

IN THE SUPREME COURT OF OHIO

On Appeal From the Ohio Board of Tax Appeals

DAIMLERCHRYSLER CORPORATION, :

Appellant, :

v. :

WILLIAM W. WILKINS [Richard A. Levin], :
TAX COMMISSIONER OF OHIO, :

Appellee. :

Case No. 06-1731

BTA Case Nos. 2004-T-187, 188

BRIEF OF APPELLEE

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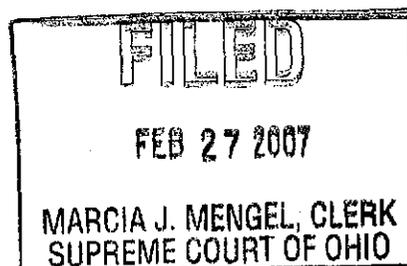


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STATEMENT OF CASE AND FACTS

A. Introduction / Summary

The Tax Commissioner assessed use tax against DCC for its purchases of repair parts and services that it then provided free of charge to car owners pursuant to its goodwill repair program. DCC challenged the assessments. The Tax Commissioner and the Board of Tax Appeals (“BTA”) properly found DaimlerChrysler Corporation (“DCC”) liable for Ohio use tax as the “consumer” of these repair parts and services used in carrying out goodwill repairs.

The issues presented in this case have already been decided in *General Motors Corporation v. Wilkins* (2004), 102 Ohio St.3d 33 (“*GM*”). In *GM*, this Court held that, by paying for the parts and service for “warranty” repairs and “special-policy” repairs and realizing the benefit in this state from those purchases, GM was properly subject to the use tax for those purchases of parts and services.

The special-policy repairs at issue in *GM* were provided by the carmaker pursuant to discretionary, goodwill repair programs similar to DCC’s discretionary program at issue here. As in this case, those repairs were done on a case-by-case basis, at the discretion of GM and at its cost. In *GM*, this Court held that GM, not the Ohio vehicle owner, was the “consumer” as defined in R.C. 5741.01(F), for both the warranty repairs and the goodwill repairs because GM, not the vehicle owner, paid for those repair parts and services. The Ohio vehicle owners were not the “consumers” of the parts and services provided pursuant to the warranty repair program and special-policy / goodwill repair programs because, in the words of the Court, these parts and services were provided to the car owners “without any charge” *Id.* at ¶65.

As the BTA correctly held below, applying this Court’s *GM* decision in this case requires a like result. In fact, the absence of a “quid pro quo” here between DCC and the car owners for

the car owners' receipt of the goodwill repairs is even clearer than was the situation regarding the "special-policy" goodwill repairs and warranty repairs in *GM*. Indeed, the absence of any consideration paid by the car owners for the repair parts and services that DCC furnished to them pursuant to its goodwill repair program follows directly from DCC's own characterization of the facts. (Supp. 55, page 13). As DCC openly admits in its merit brief at 14 and 16, DCC had no contractual obligation to a vehicle owner to pay for goodwill repairs; DCC's provision of such free parts and services was with no contractual strings attached. (Second Supp. 7, 18, 25).

In favorable contrast to *GM*, wherein the "special-policy" repairs were provided both during and after the limited warranty period, all of the goodwill repairs at issue here were provided after the expiration of the limited warranty contract period. DCC purchased the parts and service in its discretion, providing the repairs to the customers for free in order to enhance customer satisfaction, not in fulfillment of an existing contract with those customers to provide the repair work. The evidentiary record in this case reveals that the car owners were not even made aware by DCC or the car dealers of the possibility that they may receive free parts and services pursuant to DCC's goodwill repair program.

Moreover, by affirming the BTA and Commissioner in the present case, this Court will not only be applying *GM*, it will be following a long line of its decisional law preceding *GM*. Purchasers of promotional items, provided free of charge to others in order to enhance the purchasers' marketing efforts, customer satisfaction goals, or like business purposes, have long and uniformly been properly subject to use taxation as the "consumers" of the promotional items. The purchasing (or production) of such promotional items, given free-of-charge to others, has always subjected the purchaser or producer to sales and use taxation. *International Thomson Publ. v. Tracy* (1997), 79 Ohio St.3d 415 (purchase of free textbooks, called "exam copies," then

given away free-of-charge to teachers and professors for the purchaser's promotional purposes properly subjected to use taxation on the full produced cost); *Am. Cyanamid Co. v. Tracy* (1996), 74 Ohio St.3d 468 (production of prescription drug samples given to doctors free-of-charge for the pharmaceutical company's own promotional purposes subjected to use taxation); *Boehringer Ingelheim Pharms. v. Tracy* (1996), 74 Ohio St.3d 472 (same); *Midwest Foundation Independent Physicians Assn. v. Tracy* (1996), 74 Ohio St.3d 221 (purchase order to print magazines and then have then mail them to the organization's members in Ohio); and *Drackett Products Co. v. Limbach* (1988), 38 Ohio St.3d 204 (purchase of advertising supplements inserted into newspapers properly subjected to use taxation)

This case should be no exception. Following *GM*, as well as the applicable sales and use tax statutes and a long line of previous precedent, the Court should affirm the Commissioner's and BTA's holdings that DCC owes use tax on goodwill repairs.

B. Procedural Posture

In the present case, the Commissioner issued an initial use tax assessment on DCC's purchases covering the period from October 1, 1994 through December 31, 1997. (Supp. 1-2, page 6). The assessed transactions relate solely to DCC's purchases of repair parts and services from its dealers that were used in Ohio in making goodwill repairs. Exhibits received into evidence during the BTA's hearing will be clearly referenced in the supplement ("Supp."), second supplement ("Second Supp."), and BTA record ("BTA Ex."). The goodwill repairs were purchased by DCC pursuant to its Customer Satisfaction Assurance Program. (Second Supp. 4, 6-7, 11). DCC did not pay use tax on these parts and services, thereby resulting in the assessment which DCC then sought administrative review pursuant to its filing of a petition for reassessment. (Supp. 1-2, pages 6-7).

Subsequently, the Commissioner issued a second use tax assessment covering the period from January 1, 1998 through December 31, 2000. (Supp. 2, page 6). Again, the tax assessed was solely based on DCC's purchases of goodwill repair parts and services paid for by DCC as part of DCC's Customer Satisfaction Assurance Program, which DCC then sought administrative review pursuant to a petition for reassessment. (Supp. 2, page 6).

The Commissioner issued final determinations on the petitions for reassessment, upholding the use tax amounts assessed but remitting the assessed penalties. (Second Supp. 28-45). Thereafter, on August 18, 2006, the BTA issued a single Decision and Order affirming the Commissioner's final determinations in their entirety. DCC now appeals.

C. Statement of Facts

DCC is a major manufacturer of automobiles which sells a majority of its vehicles through a network of retail dealers. When a customer buys a new vehicle, the vehicle comes with a limited warranty that covers repairs related to defects in materials or workmanship. (Supp. 21, page 84; BTA Ex. 7 sec. 2B, BTA Ex. 9b sec. WC1 BTA Exs. 10a-10j). The limited warranty lasts for either a 3-year/36,000 mile basic warranty or a 12-month/12,000 mile basic warranty with a 7-year/ 70,000 mile powertrain coverage. (Supp. 21, page 84). The limited warranty is a contractual obligation entered into by DCC with its customers.

The assessed transactions involve solely goodwill repairs; no repairs made pursuant to warranty contracts are at issue. DCC did not enter into any contractual agreement with its customers to conduct goodwill repairs. (Supp. 26, page 102; Second Supp. 7, 18, 25; DCC brief at 14 ["[i]n the matter at hand, DCC has no contractual obligation to a vehicle Owner to authorize or pay for goodwill repairs."]).

Goodwill repairs are performed pursuant to DCC's Customer Satisfaction Assurance Program, which was instituted by DCC in order to increase customer satisfaction and loyalty. (Supp. 29, page 113-114; Second Supp. 6-7, 11-12). Goodwill repairs are voluntarily conducted by DCC. The owner of the vehicle does not pay for a goodwill repair. DCC customers are not charged for goodwill repair program coverage at the time of retail purchase, or at any time thereafter. (Supp. 55, page 14; BTA Ex. 10). Car owners do not purchase any enforceable, contractual right to have goodwill repairs performed. (DCC brief at 14, 16; Second Supp. 7, 18, 25).

In fact, car purchasers are never made aware of DCC's Customer Satisfaction Assurance Program and the possibility of getting goodwill repairs. DCC customers are given warranty manuals by the retail dealers which explain to them their right to obtain warranty repairs pursuant to the limited warranty. (BTA Exs. 10a-10j). These warranty manuals do not contain any information or reference to DCC's Customer Satisfaction Assurance Program or the goodwill repairs offered under it. *Id.* The evidentiary record is devoid of any evidence that the car owner customers are even orally apprised of the possibility that DCC, in its discretion, may determine to provide such free parts and services pursuant to the program.

As part of its contractual agreement with its dealers, called a Sales and Service Agreement ("Dealer Agreement"), DCC contracts for the dealers to provide goodwill parts and services at DCC's direction, as set forth therein. (Supp. 17, page 65; BTA Exs. 4a-4e). Amendments and additions to the Dealer Agreement appear in a document captioned Dealer Sales and Service – Additional Terms and Provisions. (Supp. 17, page 65; BTA Exs. 5a-5b). In accordance with these terms, the dealers can purchase parts for only those specific vehicle models that DCC lists on the Motor Vehicle Addendum, which is separate from the Dealer Agreement. (Second Supp. 18, page 71-72; BTA Ex. 6). The price set by DCC for any given

vehicle is set forth in a Cost Guide, which also is separate from the Dealer Agreement. (Supp. 19, page 73; BTA Ex. 15).

As provided in the Dealer Agreement, retail dealers, at the direction of DCC, are responsible for carrying out DCC's contractual and goodwill repair programs by performing the repairs. (Second Supp. 1-2; BTA Exs. 4a-4e). DCC's goodwill repairs may be authorized by specified dealers, under the conditions set by DCC, or directly by DCC. (Second Supp. 17-24). DCC has a Dealer Self Authorization ("DSA") program that allows certain dealers to authorize goodwill repairs under specific circumstances. *Id.* Individual dealers' discretion must be carried out within the parameters dictated by DCC, as provided for by DCC's DSA program. (Second Supp. 17-24). DCC then reimburses the dealer for the repair work according to the provisions of the Dealer Agreement and procedural warranty manuals. (Supp. 4; Second Supp. 4, 6-8, 11-13, 18-19, 25; BTA Exs. 4a-4e).

In order to be reimbursed for these goodwill repairs, the dealers must follow the procedures set forth by DCC in the manuals.

Any further facts will be referenced directly to the evidentiary record in the Law and Argument section which follows.

LAW AND ARGUMENT

PROPOSITION OF LAW NO. 1:

The Tax Commissioner's findings are presumptively valid absent a demonstration by the one challenging those findings that they are clearly unreasonable or unlawful. When the BTA affirms those findings, the standard of judicial review is whether the BTA acted reasonably and lawfully in upholding those presumptively valid findings.

Moreover, provisions granting exemption or exception from taxation are in derogation of the rights of all other taxpayers, shifting a higher burden upon the non-exempt, and thus

must be construed strictly against the claim of exemption or exception. The General Assembly's intention to grant such claims must be clear and express.

In reviewing decisions of the BTA, this Court is limited to its statutorily delineated duties in R.C. 5717.04 of making a determination from the record whether the BTA's decision is "reasonable and lawful." *Citizens Financial Corp. v. Porterfield* (1971), 25 Ohio St.2d 53; *Buckeye Power v. Kosydar* (1973), 35 Ohio St. 2d 135; *Cardinal Federal S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St. 2d 13; *Conalco v. Bd. of Revision* (1978), 54 Ohio St. 2d 330; *Alcoa v. Kosydar* (1978), 54 Ohio St. 2d 477." *Episcopal Parish v. Kinney* (1979), 58 Ohio St. 2d 199, 201; *Operation Evangelize-Youth Mission, Inc. v. Kinney* (1982), 69 Ohio St.2d 346, 347. It is not a trier of fact de novo. *Id.* Nor is it the function of this Court to substitute its judgment on factual issues for that of the BTA. *Id.*

Similarly, when reviewing the final determination of the Tax Commissioner, the BTA is required to presume that the findings of the Tax Commissioner are valid absent a demonstration that those findings are clearly unreasonable or unlawful. *Nusseibeh v. Zaino* (2005), 98 Ohio St.3d 292, 2003-Ohio-855, ¶10; *Kern v. Tracy* (1995), 27 Ohio St.3d 24; *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121; *Hatchadorian v. Lindley* (1983), 21 Ohio St.3d 66. Consequently, it was 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 had 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. *Id.* Provisions granting exception or exemption from

taxation are to be construed most strongly against the claimed exception or exemption. *Lakefront Lines, Inc. v. Tracy* (1996), 75 Ohio St.3d 627, 629; *Roxanne Laboratories, Inc. v. Tracy* (1996), 74 Ohio St.3d 654, 647; *Am. Cyanamid Co. v. Tracy* (1996), 74 Ohio St.3d 468, 470; *Bird & Son Inc. v. Limbach* (1989), 45 Ohio St.3d 76, 78; *Akron Home Medical Services, Inc. v. Lindley* (1986), 25 Ohio St.3d 107, 108; *National Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph 2 of the syllabus. As this Court reaffirmed in *Roxanne Laboratories*:

It is axiomatic the exemptions from taxation are not favored by the law and the intention to grant an exception must be clearly expressed.

74 Ohio St.3d at 657. As those and innumerable other authorities hold, an exception can be allowed only where the General Assembly has clearly and expressly so provided. Indeed, as this Court has emphasized, “exemption is in derogation of the rights of all other taxpayers and necessarily shifts a higher burden upon the non-exempt.” *Parma Hts. v. Wilkins* (2005), 105 Ohio St.3d 463, 2005-Ohio-2818, ¶10, quoting with approval, *Joint Hospital Serv., Inc. v. Lindley* (1977), 52 Ohio St.2d 153, 155.

Applying the foregoing principles, the BTA held that DCC failed to prove, by competent and probative evidence, that its purchases of goodwill repair parts and services were not subject to use tax. The BTA found that the Commissioner’s determinations are supported by a preponderance of the evidence and are in accordance with the law. As the law presumes taxation and disfavors exemptions, the Court should presume the assessed transactions are taxable and affirm the decision of the BTA and Tax Commissioner.

In deciding this case, the Court should be guided by its holding in *GM*. In *GM*, this Court held that by paying for the parts and service for warranty repairs and realizing the benefit in this state from those purchases, GM exercised sufficient rights and powers incidental to ownership to

subject it to the use tax for those parts and services. The result should be no different in this case.

Indeed, if anything, DaimlerChrysler Corporation's ("DCC's") arguments are weaker than GM's arguments were. What makes this an easier case for the Court to affirm the Commissioner and the BTA than in *GM* is the exclusively "goodwill" nature of the repairs. Just as in the present case, in *GM* goodwill repairs were assessed and contested by the taxpayer (referred to in *GM* as "special-policy repairs"). But *GM* also involved a more difficult fact pattern in which to impose use tax: where GM's customers (the car owners) received the repair parts and services as of contractual right pursuant to warranty contracts they had previously paid for (referred to in *GM* as "warranty repairs").

Accordingly, the focus of this Court in *GM* was on the harder fact pattern: regarding the warranty repairs, not the special-policy repairs. By ruling in *GM* in favor of the Commissioner on the entire assessments, even for GM's purchases of repair parts and services in which the customers' own contractual rights were implicated (i.e., the warranty repairs), this Court has already resolved the issues presented here.

PROPOSITION OF LAW NO. 2:

The taxpayer, DaimlerChrysler Corporation, is properly subjected to Ohio use tax on goodwill repair parts and services because it used them to carry out its Customer Satisfaction Assurance Program and realized the benefit from the increased customer satisfaction and loyalty.

In Ohio, retail sales of tangible personal property, including repair parts, and retail sales of a broad range of enumerated services, including repair and installation services¹, are subject to

¹ For purposes of this brief, the various assessed services are referred to as "repair services" rather than more accurately as constituting either a "repair service" or an "installation service." We do so because the

sales and use taxation. R.C. 5739.01(B) and (E), 5739.02 and 5741.02. Under the Ohio sales tax and use tax provisions in R.C. Chapter 5739 and R.C. Chapter 5741, respectively, retail sales of tangible personal property are subject to use tax when the items of property are “used” in this state, and retail sales of taxable services are subject to use tax when a “benefit [is] realized” in this state from the services provided. R.C. 5741.02.

Specifically, R.C. 5741.02 levies a use 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.” Several of the terms contained in R.C. 5741.02 are themselves defined in the divisions of R.C. 5741.01. “Use” is defined, in part, as “the exercise of any right or power incidental to the ownership of the thing used. ***.” R.C. 5741.01(C).

Additionally, the term “providing a service” is defined in R.C. 5741.01(M) to expressly incorporate the definition of “providing a service” as set forth in R.C. 5739.01(X). In turn, R.C. 5739.01(X) defines “providing a service” to include, among other things, all services set forth in R.C. 5739.01(B)(3). Finally, under R.C. 5739.01(B)(3)(a) and (b) “repair services” and “installation services” are expressly enumerated as taxable services.

Thus, use tax is properly imposed upon the purchase and use of repair parts and services whenever rights incidental to ownership are exercised in this state regarding those repair parts and whenever benefits of the repair services are realized in this state. R.C. 5741.01(C), R.C. 5741.02.

A. DaimlerChrysler Corporation used the goodwill repair parts in Ohio in carrying out its Customer Satisfaction Assurance Program.

DCC used the repair parts and realized the benefit of the repair services in Ohio in carrying out its discretionary customer satisfaction program, i.e., performing goodwill repairs. In

legal analysis is the same no matter if the service is properly characterized as being an “installation service” or a “repair service.”

addition to making its own discretionary decisions directly, DCC empowers some of its dealers to self-authorize goodwill repairs within certain designated parameters prescribed by DCC and instituted as part of DCC's Dealer Self Authorization program. The goodwill repairs are performed by DCC dealers pursuant to the Dealer Agreement. DCC instituted the Customer Satisfaction Assurance Program in order to increase customer satisfaction and loyalty. (Supp. 29, page 113-114; Second Supp. 6-7, 11-12).

DCC "uses" the repair parts and services when it exercises a "right or power incidental to the ownership of the thing used" by directing its dealers to conduct the goodwill repairs on its behalf. R.C. 5741.01(C). DCC exercises such "right or power" when it pays its dealers for parts that are used in goodwill repairs that DCC undertakes as part of its Customer Satisfaction Assurance Program. Dealers do not perform this work for themselves; they perform it for DCC. The dealers perform the work for DCC, and DCC purchases the parts and services by reimbursing the dealers in full. Having paid for the parts, DCC owned the parts and directed the dealers to incorporate those parts into the customers' vehicles.

In *GM*, this Court decided that a carmaker's purchase of repairs done for automobile customers pursuant to the carmaker's customer satisfaction programs constitute a taxable transaction. GM was assessed use tax for amounts it paid for parts and services provided to the car owners by GM's Ohio dealers to repair motor vehicles under GM's warranty repair program, as well as pursuant to its special-policy repair program. *Id.* at ¶ 1. See also, the BTA's findings, *General Motors Corp. v. Tracy* (Oct. 4, 2002), BTA Case No. 97-T-168, unreported, at 4. The agreements between GM and its dealers provided that the dealers would perform these repairs on behalf of DCC. *GM v. Wilkins* at ¶ 2. The services and parts provided by the dealers in fulfilling their contractual agreement to perform the repairs were then charged to GM based on prices set

by GM. *Id.* GM contended that it did not use the repair parts, because it never owned or possessed them. *Id.* at ¶ 50.

This Court rejected GM's contention that physical possession of the repair parts by the purchasers is necessary in order for the purchaser to "exercise rights incidental to ownership," and thus to "use" the repair parts. *Id.* at ¶ 52. This Court found that 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. *Id.* at ¶ 52.

The present case cannot be favorably distinguished from *GM* on the basis that, in the present case, the repair parts that DCC provides are pursuant to a customer satisfaction program because the same kinds of repairs were at issue in *GM*. Both the present case and *GM* involve free repair parts and services given to car owners in carrying out customer satisfaction programs. As in *GM*, the repair parts were paid for by DCC and were placed on the customers' vehicles on DCC's behalf. As *GM* holds, this constitutes an exercise of rights or powers incidental to ownership sufficient to be subject to use tax. *Id.* at ¶ 52. As the facts in *GM* are identical to this case in all significant respects, the conclusion also should be the same, and DCC should be required to pay use tax on the repairs. Thus, DCC's attempt by brief to distinguish *GM* (see DCC's brief at 14) on the basis that the warranty contract repair parts and services in that case were used to fulfill a contractual obligation, whereas in this case no such contractual obligation is present, should be unavailing.

Moreover, DCC would be wrong even if this Court in *GM* had not already resolved this issue because, in many other cases as well, this Court has long and uniformly held that the provision of such free, promotional items renders the provider the "consumer" of the goods and

services given away free-of-charge. Among numerous cases so holding, *Drackett Products Co. v. Limbach* (1988), 38 Ohio St.3d 204, is particularly instructive on this point.

Drackett provided, free of charge, advertising supplements to targeted prospective customers. It did not use the assessed items to fulfill a contractual obligation with those customers; it used the assessed items, advertising supplements, to promote its products. At the direction of Drackett, the publishers of these supplements delivered them to Ohio newspaper companies that distributed them to persons in Ohio by inserting them into the newspapers. *Id.* at 204.

Similar to DCC's purpose for providing the repair parts and services here, the use of the advertising supplements was to promote Drackett's products and to obtain and maintain customers. *Id.* In *Drackett*, this Court rejected the taxpayer's argument that use tax was improperly assessed on the supplements because it never obtained physical possession of them in Ohio. Drackett contracted for and selected the content of the supplements and the newspaper in which they were placed. This Court held that by directing the publishing companies to publish and distribute advertising supplements in Ohio, the taxpayer exercised sufficient rights or powers incidental to ownership of the supplements to subject its purchases of those supplements to the use tax.

Drackett held that where a person pays another for tangible personal property or services to be used or performed for the person, the person who pays for the property or services exercises sufficient rights or powers incidental to ownership to subject the purchase to use tax. *Id.* at 206. Similarly, DCC's use of the repair parts was to promote its products by increasing its customer satisfaction, thereby maintaining customer loyalty. By paying for the parts used in the

performance of goodwill repairs, DCC exercised a right or power incidental to ownership of such parts.

Drackett was followed by the Court in *Midwest Foundation Independent Physicians Assn. v. Tracy* (1996), 74 Ohio St. 3d 221, and, more recently, in *TV Fanfare Publications, Inc. v. Tracy* (1999), 87 Ohio St.3d 165, 169-170. In these cases this Court similarly held that the distribution of tangible personal property free-of-charge to Ohio recipients at the direction of the assessed taxpayers constituted taxable “uses” by the taxpayers within Ohio. In these cases, as in *Drackett*, the given-away items were produced or purchased by the assessed taxpayers and then distributed by others at the direction of the taxpayers to Ohio residents.

Likewise, this Court’s decisions involving the provision of free textbooks to college professors by college textbook publishers, and the provision of free drug samples to medical doctors by pharmaceutical companies are directly on point. *International Thomson Publ. v. Tracy* (1997), 79 Ohio St.3d 415 (purchase of free textbooks, called “exam copies,” then given away free-of-charge to teachers and professors for the purchaser’s promotional purposes properly subjected to use taxation on the full produced cost); *Am. Cyanamid Co. v. Tracy* (1996), 74 Ohio St.3d 468 (production of prescription drug samples given to doctors free-of charge for the pharmaceutical company’s own promotional purposes subjected to use taxation); *Boehringer Ingelheim Pharms. v. Tracy* (1996), 74 Ohio St.3d 472 (same).

In the present case, based upon its review of the facts, the BTA found that the dealers used the parts purchased by DCC on DCC’s behalf in order for DCC to fulfill its Customer Satisfaction Assurance Program. *BTA Decision and Order* at 8. Following the established law of this Court, as set forth in a long line of cases including *Drackett*, *International Thomson Publ.*, *Am. Cyanamid Co.*, *Boehringer Ingelheim Pharms.*, *Midwest Foundation Independent*

Physicians Assn, T.V. Fanfare, and GM, the BTA held that DCC exercised sufficient rights or powers incidental to ownership of the repair parts and that DCC was therefore properly assessed use tax on those repair parts and services.

Any attempt by DCC to distinguish itself from this long, unbroken line of cases should therefore be unavailing. DCC claims that these cases are different because they involved situations where the party initiated the processes that led to the creation of 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 business. But the evidentiary record here is replete with evidence of DCC's direct control over the entire goodwill repair program.

Based upon its review of the facts, the BTA found that the dealers used the parts purchased by DCC on DCC's behalf in order for DCC to fulfill its Customer Satisfaction Assurance Program. (Supp. 12, pages 46, 48). Following the established law of this Court in *Drackett* and *GM*, the BTA held that DCC exercised sufficient rights or powers incidental to ownership of the repair parts and that DCC was therefore properly assessed use tax on those repair parts and services. *Id.*

Any attempt by DCC to distinguish itself from *Drackett, T.V. Fanfare Publications, International Thomson Publ., Am. Cyanamid Co., Boehringer Ingelheim Pharms., and Midwest Foundation Independent Physicians Assn.* should therefore be unavailing. DCC claims that these cases are different because they involved situations where the party initiated the processes that led to the creation of 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 business.

These exact circumstances are not prerequisites. DCC exercised rights or powers incidental to ownership of the property in question. DCC has much more involvement with the goodwill repairs than just merely reimbursing the dealers for them. The fact is that goodwill repairs performed by DCC dealers are performed for DCC at DCC's direction, no different from the direction that constituted taxable uses in the long line of previous Court decisions upon which we rely. DCC governs the entire repair process. When a car owner brings in a vehicle and requests repairs, the dealer begins the process by filling out a Universal Repair Order for DCC. (Supp. 22, pages 86-88; BTA Ex. 11). DCC "require[s dealers] to use MOPAR brand parts in making warranty repairs," including goodwill repairs. (DCC brief at 8; Second Supp. 5). In certain instances, DCC requires dealers to return to DCC defective parts removed. Failure to return the parts would result in a charging back of the cost to the dealer. (Supp. 4-5, 13, pages 16-17, 50-51; Second Supp. 10). Contrary to DCC's position, the extent of DCC's involvement in the goodwill repairs is not limited to just reimbursing the dealers. DCC requires that specific procedures be followed, or else the dealers risk not being reimbursed. These procedures evidence DCC's capability to compel its dealers to follow its instructions regarding the various repair transactions. DCC controls these transactions and, in so doing, DCC exercises rights or powers over the property.

B. DaimlerChrysler Corporation realized the benefit of increased customer satisfaction and loyalty from the repair parts and services provided to its customers in making the goodwill repairs, so under R.C. 5741.02, it must pay the use tax.

R.C. 5741.02 levies use tax on the realization in this state of a benefit of a service provided. DCC's Customer Satisfaction Assurance Program was instituted by DCC in order to increase customer loyalty. (Supp. 29, page 113-114; Second Supp. 6-7, 11-12). In fact, DCC's Dealer Warranty Manual clearly states that "post-warranty or goodwill adjustments are to the

benefit of both the dealer and Chrysler”. (Second Supp. 6). DCC benefits from performing goodwill repairs in the form of increased customer satisfaction and loyalty. If customers are satisfied, they are more likely to consider purchasing subsequent vehicles again from DCC and to recommend DCC vehicles to others. Asserting that it gains no benefit from the goodwill repairs, since there is no contractual obligation to do the repairs, DCC would have this Court believe that its payments for goodwill repairs are completely disinterested and generous and devoid of any effect on DCC’s reputation and likelihood of repeat purchases. But the reality is far different.

DCC clearly realized the benefit of the repair parts and services in Ohio, and it did so not out of a “disinterested generosity” but to further its own business goals: to foster improved customer relations and to increase future motor vehicle sales. (Supp. 29, page 113-114; Second Supp. 6-7, 11-12; *BTA Decision and Order* at 5). The repair work was performed by the dealers for DCC. It was through purchasing these repair parts and services that DCC carried out its customer satisfaction program.

GM addressed these same arguments and facts. Like DCC, GM also contended that it did not realize any benefit from the repair services. *Id.* at ¶ 60. As this Court held, GM received a benefit because the parts and services enabled GM to fulfill its warranty repair programs. *GM* at ¶ 60. This Court held that “GM did realize a benefit from the repair services provided by its dealers and that benefit is subject to use tax.” *GM* ¶ 60. Similarly, the assessed repair parts and services enable DCC to carry out its Customer Satisfaction Assurance Program. Therefore, as GM was obligated to pay use tax on its goodwill repairs, for the same reasons, DCC has the same obligation.

PROPOSITION OF LAW NO. 3:

DaimlerChrysler Corporation was the consumer of the repair parts and services used in performing goodwill repairs because it purchased them and was provided a service by its dealers from which it benefited from in Ohio.

Like *GM*, the only transactions involved in this case are between the carmaker and its dealers. Therefore, those transactions always must be in the forefront of any analysis in this case. Because the recipient, of the free repair parts and services is not a party to the transaction between DCC and its dealer, the recipient cannot bear the tax burden. It follows, then, that DCC's arguments to the contrary are wrong.

- A. DaimlerChrysler Corporation is a "consumer" pursuant to R.C. 5741.01(F), the relevant use tax definition, because it purchased the repair parts and services and the services were provided to DaimlerChrysler Corporation from its dealers from which it derived a benefit in this state.**

Both the holding in *GM* and the plain language of R.C. 5741.01(F) establish that DCC is the consumer in this transaction. During the relevant period, R.C. 5741.01(F) defined "consumer" for purposes of the use tax law:

'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.)

Under the plain language of this provision, DCC is clearly the consumer of the repair parts and services at issue. DCC purchased the parts from the dealers, as DCC, not the car owner, paid for the parts. DCC also received a benefit from the repair parts and services. As noted above, the parts and services were used or consumed in Ohio to perform the goodwill repairs under DCC's Customer Satisfaction Assurance Program. The transactions at issue were between DCC and the dealers, not the dealers and the car owners.

Just as clearly, the car owners were not the consumers of the goodwill repair parts and services. As emphasized above, the second sentence of R.C. 5741.01(F) states that “[c]onsumer” does not include a person who receives, without charge, tangible personal property or a service.” As *GM* holds, applying the definition of “consumer” in R.C. 5741.01(F) expressly shows that the car owner could not be the consumer, as the car owner did not pay for the parts and services. *GM* at ¶ 65. The plain meaning of the last sentence of R.C. 5741.01(F) allows for no other conclusion.

In an effort to avoid this obvious conclusion, DCC argues that the price of the car included future costs of goodwill repairs, and therefore the customer had not received the repairs “without charge.” This argument was rejected by this Court in *GM* for both the warranty repairs and the special-policy repairs at issue in that case. As this Court explained in *GM*, there are two transactions in a warranty or goodwill repair: one between GM and the dealers and one between GM and its customers. *GM* at ¶ 60. Between GM and its dealers, the dealer provides the parts and services necessary for GM to fulfill its warranty repair and goodwill repair programs for its customers. *Id.* For neither kind of repair does the car owner pay for the repairs.

When the various dealers performed the goodwill repairs that have been assessed in this case, the dealers were performing those repairs at the behest of DCC, not the car owners. Moreover, DCC, not the car owners, paid for the repair parts and services. If DCC’s involvement in these transactions was removed, the dealers, then no longer being compensated for the repair work by DCC, may stop doing the repairs.

Further, DCC also meets the definition of “consumer” for its purchases of the goodwill repair services because it has “been provided a *** benefit in this state.” R.C. 5741.01(F). The benefit to DCC is that its customer satisfaction program promotes its products by increasing

customer satisfaction and thereby maintaining customer loyalty. As the purchaser of the parts and services, and as the recipient of the benefit, DCC satisfies the definition of consumer in R.C. 5741.01(F). Therefore, it owes use tax on the goodwill repairs. Just as GM received benefits for its purchase of repair parts and services by fulfilling the terms of its contractual warranty obligations, DCC received benefits in purchasing repair parts and services from the dealers. DCC did so in order to carry out its customer satisfaction program

B. Although not relevant to the use tax assessments at issue, DaimlerChrysler Corporation also is a “consumer” under the sales tax definition in R.C. 5739.01(D), as well as under the relevant use tax definition in R.C. 5741.01(F), because it is the person “for whom the [dealer] services are provided.”

In Ohio, pursuant to R.C. 5739.02, a sales tax is imposed on each retail sale made in this state. For sales tax purposes “consumer” is defined under R.C. 5739.01(D). However, DCC was assessed a use tax, so that the definition of “consumer,” as defined in the Use Tax Chapter, i.e., R.C. Chapter 5741, is the relevant use tax section. Therefore, whether DCC is a “consumer” under the sales tax definition of “consumer,” instead of under the applicable use tax definition in R.C. 5741.01(F), is irrelevant to the assessed transactions.

Moreover, even if the definition of consumer under the sales tax definition were relevant to the resolution of this use tax case, contrary to the appellant’s contention, DCC is a “consumer” under the sales tax definition because it is the “person for whom the service is provided.” Until the General Assembly amended R.C. 5739.01(D) effective September 29, 1997, R.C. 5739.01(D) read as follows:

(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,

The evidentiary record establishes that the assessed repair and installation services were provided to the car owners by the dealer, on DCC’s behalf, pursuant to DCC’s Dealer Agreement

and the Customer Satisfaction Assurance Program. Hence DCC is “the person for whom the service is provided.” The dealers are not providing the services at the will of the vehicle owners. Rather, the dealers are performing the repairs at the direction of DCC under DCC’s Customer Satisfaction Assurance Program. If DCC were removed from the transaction, the dealers would not continue to do the repairs, as they would not be compensated for the repairs.

DCC’s suggestion that it is not the recipient of any service any more than one granting a scholarship becomes the recipient of a college education is plainly inapplicable to the assessed transactions. Most obviously, scholarships are generally provided in money, an intangible that is not subject to Ohio sales or use taxation. However, if the scholarships were given to the student in the form of tangible personal property or services purchased by another, such purchases by the grantor/purchaser would be subject to sales and use taxation. For use tax purposes, the scholarship grantor/purchaser would be the “consumer” of those items under R.C. 5741.01(F). By purchasing the tangible personal property for the student who then takes title and possession of the tangible personal property at no cost to him or her and receives the free services in Ohio, the grantor/purchaser has exercised rights incidental to ownership of the items purchased in Ohio, and has realized a benefit of the services in Ohio. Therefore, the purchaser would be subject to sales and use taxes on those purchases of goods and services.

DCC is also wrong to rely on the amended version of the sales tax definition of “consumer” effective September 29, 1997. (DCC brief at 18-19). First, as noted above, the sales tax definition of “consumer” is irrelevant since there is an applicable use tax definition of “consumer” under R.C. 5741.01(F). Second, even under the amended definition of “consumer” for sales tax purposes, DCC still is a “consumer.” The following provision was added to amend the definition of consumer in R.C. 5739.01(D) that we previously quoted above, as follows:

(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.

This provision simply provides that a person who makes sales of taxable services is the consumer of tangible personal property that the person may use in performing the service.

The provision has no applicability to the present facts. Instead, it covers purchases of items such as tools, equipment, and supplies used or consumed in “performing the service.” It does not include the repaired or installed item itself. R.C. 5739.01(D)(5). For example, a person who provides repair services for motor vehicles is the consumer of the repair tools, repair shop machinery and equipment, and shop supplies it uses in performing the repairs. Likewise, the repairer is the “consumer” of any “consumables” such as oil, or other lubricants, used to perform the repair service. The repairer is not, however, the consumer of the repair parts that are sold to the customer. Rather, the parts are taxable to the consumer, the person who pays for them. In this case, that consumer is DCC because DCC purchases and utilizes these parts in its customer satisfaction program. Use tax has been assessed on the repair service itself and the parts installed as part of that service. Use tax has not been assessed on the tools, equipment and supplies used to render the service and install the parts. Therefore, as applied in the present case to the facts here, R.C. 5739.01(D)(5) does not conflict with the definition of the controlling definition of “consumer” for use tax purposes as set forth in R.C. 5741.01(F).

C. DaimlerChrysler Corporation is not eligible for the use tax exception under R.C. 5741.02(C)(2) for its use of tangible personal property and services because, the acquisition of which if made in Ohio, would be sales that are subject to the sales tax imposed by sections R.C. 5739.01 to R.C. 5739.31.

Pursuant to R.C. 5741.02(C)(2), to the extent a transaction is not properly subject to sales tax, it cannot be subject to use tax either. R.C. 5741.02 provides:

(C) 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.

R.C. 5741.01(C)(2) generally provides for an exception to use tax where the same transaction would be excepted from the sales tax imposed by R.C. Chapter 5739. But here, the sale to DCC of the repair parts and services would be equally subject to sales taxation as to use taxation, if the sale took place in Ohio. Namely, R.C. 5739.01(B)(1) provides that sales tax applies to sales of tangible personal property, and R.C. 5739.01(B)(3)(a) and (b) provide for a sales tax on repair services and installation services regarding personal property. Motor vehicles and components thereof that are repaired by DCC dealers are personal property. *GM* at ¶ 43. The assessed transactions are sales that would be subject to sales tax. In order for DCC to show otherwise, it would have to identify some sales tax exemption or exception that properly applies to the goodwill repairs at issue. For this purpose, DCC asserts several candidates, but as we discuss below, none of these statutes apply here.

PROPOSITION OF LAW NO. 4:

DaimlerChrysler Corporation's purchases of repair parts and services do not qualify for the resale exception formerly codified at R.C. 5739.01(E)(1), and now codified at R.C. 5739.01(E), because new car customers do not exchange consideration for goodwill policy repairs when purchasing vehicles, no consideration is paid for by the car owners for the goodwill repairs, and the benefit of the thing transferred to car owners is not "in the form in which the same was received" by DaimlerChrysler Corporation.

R.C. 5739.01(E) provides for an exception from sales tax when the purpose of the consumer in the transaction is to resell the "the thing transferred or benefit of the service

provided.” For the audit periods at issue, the resale exception now contained in R.C. 5739.01(E) was set forth in the identical language in what was then R.C. 5739.01(E)(1), as follows:

“Retail sale” and “sales at retail” shall 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 him;

A. DCC’s giving away of repair parts and services to car owners for free is not a resale.

By affirming the BTA and Commissioner in the present case, the Court will simply be applying a long line of its decisional law preceding *GM*. Purchasers of promotional items, provided free of charge to others in order to enhance the purchasers’ marketing efforts, customer satisfaction goals, or like business purposes, have long and uniformly been properly subject to use taxation as the “consumers” of the promotional items. The purchasing (or production) of such promotional items, given free-of-charge to others, has always subjected the purchaser or producer to sales and use taxation.

We have already discussed these cases in detail under Section A of Proposition of Law No. 2, *supra*, and refer the Court to that discussion here. In the following section, we provide a factual and legal analysis detailing the complete absence of any consideration paid by the car owners for their receipt of the goodwill repairs.

B. The R.C. 5739.01(E) resale exception is not applicable to the assessed transactions because the resale is not a “sale” as defined in R.C. 5739.01(B) as no consideration was exchanged for the goodwill repairs.

DCC attempts to avail itself of the exception created by former R.C. 5739.01(E)(1), but that statute is not applicable in the assessed transactions because no sale or resale took place; new car customers did not exchange consideration for a right to goodwill policy repairs when

purchasing vehicles or when they received the repaired vehicle. The sales tax chapter defines "sales," in pertinent part, as "transactions by which * * * a license to use or consume tangible personal property is or is to be granted * * * for a consideration * * *." R.C. 5739.01(B). No consideration was paid by the car owners to DCC for the goodwill repair transactions. Consideration requires a bargained-for legal detriment. See, e.g., *Gruber v. Chesapeake & O. R. Co.*(1957), 6 Ohio Op.2d 317, 158 F. Supp. 593, 609; *Coca-Cola Bottling Corp. v. Kosydar* (1975), 43 Ohio St.2d 186, 194 (holding that no sale occurred by the assessed taxpayer because "the transfers *** of the items assessed by the Tax Commissioner were gratuitous, conditional and unsupported by any form of consideration"). No consideration was provided to DCC from the car owners in return for the repair parts and services provided. (Supp. 55, page 13). Hence, DCC is not reselling the parts and services that it paid for to the car owners. DCC did not purchase the repair parts and services to resell them. There were, in fact, no resale transactions between DCC and the car owners. Hence, no resale transaction occurred.

Further, there is no pre-payment of the goodwill repairs by the car owners simply because DCC may happen to factor in potential costs of promotional repairs into the price of the car. Indeed, in pricing their new cars, automotive manufacturers similarly include the anticipated costs of various other kinds of promotional expenditures, such as for media advertising. In pricing the cars to include such expenditures, however, the carmakers are not selling such advertising to the car purchasers, just as they are not selling the promotional repair parts and services given away free. Retail new car customers do not exchange consideration for goodwill policy repairs when purchasing DCC vehicles. When car owners purchase a new DCC car, they pay for the car only. (Supp. 55, page 13). The price of the car remains the same regardless of whether, in the exercise of DCC's discretion, the car ever receives a goodwill repair.

The payment of the purchase price for the vehicle by the owners did not give the owners a right to goodwill repairs; they are not obligations of DCC to those owners. (Second Supp. 7, 18, 25; DCC brief at 14, 16). In the present case, the absence of such obligation is particularly evident because DCC never made the car purchasers aware of the goodwill repair program and never entered into a binding agreement to perform goodwill repairs. DCC could unilaterally change or withdraw the goodwill repair program without breaching any customer contract.

But even if car purchasers somehow became aware of the goodwill repair program when buying their cars, there could be no consideration paid for the mere possibility that DCC would, in its discretion, provide free repair parts and services beyond the limited warranty period. There is no consideration if a promise or apparent promise of a promisor reserves a choice of alternative performances. See Restatement of the Law 2d, Contracts (1981) 197, Section 77; *Ash v. Board of Review* (1986), 26 Ohio St.3d 158, n6. Words of promise which by their terms make performance entirely optional with the "promisor" do not constitute a promise. *Id.* Where the apparent assurance of performance is illusory, it is not consideration. *Id.* It is performance which is bargained for. and DCC has not undertaken any obligation to perform the goodwill repairs. *Id.*; *Coca-Cola Bottling Corp.* at 193.

More specifically, there is no promise regarding the goodwill repair program made to the car owners in this situation. The car owners are not given any information about DCC's customer satisfaction program and goodwill repairs. Since there is no consideration, there is no sale. The "purchase for resale" exception requires that the "resale" transaction constitute a "sale" within the meaning of the sales and use tax statutes. Without a "sale," there can be no "resale," so the resale exception has no application to the assessed transactions.

C. The Michigan Supreme Court's holding in *General Motors Corporation v. Dept. of Treasury* is inapposite to the assessed transactions, even as persuasive authority.

The Michigan Supreme Court's decision in *General Motors v. Dept. of Treasury*, is neither persuasive nor applicable to this case. *General Motors v. Dept. of Treasury* (2002), 466 Mich. 231, 644 N.W.2d 734. The Michigan Court found that use tax assessed on goodwill repairs was improper because the cost of the repairs was included in the price of the vehicles. This Court need not look to decisions of other states' courts under other states' laws when it has already decided the same issues under Ohio law. Rather, it should follow its own precedent as announce in *GM v. Wilkins*, supra.

Nevertheless, there are fundamental factual differences between the facts as found by the majority of the Michigan Court in *General Motors v. Dept. of Treasury* concerning the repairs at issue in that case and the DCC goodwill repairs at issue here. Most basically, the majority opinion in the Michigan case found that: "GM's goodwill policy is a promise to hear and address customer complaints even after the written warranty expires." *Id.* at 738. (But see the strongly worded dissenting opinion finding otherwise – that no such promise existed. *Id.* at 740-743.) The situation here is far different. In the present case, regarding the goodwill repairs at issue, as DCC has conceded in its brief, DCC makes no such promise to its customers. (DCC brief at 14, 16).

Further, as stated in the Michigan case, "[a]t the time of retail sale, GM customers receive an owner's manual," which "invites customers to initiate a dialogue with the dealership when a defect arises, 'during or after the warranty periods.'" *Id.* at 737. In stark contrast, DCC owner's manuals given to customers do not mention anything about goodwill repairs. In fact, the DCC Dealer Warranty Manual states that "post-warranty adjustments are not legal obligations due vehicle owners under the terms of our warranty." (Second Supp. 7). DCC customers are not made aware of any right to receive repair services after the expiration of their warranty because they have no such right. In fact, DCC warranty booklets inform the customer about additional

Optional Service Contracts, which can be purchased separately, that cover different time and mileage periods. (Second Supp. 17; BTA Ex. 10a). Unlike GM customers, DCC customers have no reason to know of or to expect DCC to pay for repair services past the expiration of their warranties, especially if they are aware of the option to purchase an additional extended warranty.

D. There cannot be a resale, because the benefit of the thing transferred to car owners is not “in the form in which the same was received” by DaimlerChrysler Corporation.

Even if DCC’s provision of free repair parts and services were somehow characterized as a “sale” by DCC of the repair parts and services to the car owners, i.e., that there was a “resale,” such “resale” would not be in the same form in which it is was received by the consumer, as required under former R.C. 5739.01(E)(1) [now codified at R.C. 5739.01(E)]. The exception provided by that statute is limited to those transactions in which the purpose of the consumer is “to resell the thing transferred or benefit of the service provided * * * **in the form in which the same is * * * received** by him.”

In analyzing whether the assessed transactions qualify for the resale exception, the BTA correctly focused on the “actual benefit” test, explained by the Court in *Bellemar Parts Industries, Inc. v. Tracy*, (2000), 88 Ohio St.3d 351. *BTA Decision and Order* at 14. When a service is subject to a sale and resale, the actual benefit test requires identification of the benefit received at each step in the transactional chain. *Id.* If the benefit received is the same in each transaction, the resale exception applies. *Id.* If the benefit to the taxpayer does not match the benefit to the customer (i.e., it is not “in the same form”) the exception does not apply. *Id.* See also, *Corporate Staffing Resources, Inc. v. Zaino* (2002), 95 Ohio St. 3d 1 (holding that where “the character of the actual benefit realized by each party did not remain consistent throughout

the transactional chain, the resale exception did not apply), and *Cousino Constr. Co. v. Wilkins* (2006), 108 Ohio St. 3d 90, 2006-Ohio-0162.

In *Corporate Staffing*, this Court emphasized that “the proper inquiry is a focus on the actual benefit received and not on the service purchased.” *Id.* at 3-4. With regard to the benefit derived by DCC, the BTA correctly states that DCC benefits from the labor of its dealer, not from the actual repairs that the dealer provides. (*BTA Decision and Order* at 14; *Bellemar* at 354). DCC is not actually benefiting from the repaired car, only the car owner benefits from the actual car. Rather, DCC is benefiting from the services that the dealers are providing to DCC customers on its behalf. The customer benefit is a repaired car at no cost. DCC’s benefit is increased customer satisfaction. These benefits are not the same. DCC and its customers have different interests and ultimately realize different, although related benefits. *Corporate Staffing* at 4. This distinction is relevant in showing that, in accordance with this Court’s analysis of the actual benefit test, the benefit received at each step in the transactional chain of these goodwill transactions is different, and not “in the same form.”

At the original sale, what was sold was a vehicle, not the separate parts of the vehicle, and certainly not repair parts and services. Just as the vehicle purchaser is not purchasing each of the thousands of component parts of the vehicle or the labor, engineering services and other items and services that went into the production of that vehicle, neither is that person purchasing the individual repair parts and services used by DCC in goodwill repairs. The thing that the vehicle purchaser pays for is in the form of a fully manufactured vehicle. The purchaser does not pay any consideration for any other specific item. Because DCC did not resell the repair parts and services to the vehicle owners, and certainly not in the same form that it purchased those parts and services, its purchases of those items do not qualify for the resale exception.

E. The taxation of goodwill repairs does not result in double taxation because the goodwill repairs and original car sale are separate transactions and involve different parties to the transactions.

The assessed goodwill repair and the original car sale are separate transactions, both in kind and duration. In a car sale, sales tax is paid by the car purchaser on the sale of a new car. In a goodwill repair, a use tax is paid by the car manufacturer on the purchase of repair parts and services from its dealer at some later time. Goodwill repairs are strictly gratuitous and thus are not something sold at the time of the purchase of the car. Therefore, they cannot be the basis for the sales tax paid by the customer. If goodwill repairs had been part of the purchase contract, DCC would have been under the obligation to make the repairs by contract. The repairs then would not be goodwill.

In fact, goodwill repairs are actually being made at the discretion of DCC mainly for the purpose of maintaining customer loyalty. Since the customer is not paying in advance for the goodwill repairs and services, or for a right to have the repairs done, there is no double tax. The fact that DCC may choose to build costs of repair parts and services into the price of the car does not equate to the customer being taxed for those repairs. The customers are not the consumers of the parts and services and did not "use" them. R.C. 5741.02. DCC is liable for use tax on goodwill repairs, because it "used" and derived a benefit from the parts and services.

F. The legislative history and Tax Commissioner's releases (although inapplicable because they deal with warranty repairs only and not goodwill repairs) confirm that the assessed transactions do not qualify for the resale exemption and are subject to use tax.

The Tax Commissioner has issued releases to clarify various statutory amendments, including some regarding warranty repairs. DCC's assessed transactions do not even involve

warranty repairs. While none of the releases addressed this kind of goodwill repairs, these releases support the conclusion that DCC owes use tax on goodwill repairs.

In 1986, the General Assembly amended R.C. 5739.01(E) to except from the definition of retail sale the sale of items or services used or consumed to fulfill an obligation pursuant to a warranty, provided as part of the price of the tangible personal property sold. R.C. 5739.01(E)(9)², Am. Sub. H.B. No. 54 ("H.B. 54"), 141 Ohio Laws, Part I, 1211, 1214-1215, effective September 17, 1986. Prior to the enactment of this exception, the purchase of warranty repair parts and services did not qualify for the resale exception. As the Legislative Service Commission summary of H.B. 54 notes, prior to the enactment of R.C. 5739.01(E)(9), such purchases were subject to tax:

Formerly, when a person provided warranty service on property under a warranty included in the property's purchase price, state and local sales or use taxes had to be paid on the things used or consumed and services involved in providing that warranty service.

Legislative Service Commission, Summary of Enactments, April-June 1986, at 156. H.B. 54 added the former R.C. 5739.01(E)(9) exception for the purchase of items used or consumed to fulfill a warranty obligation.

In 1991, the General Assembly enacted legislation that made the sale of warranties, maintenance or service contracts, or similar agreements, where a vendor agrees to repair or maintain tangible personal property, subject to the sales and use tax. Am. Sub. H.B. No. 298 ("H.B. 298"), 144 Ohio Laws, Part III, 3987, 4440, effective August 1, 1991. H.B. 298 also again amended R.C. 5739.01(E)(9) to provide an exception to vendors of warranties for items purchased to fulfill warranty obligations. Former 5739.01(E)(9) as amended by H.B. 298 stated:

(9) to use or consume the thing transferred to fulfill a contractual obligation

² Renumbered from R.C. 5739.01(E)(10) to R.C. 5739.01(E)(9) in Am. H.B. No. 531, 143 Ohio Laws, Part IV, 5570, 5573, effective July 1, 1990.

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 pursuant to division (B)(7) of this section. H.B. 298.

In 1992, H.B. 904 repealed the R.C. 5739.01(E)(9) amendment enacted by HB 298. Am. Sub. H. B. No. 904 ("H.B. 904"), 144 Ohio Laws Part IV, 6598, 6691, effective January 1, 1993. The repeal of this exception was intended to subject to sales and use tax, purchases by a warrantor of parts and services used to fulfill warranty obligations, thereby negating any tax exemption that had existed since 1986. The Legislative Service Commission ("LSC") summary of H.B. 904 confirmed this intent; it wrote:

Property used to fulfill warranty contracts. The act makes transfers of items that are to be used or consumed to fulfill a warranty contract, such as parts purchased by a warrantor to repair an automobile pursuant to a warranty contract, subject to the sales and use tax.

Legislative Service Commission, Summary of Enactments, 1992, Part I, at 17. To accept DCC's resale argument would render both of these legislative actions meaningless (the enactment of the exception and repeal of the exception). If the purchase of items to fulfill warranty repairs did qualify for the resale exception prior to the enactment of the exception in H.B. 54, there would have no reason for H.B. 54. Such purchases would have already been excepted under the resale provision.

Subsequently, 1993 Am. Sub. H.B. No. 152 ("H.B. 152") was enacted in order to specify how the sales tax applied to purchases by warrantors after the repeal of the former R.C. 5739.01(E)(9) exception by H.B. 904. 145 Ohio Laws, Part II, 3311, Part III, 4289-4290. The LSC analysis of this amendment so states:

The act [H.B. 904] specifies how the sales tax applies in light of the repeal.

[T]he purchase of tangible personal property or services for use or consumption in the performance of the warranty or service contract is not subject to sales tax exemptions under law not changed by the act for (1) reselling an item transferred or the benefit of a service received, by a person engaged in business, in the form in which the item or service is received by him, or (2) incorporated the item transferred into a product for sale.

Legislative Service Commission, Summary of Enactments, Appropriation Acts, 1993, at 347-348. H. B. 152 specifies that the purchase of parts and services by a warrantor for use or consumption in the performance of a warranty is not subject to the resale exception. The enactment of then R.C. 5739.01(D)(4)³ by H.B. 152 clarifies that the warrantor is the consumer of all parts and services purchased for use or consumption in the performance of the warranty. Former R.C. 5739.01(D)(4) stated:

(4) A person who warrants tangible personal property pursuant to a warranty or 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. *** H.B. 152.

The Tax Commissioners releases issued in 1982 (Supp. 57-58, Ex. 19), 1991 (Supp. 59-60, Ex. 21), and 1992 (Supp. 61-64, Ex. 22), explained the various statutory amendments, which included changes to the law with regards to warranty repairs. The releases do not support the argument that the assessed goodwill repair parts and services were resold by DCC to the vehicle owners. On the contrary, as is more fully set forth below, these releases inform warranty vendors about their tax liability regarding sales of warranty contracts and use or consumption of items used to fulfill such agreements.

³ R.C. 5739.01(D)(4) was effective July 1, 1993 – April 22, 1994.

In attempting to support its resale contention, DCC asserts that, prior to November 15, 1981, the Tax Commissioner did not assert that a manufacturer's purchases of parts and labor used in performing warranty repairs was subject to tax. (DCC brief at 24). But this assertion by DCC is wholly unsupported. DCC's statement that "notwithstanding this release, manufacturers *** did not consider themselves to be subject to tax on the cost of such parts and labor" is irrelevant and pure conjecture. *Id.* DCC does not cite to any evidence in support of these statements, and no such evidence exists.

Even in the face of an information release issued by the Tax Commissioner on January 13, 1982 (Supp. 57-58, Ex. 19), which clearly states the Tax Commissioner's position that the warrantor is the consumer of parts and services used to fulfill warranty obligations, DCC still asserts that that was not really the Tax Commissioner's position. Ex. 19 states:

*** the [warranty] provider is the consumer of all parts and services that he purchases in order to fulfill his warranty/contract obligation. If the repair is made by an independent repairman who then bills the warranty provider, the provider must pay sales tax to the repairman on his charge. If the provider makes the repairs himself or with his own employees, there is no sales tax consequence on the labor. However, any parts purchased by the provider are subject to the tax.

Again, DCC identifies no evidence to support its assertion that the Tax Commissioner's predecessors never issued an assessment on parts and labor purchased by a manufacturer to provide warranty repairs.

DCC's reliance on two releases (Supp. 59-64, Ex. 21 and Ex. 22) from the Department of Taxation is misplaced. These releases in no way evidence that the Tax Commissioner's predecessors considered such parts and services purchased by the warrantor to be eligible for the resale sales tax exception. For example, the first release relied upon (Supp. 59-60, Ex. 21) provided guidance for all vendors from the Tax Commissioner in 1991 regarding the many sales

and use tax changes implemented by H.B. 298, and how the changes may affect their sales or use tax collection and payment responsibilities. Ex. 21 stated:

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 O RUSE 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 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.

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H.B. 298 set forth those services that were included in the definition of "sale" and "selling"; sales of such services are subject to the Ohio sales and use tax. This release reminds all vendors, including vendors of warranties, that "since the transactions outlined" in the release "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.” (Supp. 59-60, Ex. 21, emphasis added). This statement did not guarantee eligibility for exemption for all types of services mentioned in the release.

Further, the release deals with a situation involving a sale of a warranty contract that was made a taxable sale by H.B. 298. Moreover, what DCC ignores in its reliance on this release (Ex. 21) is that H.B. 54 had already expressly excepted items purchased to fulfill an obligation of a warranty (included in the price of the property sold) from sales and use tax in R.C. 5739.01(E)(9). It doesn't make sense that the release is telling vendors of warranties that parts and services used in warranty repairs are eligible for the resale exception, when they are already specifically excepted under R.C. 5739.01(E)(9).

The second release (Ex. 22) is plainly inapposite. This release generally discusses the taxability of warranty contracts and parts used to fulfill warranty repairs. The portion of Ex. 22 focused on by DCC was directed at persons who provide repair services to a warrantor. Ex. 22 stated:

The Ohio General Assembly recently amended the Ohio Revised Code relative to warranties, maintenance or service contracts, or similar agreements. These changes became effective August 1, 1991.

Section 5739.01(B)(7) was enacted to include in the definition of sale or selling 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.

Section 5739.01(E)(9) was amended to exclude from the definition of “retail sales” transactions where the purpose of the consumer is to use or consume the thing transferred to fulfill a contractual obligation by a vendor of a warranty, maintenance or service contract, or similar agreement.

Section 5739.01(E)(11) was enacted to exclude from the definition of “retail sales” transactions where the purpose of the consumer is to use the benefit of a

warranty, maintenance or service contract, or similar agreement, to repair or maintain tangible personal property that would be exempt from the sales tax imposed by Section 5739.02 of the Revised Code when purchased.

The following is a summary of typical questions being asked along with the Department's responses. The responses should be used as a guide to understanding the law changes.

"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." 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.

You can claim exemption on the equipment used to make the actual repair or to provide maintenance based on the "used to fulfill a warranty" exception. [5739.01(E)(9), O.R.C.].

(Supp. 61-64, Ex. 22). The release provided an answer to the question "as the provider of the repair, maintenance, or service, do I have any claims for exemption." (Supp. 61-64, Ex. 22). If a repairman purchased parts to perform the service for the warrantor, the release states that the repairman could claim a resale exception for such purchases because the parts are resold to the warrantor.

In this case, the provider of the service is the dealer, and DCC, as referred to in this release, would be the "vendor of the warranty." *Id.* Hence, the dealer would be able to claim an exemption for parts used in performing the repair based on the claim "purchased for resale" because they are resold to DCC. DCC is not the dealer, the "provider" of the service, it is the "vendor of the warranty."

PROPOSITION OF LAW NO. 5:

DaimlerChrysler Corporation's use and consumption of the repair parts and services in goodwill repairs does not qualify for the exceptions provided by former R.C. 5739.01(E)(2) or former R.C. 5739.01(E)(9) (now codified as R.C. 5739.02(B)(42)(a) and R.C. 5739.02(B)(42)(g) respectively) because they are incorporated into the automobile after production of the automobile is completed and the product is sold.

DCC's argument that its use and consumption of the parts and services are excepted under either R.C. 5739.01(E)(2) or R.C. 5739.01(E)(9) is rebutted by the very language of those provisions. R.C. 5739.01(E)(2) provides an exception for repair parts as things transferred that are incorporated into tangible personal property to be produced for sale by manufacturing. That statute required that the thing transferred be incorporated "into tangible personal property **to be produced for sale** by manufacturing." The item produced by DCC for sale by manufacturing is an automobile. The parts and services used by DCC in carrying out its customer satisfaction program were, by their very nature, not used or consumed until **after** the automobiles were produced and sold.⁴ DCC's argument confuses manufacturing of an item with repairing an item that has previously been manufactured and therefore, it is incorrect. Moreover, because the automobile owners' purchases of vehicles from DCC did not give them any right to goodwill repairs, such repairs cannot be part of what was produced for sale.

R.C. 5739.01(E)(9) provides an exception for property that is used "primarily in a manufacturing operation to produce tangible personal property for sale." Such property might include "[p]roduction machinery and equipment that act upon the product or *** that treat the materials *** in preparation for the manufacturing operation. R.C. 5739.011(B). The automobiles that DCC manufactured had been completed and sold long before any of the repair transactions were performed. (See R.C. 5739.011(A)(5), which provides that a manufactured product is completed when it is in the form and condition that it will be sold.)

⁴ DCC's argument refers to parts and labor under its warranty program (DCC brief at 33). In contrast, the parts and services at issue here were used in DCC's discretionary customer satisfaction program.

Moreover, that the General Assembly enacted the former R.C. 5739.01(E)(9) exception for things used or consumed in fulfilling a warranty obligation (H.B. 54) and later repealed that exception (H.B. 904), militates against DCC's manufacturing claims. If the manufacturing exception were applicable, there would have been no reason for either of these enactments.

DCC's reliance on *General Motors Corporation v. Rose* (1987), 179 W.Va. 461, 370 S.E.2d 117, is misplaced. (DCC brief at 34). Applying what this Court has rejected as the "integrated plant theory," the West Virginia Court held that warranty repairs, i.e., contractual repairs -- not goodwill repairs -- were "an integral part of the manufacturing process," and therefore qualified for exemption. *GM v. Rose* at 462. However, as the dissent points out, Ohio has rejected the "integrated plant" theory. *Southwestern Portland Cement Co. v. Limbach* (1988), 35 Ohio St.3d 196, and *Youngstown Bldg. Material & Fuel Co. v. Bowers* (1958), 167 Ohio St. 363, is relevant to determining what purchases the legislature intended to exempt from sales tax as being directly used in the business of manufacturing. In those cases, this Court held that, to qualify for the manufacturing exception, the item must be used during and in the manufacturing process.

These decisions also state that the beginning and end of the manufacturing must be delineated. Were this Court to accept DCC's argument, the manufacturing process for the vehicles would never end. Our sales and use tax exception applies only when the thing transferred is incorporated into the product during and in the manufacturing process. Manufacturing ends when the product "is in the form and condition that it will be sold," meaning at some time prior to when the car is offered for sale. R.C. 5739.011(A)(5).

As the BTA correctly noted, goodwill repairs occur after manufacturing has been completed. *BTA Decision and Order at 16*. Therefore, the manufacturing exemption DCC urges cannot apply to goodwill repairs.

PROPOSITION OF LAW NO. 6:

DaimlerChrysler Corporation's purchase of parts pursuant to its goodwill repair program does not qualify for the sales tax exception under former R.C. 5739.01(E)(15) because the parts were not used to perform the repair and installation services, as required for DCC's purchases to qualify for the exception.

Former R.C. 5739.01(E)(15), which first became effective September 27, 1997, excepted from the definition of "retail sale" tangible personal property "used 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." In this case, the services purchased by DCC from its dealers constitute either taxable "repair services" as defined in R.C. 5739.0(B)(3)(a), or taxable "installation services," as defined in R.C. 5739.01(B)(3)(b).

DCC argues that from the September 27, 1999 effective date of the exception through the end of the assessment periods at issue, the repair parts that it purchased pursuant to its goodwill repair programs were excepted from sales and use tax under former R.C. 5739.01(E)(15). This contention fails for a very basic reason.

The flaw in this argument is that the repair parts provided by DCC to the car owners pursuant to the goodwill repair program are not "used to perform" the repair (or installation) service. Rather, the items that are used to "perform" the repair or installation service are the tools, equipment and supplies used or consumed by the repairer to perform the repair or installation service. By its express terms, this provision operated as an exception from the definition of retail sale only if the tangible personal property is "used to perform a service"

listed as taxable under R.C. 5739.01(B)(3) and if the property is “an integral part of the **performance** of the service (emphasis added).”

To illustrate the meaning and application of this exception, we provide two examples here. First, consider the pins, brackets and screws used by a drapery installer when installing drapes. Just as the installation of repair parts by DCC’s car dealers in the present case constitutes an “installation service” under R.C. 5739.01(B)(3)(b), so, too, does the installation of the drapes. Under R.C. 5739.01(E)(9) (recodified as R.C. 5739.02(B)(42)(g)), however, the permanent transfer of the pins, brackets and screws used by the drapery installer to perform the installation service would not constitute a “retail sale” of those items. This is so because the transfer of the pins, brackets and screws is “integral to the performance of the [installation] service.” Similarly, under R.C. 5739.01(E)(9), the car dealer’s transfer of oil or other lubricant used to install the automotive part would likewise be excepted for such items, too, would be permanently transferred to the customer, and are integral to the performance of the installation service.

Additionally, consider the chemicals used by landscaping and lawn care companies that are applied to their customers’ flora. We use this example because “landscaping and lawn care services,” are subjected to sales and use taxation pursuant to sub-division (g) of R.C. 5739.01(B)(3). And “landscaping and lawn care services” are defined for purposes of sales and use tax law in R.C. 5739.01(DD) as including the service of “applying chemicals *** to establish, promote, or control the growth of trees, shrubs, grasses, ground cover, or other flora ***.”

Accordingly, under the R.C.5739.01(E)(9) exception, the chemical spray that the lawn care company applies to its customers’ flora would not constitute a taxable sale to the customer of the chemicals. In the words of the exception, the chemicals are “integral to the performance of

the service.” Thus, the lawn care company would be the consumer of the chemicals, and would be required to pay sales and/use tax to its supplier for its purchase of the chemicals.

In contrast to the foregoing examples, which apply the plain meaning of the exemption, DCC’s broad misreading of the exception set forth in former R.C. 5739.01(E)(15) would radically alter the existing sales and use tax law. For example, when a drapery business would sell both drapes and the installation labor to install the drapes the purchaser of the drapery and the related installation service would pay sales and/or use tax only on the installation service. Acceptance of DCC’s contention would require that the drapery business would be the “consumer” of the drapes and pay use tax to its supplier on the price charged by the supplier for the drapes. Similarly, when a car mechanic would sell a battery and the associated installation service, only the installation service would be a “retail sale.” The mechanic would be the consumer of the battery.

Such results would not only contravene the plain meaning of this sales tax exception, they would directly conflict with the universal understanding of the sales and use tax law as applied by the Commissioner and complied with by taxpayers. From the 1997 enactment date of former R.C. 5739.01(E)(15) to its subsequent repeal in 2002⁵, this provision has never been applied by anyone in the fashion suggested by DCC here. Such broad, novel misreading of the exception should be rejected. DCC’s interpretation would prove far too much. It would be difficult to imagine that everyone but DCC has gotten it wrong up to now.

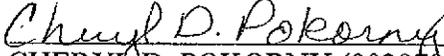
CONCLUSION

⁵ The sales tax exception formerly codified at R.C. 5739.01(E)(15) was legislatively eliminated and replaced by a sales tax exemption presently codified at R.C. 5739.02(B)(42)(m).

For the reasons set forth above, the Decision and Order of the BTA of Tax Appeals upholding the Commissioner's final determination should be affirmed.

Respectfully submitted,

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FINAL DETERMINATION

Date: DEC 18 2003

DaimlerChrysler Corporation
Attn. Lee Sweet
Office of Tax Affairs 483-00-33
800 Chrysler Drive
Auburn Hills, MI 48326

Re: Assessment No. 99000098 U
Use Tax
Direct Pay Permit No. 98-000843

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

	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Use Tax	\$1,303,631.64	\$195,544.75	\$1,499,176.39
Preassessment Interest	299,777.58	0.00	<u>299,777.58</u>
		Total-----	\$1,798,953.97

DaimlerChrysler Corporation, formerly known as Chrysler, is a manufacturer of automobiles. It provides a warranty with each new vehicle sold. The basic warranty is a contract between the petitioner and the vehicle owner that covers the cost of parts and labor needed to repair most items on a Chrysler vehicle that are found to be defective in material, workmanship, or factory preparation within a definite period, e.g. 3 years or 36,000 miles. However, in some cases the petitioner will agree to repair vehicles even though the period assigned by the warranty contract has expired. These repairs are termed "goodwill repairs." Goodwill repairs are performed at DaimlerChrysler dealers at no charge to the vehicle owners. The petitioner reimburses the dealers for parts and labor expended in performing these repairs. This assessment is the result of an audit of the petitioner's goodwill repairs covering the period of October 1, 1994 through December 31, 1997. The petitioner objected to the assessment and filed a petition for reassessment. A hearing was duly held. The petitioner's objections are stated below along with the tax commissioner's response.

Motor Vehicles as Tangible Personal Property

The petitioner argues that registered motor vehicles do not constitute personal property for Ohio tax purposes under R.C. 5701.03(A). Consequently, it says, the goodwill repairs performed by dealers on customer vehicles do not involve a repair of personal property and are not subject to Ohio's sales or use tax.

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Response: The definition cited pertains only to personal property tax. In *General Motors Corp. v. Lindley* (1981), 67 Ohio St. 2d 331, the Court affirmed a finding by the Ohio Board of Tax Appeals that the exclusion from taxation contained in R.C. 5701.03 pertains only to *ad valorem* taxes on the property itself, and not to the use tax, which is an excise tax on an activity.

Further, in *General Motors Corporation v. Tracy* (October 4, 2002), BTA Nos. 97-T-168 and 97-T-169, unreported¹, the Ohio Board of Tax Appeals reviewed this issue. Citing the *General Motors Corporation* 1981 case, the Board stated:

“* * * we reject GM’s assertion that R.C. 5701.03 proscribes the application of sales or use tax on the repair transactions issue. While R.C. 5701.03 provides that registered motor vehicles are not personal property, the statute serves only as an exclusion from the personal property tax. Under *Gen. Motors*, *supra*, however, the repair of a vehicle registered to the owner thereof is nevertheless a transaction in which an item of tangible personal property is repaired under R.C. 5739.01(B)(3). In essence, the question of whether a motor vehicle registered to the vehicle’s owner constitutes tangible personal property under R.C. 5701.03 becomes supererogative for purposes of levying sales and use tax on transactions made with respect to such vehicles.

Further, we agree with the commissioner that, had the General Assembly intended through R.C. 5701.03 to exclude the application of sales or use tax to transactions involving registered motor vehicles, there would be no need for the numerous provisions concerning motor vehicles within the sales and use tax statutes. *Celebrezze v. Hughes* (1985), 18 Ohio St. 3d 71; *Brown v. Martinelli* (1981), 66 Ohio St. 2d 45 (holding that the General Assembly is presumed not to have done a vain act). For example, see R.C. 5739.02(B)(33) [exempts the sale, lease, repair, and maintenance of motor vehicles used for transporting tangible personal property by a person engaged in highway transportation for hire], R.C. 5739.01(P) [limits the exception on tangible personal property used in the repair and maintenance of a public utility service to only those motor vehicles that are specifically designed and equipped for such use], and R.C. 5739.02(B)(8) [exemption on casual sales does not apply to motor vehicles that are required to be titled].

Based on the foregoing, the petitioner’s objection is denied.

¹ *General Motors Corporation v. Tracy* (October 4, 2002), BTA Nos. 97-T-168 and 97-T-169, unreported is currently on appeal to the Ohio Supreme Court. The appeal was filed November 1, 2002.

Use of Tangible Personal Property

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The petitioner next contends that it did not acquire title, possession or use any tangible personal property that may have been provided to vehicle owners by its dealers in the transactions underlying the Assessment. Consequently, it says, that it cannot be held liable for tax on the amounts paid for such property.

Response: R.C. 5741.02(A) levies an excise tax on the storage, use or other consumption of tangible personal property in Ohio and on the benefit realized in Ohio of any service provided. The definition of "use" in R.C. 5741.01 "* * * 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." The Warranty Administration Manual submitted indicates that pre authorization is required from the petitioner for repair coverage outside of the service contract plan term (e.g. vehicle exceeds months or mileage limits). In directing dealers to provide repair parts and services to vehicle owners, and agreeing to pay the dealers for the parts and services, the petitioner has purchased parts and services and exercised a right incidental to ownership of the parts and services.

The Ohio Board of Tax Appeals also examined this issue in *General Motors Corporation v. Tracy*, supra. Citing *Drackett Products Co. v. Limbach* (1988), 38 Ohio St. 3d 204, the Board stated:

In *Drackett*, the taxpayer paid several companies to produce advertising supplements, which were distributed to newspapers chosen by the taxpayer. The taxpayer argued that, as it did not obtain physical possession of the advertisements, the transactions were not subject to use tax. The court held that the use tax "*** contrary to appellant'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." * * * The court found that the taxpayer in *Drackett* had purchased the advertising supplements when it paid the consideration to the publisher to produce and distribute the supplements. Taking into account the fact that the taxpayer had selected the content of its ad, the newspapers in which the ad was placed, and the dates upon which the ads would run, the court held the taxpayer had exercised sufficient rights or powers incidental to ownership to subject its purchase of the supplement to the tax. "Thus," the court stated, "a use of tangible personal property occurs, under R.C. 5741.02(A) and 5741.01(C), when several advertisers, in concert, pay the cost for producing and distributing a publication that advertises their products."

* * *

Drackett illustrates that, where a party pays either for tangible personal property used by another under the party's direction or for services performed

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by another on the party's behalf, the party making the payment exercises rights or powers incidental to ownership that make the party subject to use tax. See *Louisville Title Agency for N.W. Ohio, Inc. v. Kosydar* (1975), 43 Ohio St. 2d 109 (exercise of rights incidental to ownership constitutes a taxable event). In the instant matter, GM paid dealers to perform repairs on GM's behalf, pursuant to GM's warranty program. The repairs were performed under the "Dealer Sales and Service Agreement," "Standard Provisions" and other manuals, to which the dealers are required to conform in making all warranty repairs. GM requires dealers to utilize only GM or GM-approved parts and accessories in performing warranty repairs or any other repairs paid for by GM. * * * GM determines the methods dealers may use in seeking credit for a warranty repair. GM may also specify those time and mileage restraints, if any, that apply to certain repairs for which GM will pay. In certain instances, such as with recalls, GM will also send dealers bulletins that specify what parts must be used and the manner in which the repair must be made. With respect to goodwill adjustments, GM receives the benefit of enjoying enhanced customer loyalty and appreciation. (Emphasis added)

* * *

Upon review, we find that GM has purchased the warranty repairs performed and has exercised sufficient rights or powers incidental to the ownership of repair parts to subject its purchases of such parts to use tax. * * * *Dractkett, supra.* We further find that GM realized the benefit of the repair services under R.C. 5741.01(N) in that the dealers performed the repairs on GM's behalf in order for GM to comply with the requirements of its warranty obligations.

As in *General Motors Corporation v. Tracy, supra*, the petitioner paid and authorized dealers to perform repairs on its behalf. The dealers were required to perform the repairs under the conditions set out in the Sales and Service Agreement, Warranty Administration Manual, and other manuals. The petitioner sets the policy on how the dealers must apply for claims reimbursements. Also, the petitioner establishes the time and/or mileage restraints that may apply to certain repairs made by the dealers. Finally, like GM, the petitioner receives the benefit of enhanced customer loyalty when paying the dealers for the goodwill repairs. Accordingly, the objection is denied.

Consumer

Next, the petitioner argues that it is not the consumer of parts and labor used in making the goodwill repairs to its customers' vehicles. It claims that the consumer is the person for whom the repair was provided that is, the owner of the repaired vehicle.

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Response: This contention is without merit. R.C. 5741.01(F) defines "consumer" as:

* * * 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.

The Ohio Board of Tax Appeals examined this issue in *General Motors Corporation v. Tracy*, supra, and stated the following:

At the outset, we observe that R.C. 5741.01(F) specifically excludes as a consumer those who receive tangible personal property or the benefit of a service without charge. Consequently, we find that the vehicle owners are not the consumers of the property and services at issue in the subject warranty repairs. (Emphasis added) *Sears v. Weimer* (1944), 143 Ohio St. 312, at paragraph five of the syllabus (an unambiguous statute is to be applied, not interpreted.).

Next, R.C. 5741.01(F) provides that a consumer is one who purchases tangible personal property or has been provided a service, other consumption, or benefit in this state. The parts and services provided under GM's warranty program were clearly purchased and used or received in Ohio. We have already concluded that under *Drackett*, supra, GM is the purchaser of the repair parts. GM also purchased the repair services. GM received the benefit of the repair services in that GM's dealers performed the services on GM's behalf in order to fulfill GM's warranty obligations to vehicle owners. Upon review, we therefore find that GM is a "consumer" under R.C. 5741.01(F) * *

Like the vehicle owners in the General Motors case, the owners of DaimlerChrysler vehicles who received goodwill repairs from the petitioner are not the consumers of the property and services in such repairs. The owners did not pay anything for the repairs made. Accordingly, pursuant to R.C. 5741.01(F), the vehicle owners are not the consumers.

Further as determined above, the petitioner is the purchaser of the repair parts and services used in making the goodwill repairs. The repair work was done on behalf of the petitioner in order that it might maintain good relations with the purchasers of its vehicles. The petitioner, through a pre authorization process, agreed to pay its dealers for the goodwill repairs provided to the vehicle owners. As the work was done for the benefit of the petitioner, and it is the third party payor for the repairs, it is the person for whom the service is provided. The petitioner bought the repairs and repair services and then gave them away to the purchasers of its vehicles.

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In *S. Rose, Inc. v. Limbach* (January 7, 1987), BTA Nos. 84-D-79 and 84-A-87, unreported, the Board held that the visitors' bureau that purchased chairs from S. Rose and later donated them to the convention center was the consumer of the chairs and liable for use tax on them. Similarly in the case here, the petitioner, the purchaser of the goodwill repairs that it gives away to the vehicle owners, is the consumer of the repairs.

Finally, as the consumer of the repair and repair services, the definition of "use" found in R.C. 5741.01(C) includes that "[a] thing is also 'used' in this state if its consumer gives or otherwise distributes it, without charge, to recipients in this state." Here the petitioner gives away the repairs and repair services to its customers to maintain a good relationship with them. The petitioner is the consumer of the goodwill repairs and thus owes the use tax thereon. The objection is denied.

Warranty

Next, the petitioner asserts that its use of the parts and repair services in question are excepted from tax under R.C. 5739.01(E)(13), as in effect during the audit period, now R.C. 5739.02(B)(43)(h), and incorporated into the use tax statute by R.C. 5741.02(C)(2).

Response: Former R.C. 5739.01(E)(13) provided the following:

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

* * *

(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; * * *.

The petitioner's reliance on the exception previously found in R.C. 5739.01(E)(13) is misplaced. First, the repairs and repair services performed were goodwill repairs. The work performed on customer vehicles was to correct problems that occurred beyond the end of any warranty or extended service agreement. At the time the repairs were performed there was no warranty contract in place that obligated the petitioner to pay for the repairs. Thus, R.C. 5739.01(E)(13) is not applicable. It must be noted that no evidence has been presented by the petitioner to show that any of the repairs in question were performed pursuant to a contractual obligation because the repair was the result of an abnormality in the vehicle that developed or existed during the contractual warranty period. *Mitsubishi Motor Sales of America, Inc. v. Zaino* (October 11, 2002), BTA No. 01-V-181, unreported. In the present matter, the customers paid nothing for the repairs performed by the dealers. The petitioner pre authorized and paid for the work done by dealers on its behalf and received the benefit of enhanced customer loyalty. As

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noted in the response above, the petitioner is a third party payor, and the consumer of the repairs and repair services. Accordingly, the objection is denied.

Resale

The petitioner next objects to the assessment claiming that the parts and labor purchased from dealers are excepted from tax for the reason that they were resold to the owners of the vehicles repaired.

Response: There is no merit to this claim. A sale requires that some form of consideration be paid. See R.C. 5739.01(B). The vehicle owners paid nothing for the repairs in question. The petitioner did not resell the parts and repair services that it purchased from the dealers to the vehicle owners. Instead, as determined above, the petitioner was a third party payor. The petitioner bought repairs and repair services from its dealers and gave them to the vehicle owners. In doing this, the petitioner derived the benefit of continued customer loyalty. The petitioner is the consumer of the repairs and repair services that it purchased. Accordingly, the objection is denied.

Manufacturing

The petitioner's final objection to the assessment is that the repairs and repair services purchased were incorporated into vehicles produced for sale or were used primarily in a manufacturing operation.

Response: This contention is without merit. Although the petitioner is a manufacturer of automobiles, the repairs in question are not part of its manufacturing process. DaimlerChrysler's customers have already purchased the finished product that the petitioner manufactured, the motor vehicles. The objection is denied.

The request for remission of the penalty is allowed.

Accordingly, the assessment will stand as adjusted in the following amount:

	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Use Tax	\$1,303,631.64	\$0.00	\$1,303,631.64
Preassessment Interest	299,777.58	0.00	<u>299,777.58</u>
		Total-----	\$1,603,409.22

Current records indicate that no payments have been made 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.

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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

J. Patrick McAndrew
J. PATRICK MCANDREW
TAX COMMISSIONER

/s/ J. Patrick McAndrew

J. Patrick McAndrew
Tax Commissioner

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FINAL DETERMINATION

Date: DEC 18 2003

DaimlerChrysler Corporation
Attn. Lee Sweet
Office of Tax Affairs 483-00-33
800 Chrysler Drive
Auburn Hills, MI 48326-2757

Re: Assessment No. 7020417319
Use Tax
Direct Pay Permit No. 98-000843

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

	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Use Tax	\$2,313,834.25	\$115,691.71	\$2,429,525.96
Preassessment Interest	573,519.45	0.00	<u>573,519.45</u>
	Total-----		\$3,003,045.41

The petitioner is a manufacturer of automobiles. It provides a warranty with each new vehicle sold. The basic warranty is a contract between the petitioner and vehicle owners that covers the cost of parts and labor needed to repair most items on a Chrysler vehicle that are found to be defective in material, workmanship, or factory preparation within a definite period, e.g. 3 years or 36,000 miles. However, in some cases the petitioner will agree to repair vehicles even though the defined period assigned by the warranty contract has expired. These repairs are termed "goodwill repairs." Goodwill repairs are performed at DaimlerChrysler dealers at no charge to the vehicle owners. The petitioner reimburses its dealers for the cost of the goodwill repairs. This assessment is the result of an audit of goodwill repairs covering the period of January 1, 1998 through December 31, 2000. The petitioner objected to the assessment and filed a petition for reassessment. A hearing was duly held. The petitioner's objections are stated below followed by the tax commissioner's response.

Motor Vehicles as Tangible Personal Property

The petitioner contends that registered motor vehicles do not constitute personal property for Ohio tax purposes under R.C. 5701.03(A). Consequently, it says, the goodwill repairs performed by dealers on customer vehicles do not involve a repair of personal property and are therefore not subject to tax.

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Response: The definition cited pertains only to personal property tax. In *General Motors Corp. v. Lindley* (1981), 67 Ohio St. 2d 331, the Court affirmed a finding by the Ohio Board of Tax Appeals that the exclusion from taxation contained in R.C. 5701.03 pertains only to *ad valorem* taxes on the property itself, and not to use tax, which is an excise tax on an activity.

Further, in *General Motors Corporation v. Tracy* (October 4, 2002), BTA Nos. 97-T-168 and 97-T-169, unreported¹, the Ohio Board of Tax Appeals reviewed this same issue. Citing the 1981 *General Motors Corporation* case the Board stated:

* * * we reject GM's assertion that R.C. 5701.03 proscribes the application of sales or use tax on the repair transactions issue. While R.C. 5701.03 provides that registered motor vehicles are not personal property, the statute serves only as an exclusion from the personal property tax. Under *Gen. Motors*, supra, however, the repair of a vehicle registered to the owner thereof is nevertheless a transaction in which an item of tangible personal property is repaired under R.C. 5739.01(B)(3). In essence, the question of whether a motor vehicle registered to the vehicle's owner constitutes tangible personal property under R.C. 5701.03 becomes supererogative for purposes of levying sales and use tax on transactions made with respect to such vehicles.

Further, we agree with the commissioner that, had the General Assembly intended through R.C. 5701.03 to exclude the application of sales or use tax to transactions involving registered motor vehicles, there would be no need for the numerous provisions concerning motor vehicles within the sales and use tax statutes. *Celebrezze v. Hughes* (1985), 18 Ohio St. 3d 71; *Brown v. Martinelli* (1981), 66 Ohio St. 2d 45 (holding that the General Assembly is presumed not to have done a vain act). For example, see R.C. 5739.02(B)(33) [exempts the sale, lease, repair, and maintenance of motor vehicles used for transporting tangible personal property by a person engaged in highway transportation for hire], R.C. 5739.01(P) [limits the exception on tangible personal property used in the repair and maintenance of a public utility service to only those motor vehicles that are specifically designed and equipped for such use], and R.C. 5739.02(B)(8) [exemption on casual sales does not apply to motor vehicles that are required to be titled].

* * *

Based on the foregoing, the petitioner's objection is denied.

¹ *General Motors Corporation v. Tracy* (October 4, 2002), BTA Nos. 97-T-168 and 97-T-169, unreported is currently on appeal to the Ohio Supreme Court. The appeal was filed November 1, 2002.

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Use of Tangible Personal Property

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The petitioner next contends that it did not acquire title, possession or use any tangible personal property, or realize any benefit from personalty, that may have been provided to vehicle owners by its dealers in the transactions underlying the Assessment. Consequently, it says, that it cannot be held liable for tax on the amounts paid for such property.

Response: R.C. 5741.02(A) levies an excise tax on the storage, use or other consumption of tangible personal property in Ohio and on the benefit realized in Ohio of any service provided. The definition of "use" in R.C. 5741.01 "* * * 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." The Warranty Administration Manual submitted indicates that pre authorization is required from the petitioner for repair coverage outside of the service contract plan term (e.g. vehicle exceeds months or mileage limits). In directing dealers to provide repair parts and services to vehicle owners, and agreeing to pay the dealers for the parts and services, the petitioner has purchased parts and services and exercised a right incidental to ownership of the parts and services.

The Ohio Board of Tax Appeals also examined this issue in *General Motors Corporation v. Tracy*, supra. Citing *Drackett Products Co. v. Limbach* (1988), 38 Ohio St. 3d 204, the Board stated:

In *Drackett*, the taxpayer paid several companies to produce advertising supplements, which were distributed to newspapers chosen by the taxpayer. The taxpayer argued that, as it did not obtain physical possession of the advertisements, the transactions were not subject to use tax. The court held that the use tax "**** contrary to appellant'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." * * * The court found that the taxpayer in *Drackett* had purchased the advertising supplements when it paid the consideration to the publisher to produce and distribute the supplements. Taking into account the fact that the taxpayer had selected the content of its ad, the newspapers in which the ad was placed, and the dates upon which the ads would run, the court held the taxpayer had exercised sufficient rights or powers incidental to ownership to subject its purchase of the supplement to the tax. "Thus," the court stated, "a use of tangible personal property occurs, under R.C. 5741.02(A) and 5741.01(C), when several advertisers, in concert, pay the cost for producing and distributing a publication that advertises their products."

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Drackett illustrates that, where a party pays either for tangible personal property used by another under the party's direction or for services performed by another on the party's behalf, the party making the payment exercises rights or powers incidental to ownership that make the party subject to use tax. See *Louisville Title Agency for N.W. Ohio, Inc. v. Kosydar* (1975), 43 Ohio St. 2d 109 (exercise of rights incidental to ownership constitutes a taxable event). In the instant matter, GM paid dealers to perform repairs on GM's behalf, pursuant to GM's warranty program. The repairs were performed under the "Dealer Sales and Service Agreement," "Standard Provisions" and other manuals, to which the dealers are required to conform in making all warranty repairs. GM requires dealers to utilize only GM or GM-approved parts and accessories in performing warranty repairs or any other repairs paid for by GM. * * * GM determines the methods dealers may use in seeking credit for a warranty repair. GM may also specify those time and mileage restraints, if any, that apply to certain repairs for which GM will pay. In certain instances, such as with recalls, GM will also send dealers bulletins that specify what parts must be used and the manner in which the repair must be made. With respect to goodwill adjustments, GM receives the benefit of enjoying enhanced customer loyalty and appreciation. (Emphasis added)

* * *

Upon review, we find that GM has purchased the warranty repairs performed and has exercised sufficient rights or powers incidental to the ownership of repair parts to subject its purchases of such parts to use tax. * * * *Drackett*, supra. We further find that GM realized the benefit of the repair services under R.C. 5741.01(N) in that the dealers performed the repairs on GM's behalf in order for GM to comply with the requirements of its warranty obligations.

As in *General Motors Corporation v. Tracy*, supra, the petitioner paid and authorized dealers to perform repairs on its behalf. The dealers were required to perform the repairs under the conditions set out in the Sales and Service Agreement, Warranty Administration Manual, and other manuals. The petitioner sets the policy on how the dealers must apply for claims reimbursements. Also, the petitioner establishes the time and/or mileage restraints that may apply to certain repairs made by the dealers. Finally, like GM, the petitioner receives the benefit of enhanced customer loyalty when paying the dealers for the goodwill repairs. Accordingly, the objection is denied.

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Consumer

Next, the petitioner argues that it is not the consumer of parts and labor used in making the goodwill repairs to its customers' vehicles. It claims that the consumer is the person for whom the repair was provided that is, the owner of the repaired vehicle.

Response: This contention is without merit. R.C. 5741.01(F) defines "consumer" as:

* * * 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.

The Ohio Board of Tax Appeals examined this issue in *General Motors Corporation v. Tracy*, supra, and stated the following:

At the outset, we observe that R.C. 5741.01(F) specifically excludes as a consumer those who receive tangible personal property or the benefit of a service without charge. Consequently, we find that the vehicle owners are not the consumers of the property and services at issue in the subject warranty repairs. (Emphasis added) *Sears v. Weimer* (1944), 143 Ohio St. 312, at paragraph five of the syllabus (an unambiguous statute is to be applied, not interpreted.).

Next, R.C. 5741.01(F) provides that a consumer is one who purchases tangible personal property or has been provided a service, other consumption, or benefit in this state. The parts and services provided under GM's warranty program were clearly purchased and used or received in Ohio. We have already concluded that under *Drackett*, supra, GM is the purchaser of the repair parts. GM also purchased the repair services. GM received the benefit of the repair services in that GM's dealers performed the services on GM's behalf in order to fulfill GM's warranty obligations to vehicle owners. Upon review, we therefore find that GM is a "consumer" under R.C. 5741.01(F) * *

Like the vehicle owners in the General Motors case, the owners of DaimlerChrysler vehicles who received goodwill repairs from the petitioner are not the consumers of the property and services in such repairs. The owners did not pay anything for the repairs made. Accordingly, pursuant to R.C. 5741.01(F), the vehicle owners are not the consumers.

Further as determined above, the petitioner is the purchaser of the repair parts and services used in making the goodwill repairs. It exercises rights incidental to ownership over the

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repair and repair services purchased. The repair work was done on behalf of the petitioner in order that it might maintain good relations with the purchasers of its vehicles. The petitioner, through a pre authorization process, agreed to pay its dealers for the goodwill repairs provided to the vehicle owners. As the work was done for the benefit of the petitioner, and it is the third party payor for the repairs, it is the person for whom the service is provided. The petitioner bought the repairs and repair services and then gave them away to the purchasers of its vehicles.

In *S. Rose, Inc. v. Limbach* (January 7, 1987), BTA Nos. 84-D-79 and 84-A-87, unreported, the Board held that the visitors' bureau that purchased chairs from S. Rose and later donated them to the convention center was the consumer of the chairs and liable for use tax on them. Similarly in the case here, the petitioner, the purchaser of the goodwill repairs that it gives away to the vehicle owners, is the consumer of the repairs.

Finally, as the consumer of the repair and repair services, the definition of "use" found in R.C. 5741.01(C) includes that "[a] thing is also 'used' in this state if its consumer gives or otherwise distributes it, without charge, to recipients in this state." Here the petitioner gives away the repairs and repair services to its customers to maintain a good relationship with them. The petitioner is the consumer of the goodwill repairs and thus owes the use tax thereon. The objection is denied.

Resale

The petitioner next objects to the assessment claiming that the parts and labor purchased from dealers are excepted from tax for the reason that they were resold to the owners of the vehicles repaired.

Response: There is no merit to this claim. A sale requires that some form of consideration be paid. See R.C. 5739.01(B). The vehicle owners paid nothing for the repairs in question. The petitioner did not resell the parts and repair services that it purchased from the dealers to the vehicle owners. Instead, as determined above, the petitioner is a third party payor. The petitioner bought repairs and repair services from its dealers and gave them to the vehicle owners. In doing this, the petitioner derived the benefit of continued customer loyalty. The petitioner is the consumer of the repairs and repair services that it purchased. Accordingly, the objection is denied.

Double Taxation

The petitioner objects to the assessment on the basis of double taxation. It contends that "[t]he amount charged for a new motor vehicle includes the anticipated cost of repairs to be performed in the future under DCC's warranty program." Accordingly, it says that tax was paid at the time the vehicles were purchased and to assess tax on the repairs and repair services separately here results in double taxation.

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(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; * * *.

The petitioner's reliance on the exception previously found in R.C. 5739.01(E)(13) is misplaced. First, the repairs and repair services performed were goodwill repairs. The work performed on customer vehicles was to correct problems that occurred beyond the end of any warranty or extended service agreement. At the time the repairs were performed there was no warranty contract in place that obligated the petitioner to pay for the repairs. Thus, R.C. 5739.01(E)(13) is not applicable. It must be noted that no evidence has been presented by the petitioner to show that any of the repairs in question were performed pursuant to a contractual obligation because the repair was the result of an abnormality in the vehicle that developed or existed during the contractual warranty period. *Mitsubishi Motor Sales of America, Inc. v. Zaino* (October 11, 2002), BTA No. 01-V-181, unreported. In the present matter, the customers paid nothing for the repairs performed by the dealers. The petitioner pre authorized and paid for the work done by dealers on its behalf and received the benefit of enhanced customer loyalty. As noted in the response above, the petitioner is a third party payor, and the consumer of the repairs and repair services. Accordingly, the objection is denied.

"Consumer" as defined in the Sales Tax Statute

The petitioner objects to the assessment based on the definition of consumer found in R.C. 5739.01(D)(5).

Response: The petitioner's reliance on the definition of consumer in the sales tax statute is misplaced. The petitioner was assessed use tax pursuant to R.C. 5741.02(A). The definition of consumer for use tax purposes, as noted above, is found in R.C. 5741.01(F). As fully discussed above, the petitioner is the purchaser of the repairs in question and use tax was properly assessed on the transactions. Accordingly, this objection is denied.

The request for remission of the penalty is allowed.

Accordingly, the assessment will stand as adjusted in the following amount:

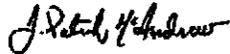
	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Use Tax	\$2,313,834.25	\$0.00	\$2,313,834.25
Preassessment Interest	573,519.45	0.00	<u>573,519.45</u>
	Total-----		\$2,887,353.70

DEC 18 2003

Current records indicate that no payments have been made 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 above-referenced totals.

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



J. PATRICK MCANDREW
TAX COMMISSIONER

/s/ J. Patrick McAndrew

J. Patrick McAndrew
Tax Commissioner

TITLE 57. TAXATION
CHAPTER 5717. APPEALS

ORC Ann. 5717.04 (2006)

§ 5717.04. Appeal from decision of board of tax appeals to supreme court; parties who may appeal; certification

The proceeding to obtain a reversal, vacation, or modification of a decision of the board of tax appeals shall be by appeal to the supreme court or the court of appeals for the county in which the property taxed is situate or in which the taxpayer resides. If the taxpayer is a corporation, then the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the supreme court or to the court of appeals for the county in which the property taxed is situate, or the county of residence of the agent for service of process, tax notices, or demands, or the county in which the corporation has its principal place of business. In all other instances, the proceeding to obtain such reversal, vacation, or modification shall be by appeal to the court of appeals for Franklin county.

Appeals from decisions of the board determining appeals from decisions of county boards of revision may be instituted by any of the persons who were parties to the appeal before the board of tax appeals, by the person in whose name the property involved in the appeal is listed or sought to be listed, if such person was not a party to the appeal before the board of tax appeals, or by the county auditor of the county in which the property involved in the appeal is located.

Appeals from decisions of the board of tax appeals determining appeals from final determinations by the tax commissioner of any preliminary, amended, or final tax assessments, reassessments, valuations, determinations, findings, computations, or orders made by the commissioner may be instituted by any of the persons who were parties to the appeal or application before the board, by the person in whose name the property is listed or sought to be listed, if the decision appealed from determines the valuation or liability of property for taxation and if any such person was not a party to the appeal or application before the board, by the taxpayer or any other person to whom the decision of the board appealed from was by law required to be certified, by the director of budget and management, if the revenue affected by the decision of the board appealed from would accrue primarily to the state treasury, by the county auditor of the county to the undivided general tax funds of which the revenues affected by the decision of the board appealed from would primarily accrue, or by the tax commissioner.

Appeals from decisions of the board upon all other appeals or applications filed with and determined by the board may be instituted by any of the persons who were parties to such appeal or application before the board, by any persons to whom the decision of the board appealed from was by law required to be certified, or by any other person to whom the board certified the decision appealed from, as authorized by *section 5717.03 of the Revised Code*.

Such appeals shall be taken within thirty days after the date of the entry of the decision of the board on the journal of its proceedings, as provided by such section, by the filing by appellant of a notice of appeal with the court to which the appeal is taken and the board. If a timely notice of appeal is filed by a party, any other party may file a notice of appeal within ten days of the date on which the first notice of appeal was filed or within the time otherwise prescribed in this section, whichever is later. A notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of. Proof of the filing of such notice with the board shall be filed with the court to which the appeal is being taken. The court in which notice of appeal is first filed shall have exclusive jurisdiction of the appeal.

In all such appeals the tax commissioner or all persons to whom the decision of the board appealed from is required by such section to be certified, other than the appellant, shall be made appellees. Unless waived, notice of the appeal shall be served upon all appellees by certified mail. The prosecuting attorney shall represent the county auditor in any such appeal in which the auditor is a party.

The board, upon written demand filed by an appellant, shall within thirty days after the filing of such demand file with the court to which the appeal is being taken a certified transcript of the record of the proceedings of the board pertaining to the decision complained of and the evidence considered by the board in making such decision.

If upon hearing and consideration of such record and evidence the court decides that the decision of the board appealed from is reasonable and lawful it shall affirm the same, but if the court decides that such decision of the board is unreasonable or unlawful, the court shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.

The clerk of the court shall certify the judgment of the court to the board, which shall certify such judgment to such public officials or take such other action in connection therewith as is required to give effect to the decision. The "taxpayer" includes any person required to return any property for taxation.

Any party to the appeal shall have the right to appeal from the judgment of the court of appeals on questions of law, as in other cases.

HISTORY:

GC § 5611-2; 107 v. 550; 116 v 104(123), § 2; 118 v 344(355); 119 v 34(49); Bureau of Code Revision, 10-1-53; 125 v 250 (Eff 10-2-53); 135 v S 174 (Eff 12-4-73); 137 v H 634 (Eff 8-15-77); 140 v H 260 (Eff 9-27-83); 142 v H 231. Eff 10-5-87.

TITLE 57. TAXATION
CHAPTER 5739. SALES TAX

ORC Ann. 5739.01 (2006)

§ 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 not be subject to 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 not be subject to 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) Until August 1, 2003, industrial laundry cleaning services are or are to be provided and, on and after August 1, 2003, laundry and dry 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, including prepaid calling service, prepaid wireless calling service, or ancillary service, is or is to be provided, but not including coin-operated telephone service;

(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;

(p) On and after August 1, 2003, satellite broadcasting service is or is to be provided;

(q) On and after August 1, 2003, personal care service is or is to be provided to an individual. As used in this division, "personal care service" includes skin care, the application of cosmetics, manicuring, pedicuring, hair removal, tattooing, body piercing, tanning, massage, and other similar services. "Personal care service" does not include a service provided by or on the order of a licensed physician or licensed chiropractor, or the cutting, coloring, or styling of an individual's hair.

(r) On and after August 1, 2003, the transportation of persons by motor vehicle or aircraft is or is to be provided, when the transportation is entirely within this state, except for transportation provided by an ambulance service, by a transit bus, as defined in *section 5735.01 of the Revised Code*, and transportation provided by a citizen of the United States holding a certificate of public convenience and necessity issued under *49 U.S.C. 41102*;

(s) On and after August 1, 2003, motor vehicle towing service is or is to be provided. As used in this division, "motor vehicle towing service" means the towing or conveyance of a wrecked, disabled, or illegally parked motor vehicle.

(t) On and after August 1, 2003, snow removal service is or is to be provided. As used in this division, "snow removal service" means the removal of snow by any mechanized means, but does not include the providing of such service by a person that has less than five thousand dollars in sales of such service during the calendar year.

(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.

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) The transfer of copyrighted motion picture films used solely for advertising purposes, except that the transfer of such films for exhibition purposes is not a sale.

(9) On and after August 1, 2003, all transactions by which tangible personal property is or is to be stored, except such property that the consumer of the storage holds for sale in the regular course of business.

Except as provided in this section, "sale" and "selling" do not include transfers of interest in leased property where the original lessee and the terms of the original lease agreement remain unchanged, or professional, insurance, or personal service transactions that involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

(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 exemption under division (B)(42)(f) of *section 5739.02 of the Revised Code* 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.

(6) A person who engages in highway transportation for hire is the consumer of all packaging materials purchased by that person and used in performing the service, except for packaging materials sold by such person in a transaction separate from the service.

(E) "Retail sale" and "sales at retail" include all sales, except those 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.

(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 itself out to the public as conducting such business. Making a casual sale is not engaging in business.

(H) (1) (a) "Price," except as provided in divisions (H)(2) and (3) of this section, means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

(i) The vendor's cost of the property sold;

(ii) The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the vendor, all taxes imposed on the vendor, including the tax imposed under Chapter 5751. of the Revised Code, and any other expense of the vendor;

(iii) Charges by the vendor for any services necessary to complete the sale;

(iv) On and after August 1, 2003, delivery charges. As used in this division, "delivery charges" means charges by the vendor for preparation and delivery to a location designated by the consumer of tangible personal property or a service, including transportation, shipping, postage, handling, crating, and packing.

(v) Installation charges;

(vi) Credit for any trade-in.

(b) "Price" includes consideration received by the vendor from a third party, if the vendor actually receives the consideration from a party other than the consumer, and the consideration is directly related to a price reduction or discount on the sale; the vendor has an obligation to pass the price reduction or discount through to the consumer; the amount of the consideration attributable to the sale is fixed and determinable by the vendor at the time of the sale of the item to the consumer; and one of the following criteria is met:

(i) The consumer presents a coupon, certificate, or other document to the vendor to claim a price reduction or discount where the coupon, certificate, or document is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any vendor to whom the coupon, certificate, or document is presented;

(ii) The consumer identifies the consumer's self to the seller as a member of a group or organization entitled to a price reduction or discount. A preferred customer card that is available to any patron does not constitute membership in such a group or organization.

(iii) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the consumer, or on a coupon, certificate, or other document presented by the consumer.

(c) "Price" does not include any of the following:

(i) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a vendor and taken by a consumer on a sale;

(ii) Interest, financing, and carrying charges from credit extended on the sale of tangible personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer. For the purpose of this division, the tax imposed under Chapter 5751. of the Revised Code is not a tax directly on the consumer, even if the tax or a portion thereof is separately stated.

(iv) Notwithstanding divisions (H)(1)(b)(i) to (iii) of this section, any discount allowed by an automobile manufacturer to its employee, or to the employee of a supplier, on the purchase of a new motor vehicle from a new motor vehicle dealer in this state.

(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 [1547.54.3] 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 this division, "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 [5739.12.1] 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 that was obtained by the person making the sale, through purchase or otherwise, for the person's own use and was previously subject to any state's taxing jurisdiction on its sale or use, and includes such items acquired for the seller's use that 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 the 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 that is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and that 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 directly in the rendition of a public utility service. In this definition, "public utility" includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under *49 U.S.C. 41102*.

(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 that 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 that includes territory in more than one county must include all the area of the most populous county that 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 that 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 that 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;

*** THIS DOCUMENT IS CURRENT THROUGH OCTOBER 10, 1996 ***

TITLE LVII [57] TAXATION
CHAPTER 5739: SALES TAX

ORC Ann. 5739.01 (Anderson 1996)

§ 5739.01 Definitions.

As used in this chapter:

(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 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 [5739.01.1] 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 divi-

*** THIS DOCUMENT IS CURRENT THROUGH DECEMBER 31, 1997 ***

TITLE LVII [57] TAXATION
CHAPTER 5739: SALES TAX

ORC Ann. 5739.01 (Anderson 1998)

§ 5739.01 Definitions.

As used in this chapter:

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

(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.

(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 the production of tangible personal property, except printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter, for sale by manufacturing, processing, refining, or 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; or directly in making retail sales or 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 or consume the thing transferred directly in the transformation or conversion of coal into coke;

(10) 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.

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 his 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.

All sales are presumed to occur at the vendor's place of business, except that sales described in division (B)(3)(e) of this section are presumed to occur at the location of the consumer where the service is performed or received.

(F) "Business" includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect.

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

(H)(1) "Price," except as provided in division (H)(2) 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 or discount paid or allowed after the sale is consummated, or any other expense. Except in the case of sales described in division (B)(3) of this section, price does not include the consideration received for labor or services used in installing or applying the property sold, the consideration received as a deposit refundable to the consumer upon return of a container for a beverage, or the consideration received as a deposit on a carton or case that is used for such returnable containers, if the consideration for such services or 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

(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 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 PURSUANT TO DIVISION (B)(7) OF THIS SECTION;

(10) 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;

(11) TO USE THE BENEFIT OF A WARRANTY, MAINTENANCE 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.

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 his 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.

All sales are presumed to occur at the vendor's place of business, except that sales described in division (B)(3)(e) of this section are presumed to occur at the location of the consumer where the service is performed or received.

Sales described in ~~division~~ DIVISIONS (B)(3)(f) AND (i) of this section charged in the records of the TELEPHONE COMPANY OR telecommunications service vendor to a telephone number or account in this state are deemed to occur at the location of the telephone number or account as reflected in those records. Sales described in division (B)(3)(f) of

(b) "Portable grain bin" means a structure that is used or to be used by a person engaged in farming or agriculture to shelter his 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 non-profit 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 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 RE-SALE 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.

(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 him;

(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 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,

TITLE 57. TAXATION
CHAPTER 5739. SALES TAX

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 5739.011 (2006)

§ 5739.011. Exemptions applicable to manufacturers

(A) As used in this section:

(1) "Manufacturer" means a person who is engaged in manufacturing, processing, assembling, or refining a product for sale and, solely for the purposes of division (B)(12) of this section, a person who meets all the qualifications of that division.

(2) "Manufacturing facility" means a single location where a manufacturing operation is conducted, including locations consisting of one or more buildings or structures in a contiguous area owned or controlled by the manufacturer.

(3) "Materials handling" means the movement of the product being or to be manufactured, during which movement the product is not undergoing any substantial change or alteration in its state or form.

(4) "Testing" means a process or procedure to identify the properties or assure the quality of a material or product.

(5) "Completed product" means a manufactured item that is in the form and condition as it will be sold by the manufacturer. An item is completed when all processes that change or alter its state or form or enhance its value are finished, even though the item subsequently will be tested to ensure its quality or be packaged for storage or shipment.

(6) "Continuous manufacturing operation" means the process in which raw materials or components are moved through the steps whereby manufacturing occurs. Materials handling of raw materials or parts from the point of receipt or preproduction storage or of a completed product, to or from storage, to or from packaging, or to the place from which the completed product will be shipped, is not a part of a continuous manufacturing operation.

(B) For purposes of division (B)(42)(g) of *section 5739.02 of the Revised Code*, the "thing transferred" includes, but is not limited to, any of the following:

(1) Production machinery and equipment that act upon the product or machinery and equipment that treat the materials or parts in preparation for the manufacturing operation;

(2) Materials handling equipment that moves the product through a continuous manufacturing operation; equipment that temporarily stores the product during the manufacturing operation; or, excluding motor vehicles licensed to operate on public highways, equipment used in intraplant or interplant transfers of work in process where the plant or plants between which such transfers occur are manufacturing facilities operated by the same person;

(3) Catalysts, solvents, water, acids, oil, and similar consumables that interact with the product and that are an integral part of the manufacturing operation;

(4) Machinery, equipment, and other tangible personal property used during the manufacturing operation that control, physically support, produce power for, lubricate, or are otherwise necessary for the functioning of production machinery and equipment and the continuation of the manufacturing operation;

(5) Machinery, equipment, fuel, power, material, parts, and other tangible personal property used to manufacture machinery, equipment, or other tangible personal property used in manufacturing a product for sale;

(6) Machinery, equipment, and other tangible personal property used by a manufacturer to test raw materials, the product being manufactured, or the completed product;

(7) Machinery and equipment used to handle or temporarily store scrap that is intended to be reused in the manufacturing operation at the same manufacturing facility;

(8) Coke, gas, water, steam, and similar substances used in the manufacturing operation; machinery and equipment used for, and fuel consumed in, producing or extracting those substances; machinery, equipment, and other tangible personal property used to treat, filter, pump, or otherwise make the substance suitable for use in the manufacturing operation; and machinery and equipment used for, and fuel consumed in, producing electricity for use in the manufacturing operation;

(9) Machinery, equipment, and other tangible personal property used to transport or transmit electricity, coke, gas, water, steam, or similar substances used in the manufacturing operation from the point of generation, if produced by the manufacturer, or from the point where the substance enters the manufacturing facility, if purchased by the manufacturer, to the manufacturing operation;

(10) Machinery, equipment, and other tangible personal property that treats, filters, cools, refines, or otherwise renders water, steam, acid, oil, solvents, or similar substances used in the manufacturing operation reusable, provided that the substances are intended for reuse and not for disposal, sale, or transportation from the manufacturing facility;

(11) Parts, components, and repair and installation services for items described in division (B) of this section.

(12) Machinery and equipment, detergents, supplies, solvents, and any other tangible personal property located at a manufacturing facility that are used in the process of removing soil, dirt, or other contaminants from, or otherwise preparing in a suitable condition for use, towels, linens, articles of clothing, floor mats, mop heads, or other similar items, to be supplied to a consumer as part of laundry and dry cleaning services as defined in division (BB) of *section 5739.01 of the Revised Code*, only when the towels, linens, articles of clothing, floor mats, mop heads, or other similar items belong to the provider of the services;

(13) Equipment and supplies used to clean processing equipment that is part of a continuous manufacturing operation to produce milk, ice cream, yogurt, cheese, and similar dairy products for human consumption.

(C) For purposes of division (B)(42)(g) of *section 5739.02 of the Revised Code*, the "thing transferred" does not include any of the following:

(1) Tangible personal property used in administrative, personnel, security, inventory control, record-keeping, ordering, billing, or similar functions;

(2) Tangible personal property used in storing raw materials or parts prior to the commencement of the manufacturing operation or used to handle or store a completed product, including storage that actively maintains a completed product in a marketable state or form;

(3) Tangible personal property used to handle or store scrap or waste intended for disposal, sale, or other disposition, other than reuse in the manufacturing operation at the same manufacturing facility;

(4) Tangible personal property that is or is to be incorporated into realty;

(5) Machinery, equipment, and other tangible personal property used for ventilation, dust or gas collection, humidity or temperature regulation, or similar environmental control, except machinery, equipment, and other tangible personal property that totally regulates the environment in a special and limited area of the manufacturing facility where the regulation is essential for production to occur;

(6) Tangible personal property used for the protection and safety of workers, unless the property is attached to or incorporated into machinery and equipment used in a continuous manufacturing operation;

(7) Tangible personal property used to store fuel, water, solvents, acid, oil, or similar items consumed in the manufacturing operation;

(8) Except as provided in division (B)(13) of this section, machinery, equipment, and other tangible personal property used to clean, repair, or maintain real or personal property in the manufacturing facility;

(9) Motor vehicles registered for operation on public highways.

(D) For purposes of division (B)(42)(g) of *section 5739.02 of the Revised Code*, if the "thing transferred" is a machine used by a manufacturer in both a taxable and an exempt manner, it shall be totally taxable or totally exempt from taxation based upon its quantified primary use. If the "things transferred" are fungibles, they shall be taxed based upon the proportion of the fungibles used in a taxable manner.

TITLE 57. TAXATION
CHAPTER 5739. SALES TAX

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 5739.02 (2006)

§ 5739.02. Levy of sales 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.

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

(42) Sales where the purpose of the purchaser is to do any of the following:

(k) 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 *section 5739.01 of the Revised Code*;

TITLE 57. TAXATION
CHAPTER 5741. USE TAX; STORAGE TAX

GO TO CODE ARCHIVE DIRECTORY FOR THIS JURISDICTION

ORC Ann. 5741.01 (2006)

§ 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 the person operates, or from whom the person obtains tangible personal property, sold by the person for storage, use, or other consumption in this state, irrespective of whether or not the person is making such sales on the person's own behalf, or on behalf of such dealer, distributor, supervisor, or employer, the commissioner may regard the person 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) of *section 5739.01 of the Revised Code*.

(G) (1) "Price," except as provided in

divisions (G)(2) to (6) of this section, has the same meaning as in division (H)(1) of *section 5739.01 of the Revised Code*.

(2) In the case of watercraft, outboard motors, or new motor vehicles, "price" has the same meaning as in divisions (H)(2) and (3) 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 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.

(6) If a consumer produces tangible personal property for sale and removes that property from inventory for the consumer's own use, the price is the produced cost of that tangible personal property.

(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 defined 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;

(7) Except as provided in *section 5703.65 of the Revised Code*, 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.

(O) "Lease" or "rental" has the same meaning as in division (UU) of *section 5739.01 of the Revised Code*.

(P) "Certified service provider" has the same meaning as in *section 5740.01 of the Revised Code*.

HISTORY:

GC § 5546-25; 116 v PtII, 101; 116 v PtII, 346; 117 v 751; 119 v 389, § 2; 121 v 247; 122 v 725; Bureau of Code Revision, 10-1-53; 127 v 133; 128 v 421(436) (Eff 7-1-59); 129 v 1164(1175) (Eff 1-1-62); 132 v H 919 (Eff 12-12-67); 135 v S 544 (Eff 6-29-74); 136 v H 1 (Eff 6-13-75); 139 v H 275 (Eff 8-1-81); 139 v H 694 (Eff 11-15-81); 139 v H 694, § 205 (Eff 8-1-82); 139 v H 671 (Eff 12-9-81); 139 v H 671, § 3 (Eff 8-1-82); 141 v H 583 (Eff 2-20-86); 142 v H 231 (Eff 10-5-87); 143 v H 365 (Eff 4-1-90); 143 v S 303 (Eff 7-18-90); 144 v H 298 (Eff 8-1-91); 145 v H 152 (Eff 7-1-93); 146 v H 61 (Eff 10-25-95); 149 v H 405 (Eff 12-13-2001); 149 v S 143 (Eff 6-21-2002); 149 v H 524 (Eff 6-28-2002); 149 v S 200, Eff 9-6-2002; 150 v H 95, § 1, eff. 6-26-03.

TITLE 57. TAXATION
CHAPTER 5741. USE TAX; STORAGE TAX

ORC Ann. 5741.02 (2006)

§ 5741.02. Levy of tax; rate; exemptions

(A) (1) 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 as provided in *section 5739.025 [5739.02.5] of the Revised Code*, provided that on and after July 1, 2003, and on or before June 30, 2005, the rate of the tax shall be six per cent. On and after July 1, 2005, the rate of the tax shall be five and one-half per cent.

(2) In the case of the lease or rental, with a fixed term of more than thirty days or an indefinite term with a minimum period of more than thirty days, of any motor vehicles designed by the manufacturer to carry a load of not more than one ton, watercraft, outboard motor, or aircraft, or of any tangible personal property, other than motor vehicles designed by the manufacturer to carry a load of more than one ton, to be used by the lessee or renter primarily for business purposes, the tax shall be collected by the seller at the time the lease or rental is consummated and shall be calculated by the seller on the basis of the total amount to be paid by the lessee or renter under the lease or rental agreement. If the total amount of the consideration for the lease or rental includes amounts that are not calculated at the time the lease or rental is executed, the tax shall be calculated and collected by the seller at the time such amounts are billed to the lessee or renter. In the case of an open-end lease or rental, the tax shall be calculated by the seller on the basis of the total amount to be paid during the initial fixed term of the lease or rental, and for each subsequent renewal period as it comes due. As used in this division, "motor vehicle" has the same meaning as in *section 4501.01 of the Revised Code*, and "watercraft" includes an outdrive unit attached to the watercraft.

(3) Except as provided in division (A)(2) of this section, in the case of a transaction, the price of which consists in whole or part of the lease or rental of tangible personal property, the tax shall be measured by the installments of those leases or rentals.

(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*;

MICHIGAN COMPILED LAWS SERVICE

CHAPTER 205 TAXATION
USE TAX ACT

MCLS § 205.94 (2006)

MCL § 205.94

§ 205.94. Exemptions.

Sec. 4. (1) The following are exempt from the tax levied under this act, subject to subsection (2):

(a) Property sold in this state on which transaction a tax is paid under the general sales tax act, 1933 PA 167, MCL 205.51 to 205.78, if the tax was due and paid on the retail sale to a consumer.

(b) Property, the storage, use, or other consumption of which this state is prohibited from taxing under the constitution or laws of the United States, or under the constitution of this state.

(c) Property purchased for resale, demonstration purposes, or lending or leasing to a public or parochial school offering a course in automobile driving except that a vehicle purchased by the school shall be certified for driving education and shall not be reassigned for personal use by the school's administrative personnel. For a dealer selling a new car or truck, exemption for demonstration purposes shall be determined by the number of new cars and trucks sold during the current calendar year or the immediately preceding year without regard to specific make or style according to the following schedule of 0 to 25, 2 units; 26 to 100, 7 units; 101 to 500, 20 units; 501 or more, 25 units; but not to exceed 25 cars and trucks in 1 calendar year for demonstration purposes. Property purchased for resale includes promotional 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.

(d) Property that is brought into this state by a nonresident person for storage, use, or consumption while temporarily within this state, except if the property is used in this state in a nontransitory business activity for a period exceeding 15 days.

(e) Property the sale or use of which was already subjected to a sales tax or use tax equal to, or in excess of, that imposed by this act under the law of any other state or a local governmental unit within a state if the tax was due and paid on the retail sale to the consumer and the state or local governmental unit within a state in which the tax was imposed accords like or complete exemption on property the sale or use of which was subjected to the sales or use tax of this state. If the sale or use of property was already subjected to a tax under the law of any other state or local governmental unit within a state in an amount less than the tax imposed by this act, this act shall apply, but at a rate measured by the difference between the rate provided in this act and the rate by which the previous tax was computed.

(f) Property sold to a person engaged in a business enterprise and using and consuming the property in the tilling, planting, caring for, or harvesting of the things of the soil or in the breeding, raising, or caring for livestock, poultry, or horticultural products, including transfers of livestock, poultry, or horticultural products for further growth. This exemption includes agricultural land tile, which means fired clay or perforated plastic tubing used as part of a subsurface drainage system for land used in the production of agricultural products as a business enterprise and includes a portable grain bin, which means a structure that is used or is to be used to shelter grain and that is designed to be disassembled without significant damage to its component parts. This exemption does not include transfers of food, fuel, clothing, or similar tangible personal property for personal living or human consumption. This exemption does not include tangible personal property permanently affixed to and becoming a structural part of real estate.

(g) Property or services sold to the United States, an unincorporated agency or instrumentality of the United States, an incorporated agency or instrumentality of the United States wholly owned by the United States or by a corporation wholly owned by the United States, the American red cross and its chapters or branches, this state, a department or institution of this state, or a political subdivision of this state.

(h) Property or services sold to a school, hospital, or home for the care and maintenance of children or aged persons, operated by an entity of government, a regularly organized church, religious, or fraternal organization, a veterans' organization, or a corporation incorporated under the laws of this state, if not operated for profit, and if the income or

Restatement of the Law, Second, Contracts

Chapter 4 - Formation of Contracts -- Consideration

Topic 1 - The Requirement of Consideration

Restat 2d of Contracts, § 77

§ 77 Illusory and Alternative Promises

A promise or apparent promise is not consideration if by its terms the promisor or purported promisor reserves a choice of alternative performances unless

(a) each of the alternative performances would have been consideration if it alone had been bargained for; or

(b) one of the alternative performances would have been consideration and there is or appears to the parties to be a substantial possibility that before the promisor exercises his choice events may eliminate the alternatives which would not have been consideration.

COMMENTS & ILLUSTRATIONS: Comment:

a. Illusory promises. Words of promise which by their terms make performance entirely optional with the "promisor" do not constitute a promise. See Comment *e* to § 2; compare § 76. In such cases there might theoretically be a bargain to pay for the utterance of the words, but in practice it is performance which is bargained for. Where the apparent assurance of performance is illusory, it is not consideration for a return promise. A different rule applies, however, where performance is optional, not by the terms of the agreement, but by virtue of a rule of law. See § 5 (defining "term"), § 78.

Illustrations:

1. A offers to deliver to B at \$ 2 a bushel as many bushels of wheat, not exceeding 5,000, as B may choose to order within the next 30 days. B accepts, agreeing to buy at that price as much as he shall order from A within that time. B's acceptance involves no promise by him, and is not consideration. Compare §§ 31, 34.

2. A promises B to act as B's agent for three years from a future date on certain terms; B agrees that A may so act, but reserves the power to terminate the agreement at any time. B's agreement is not consideration, since it involves no promise by him.

b. Alternative promises. A promise in the alternative may be made because each of the alternative performances is the object of desire to the promisee. Or the promisee may desire one performance only, but the promisor may reserve an alternative which he may deem advantageous. In either type of case the promise is consideration if it cannot be kept without some action or forbearance which would be consideration if it alone were bargained for. But if the promisor has an unfettered choice of alternatives, and one alternative would not have been consideration if separately bargained for, the promise in the alternative is not consideration.

Illustrations:

3. A offers to deliver to B at \$ 2 a bushel as many bushels of wheat, not exceeding 5,000, as B may choose to order within the next 30 days, if B will promise to order at least 1,000 bushels within that time. B accepts. B's promise is consideration since it reserves only a limited option and cannot be performed without doing something which would be consideration if it alone were bargained for.

4. A agrees to sell and B to buy between 400 and 600 tons of fertilizer in installments as ordered by B, A reserving the right to terminate the agreement at any time without notice. B's promise is without consideration.

5. A promises B to act as B's agent for three years on certain terms, starting immediately; B agrees that A may so act, but reserves the power to terminate the agreement on 30 days notice. B's agreement is consideration, since he promises to continue the agency for at least 30 days.

6. A owes B an undisputed debt of \$ 5,000 payable in five years. A makes a subsequent promise that he will either pay \$ 4,000 at the end of the first year or pay the debt at maturity; in return B promises to accept the \$ 4,000, if paid at the end of the first year, in full satisfaction of the debt. A's subsequent promise is not consideration for B's return promise, since the alternative of performing his legal duty is not consideration. See §§ 73, 75.

c. Alternatives not dependent on promisor's free choice. A promise may give the promisee a right to choose one of several stated performances. Or the selection among alternative performances may be left to events not within the control of either party. In such cases the promise, if bargained for, is consideration if any one of the alternatives would have been, unless the promisor knows that all such alternatives are subject to conditions which cannot exist or occur. See § 76(1). Similarly, the promise may be consideration even though a conditional power of choice is left to the promisor. For example, the promisor may reserve an option to terminate only after he has rendered performance which would be consideration, or only in a contingency which may never occur, or only on a condition of forbearance by him which would have been consideration. Compare Comment *d* to § 76.

Illustration:

7. A orders goods from B for shipment within three months, reserving the right to cancel the order before shipment. B has the goods in stock and accepts the order. A's promise to pay for the goods is consideration for B's promise to ship, since B can prevent cancellation by shipping immediately.

d. Implied limitations on promisor's choice. A limitation on the promisor's freedom of choice need not be stated in words. It may be an implicit term of the promise, or it may be supplied by law. Thus a power to terminate a contract for the sale of goods may be subject to a statutory requirement of reasonable notification, and an agreement dispensing with notification may be unconscionable and invalid. See Uniform Commercial Code § 2-309(3). Again, an alternative promise may cease to be alternative when performance of one alternative becomes impossible or unenforceable on grounds of public policy. See §§ 270, 184. If such a contingency is within the contemplation of the parties so that it is part of what is bargained for, the promise is consideration.

Illustrations:

8. A promises to sell his output or buy his requirements of a specified type of goods from B on specified terms. A's promise is consideration for a return promise by B. A must operate his plant or conduct his business in good faith and according to commercial standards of fair dealing in the trade so that his output or requirements will approximate a reasonably foreseeable figure. See Comment 2 to Uniform Commercial Code § 2-306.

9. A promises to pay B half of any profits he derives from the sale of goods manufactured by B; in return B promises that A shall have the exclusive right to market such goods. The promises are consideration for each other, since the agreement for exclusive dealing imposes an obligation on A to use best efforts to promote sale of the goods and on B to use best efforts to supply them. See Uniform Commercial Code § 2-306(2).

10. A owes B a matured liquidated debt bearing interest. In an agreement to extend the debt for a year at a lower rate of interest, B reserves the right to accelerate payment "at will," but under Uniform Commercial Code § 1-208, B may accelerate payment only if he in good faith believes that the prospect of payment is impaired. B's surrender of the unconditional right to demand immediate payment is consideration. Compare Illustration 8 to § 73.

11. A is under a contractual duty to deliver to B a described automobile. Because it is doubtful whether such a car will be available at the agreed time, A promises that if he cannot obtain it he will deliver a described substitute; B agrees to accept the substitute if delivered. A's promise is consideration.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Brief of Appellee was sent by regular U.S. mail to Charles M. Steines, Counsel of Record, Jones Day, 901 Lakeside Avenue, Cleveland, Ohio 44114, attorney for appellant, on this 27th day of February, 2007.



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