers are taxable under Ohio law when the customer uses the services in business. The petitioner’s description of the services provided by NDC or Envoy are quite similar to internet access services, in that NDC and Envoy provided an electronic conduit through which information flowed from computers that they had access to by way of telecommunications equipment. Accordingly, the transactions are taxable electronic information services and the objection is denied.

NDC included as part of its charges for the service something called a "Monthly Recurring Circuit Charge". When the petitioner entered into the contract for service with this provider, it was charged a one-time installation fee for the installation of the circuit and unspecified equipment. The petitioner contends that this is simply a charge for the use of the telecommunications line, which is a private line and therefore its use is not a taxable charge. However, the use of the data line is a prerequisite to the provider's being able to provide the service and thus a part of the overhead for the service. Such overhead charges are correctly treated as part of the price in a sale transaction. See R.C. 5739.01(H)(1) (1991). The objection is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that \$165,831.52 has been paid on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the amount assessed.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

William W. Wilkins
WILLIAM W. WILKINS
TAX COMMISSIONER

/s/ William W. Wilkins

William W. Wilkins
Tax Commissioner