

In the
Supreme Court of Ohio

MARC GLASSMAN, INC.,	:	Case No. 07-0328
	:	
Appellee,	:	On Appeal from the
	:	Cuyahoga County
v.	:	Court of Appeals,
	:	Eighth Appellate District
WILLIAM W. WILKINS	:	
[RICHARD A. LEVIN],	:	Court of Appeals Case
TAX COMMISSIONER OF OHIO,	:	No. CA-06-087766
	:	
Appellant.	:	

**MERIT BRIEF OF APPELLANT, RICHARD A. LEVIN,
SUCCESSOR TO WILLIAM W. WILKINS,
TAX COMMISSIONER OF OHIO**

STEPHEN A. DIMENGO (0037194)
**Counsel of Record*
DAVID W. HILKERT (0023486)
Buckingham, Doolittle & Burroughs, LLP
3800 Embassy Parkway
Suite 300
Akron, Ohio 44333
330-258-6599
330-252-5460 fax
sdimengo@bdblaw.com

Counsel for Appellee
Marc Glassman, Inc.

MARC DANN (0039425)
Attorney General of Ohio

WILLIAM P. MARSHALL (0038077)
Solicitor General
ELISE W. PORTER* (0055548)
**Counsel of Record*
ROBERT J. KRUMMEN (0076996)
Deputy Solicitors
BARTON A. HUBBARD (0023141)
Assistant Attorney General
30 East Broad Street, 17th Floor
Columbus, Ohio 43215
614-466-8980
614-466-5087 fax
eporter@ag.state.oh.us

Counsel for Appellant
Richard A. Levin,
Tax Commissioner of Ohio

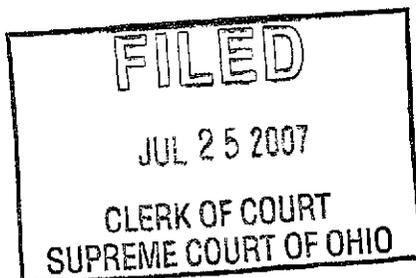


TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iii
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS	2
A. Glassman purchased a service to allow its computers to access insurance company databases to see if a customer was insured.....	2
B. The Tax Commissioner and the Board of Tax Appeals found this service to be taxable, but the court of appeals reversed.	3
ARGUMENT.....	5
<u>Appellant Tax Commissioner’s Proposition of Law:</u>	
<i>A computer service that links computers to each other for purposes of accessing data to use in business provides “electronic information services” as defined in R.C. 5739.01(Y)(1)(c), regardless of the quality or the quantity of the data received by the purchaser, and regardless of whether the purchaser modifies the data, so the purchase of such a service is a taxable transaction under R.C. 5739.01(B)(3)(e)</i>	
A. The plain text of the statute shows that Glassman’s transactions are taxable as “electronic information services.”	5
1. Both the plain reading of the E.I.S. statute and its legislative evolution demonstrate the General Assembly’s intent to tax services such as those at issue here	5
2. The service purchased by Glassman is an “electronic information service” and is therefore taxable	8
B. The Court already held in <i>MIB</i> and <i>Quotron</i> that transactions such as these are taxable.....	9
C. The appeals court’s decision ignored <i>MIB</i> and <i>Quotron</i> , and was wrong.....	11
CONCLUSION	15
CERTIFICATE OF SERVICE	unnumbered
APPENDIX	
Notice of Appeal.....	Exhibit 1

Journal Entry and Opinion, Eighth Appellate District, December 14, 2006 (date-stamped)	Exhibit 2
Journal Entry and Opinion, Eighth Appellate District, December 14, 2006 (with paragraph numbers)	Exhibit 3
Board of Tax Appeals Decision and Order	Exhibit 4
Final Determination of Tax Commissioner	Exhibit 5
R.C. 5739.01(B)(3)(e) and 5739.01(Y)	Exhibit 6
O.A.C. 5703-9-46	Exhibit 7
Excerpts from Am. Sub. H.B. 152 (eff. July 1, 1993)	Exhibit 8
Excerpts from Am. Sub. H.B. 291 (eff. July 1, 1983)	Exhibit 9
Excerpts from Sub. S.B. 112 (eff. Jan. 10, 1985)	Exhibit 10
Excerpts from Ohio Legis. Serv. Comm'n, Summary of Enactments, 120th General Assembly, 1993 Appropriations Act	Exhibit 11
<i>PNC Bank, Ohio N.A. v. Tracy</i> (July 7, 1995), BTA No. 1993-T-1316 (unreported)	Exhibit 12

TABLE OF AUTHORITIES

Cases	Pages
<i>Glassman v. Wilkins</i> (8th Dist.), 2006-Ohio-6591	4, 12, 13
<i>MIB, Inc. v. Tracy</i> (1998), 83 Ohio St. 3d 154.....	<i>passim</i>
<i>PNC Bank, Inc. v. Tracy</i> (July 7, 1995), BTA No. 93-T-1316, unreported.....	4, 12
<i>Quotron Systems, Inc. v. Limbach</i> (1992), 62 Ohio St. 3d 447.....	<i>passim</i>
Statutes and Regulations	Page(s)
O.A.C. 5703–9–46(A)(3).....	7, 9
R.C. 1.42.....	3
R.C. 5739.01(B)(3)(e)	5, 8
R.C. 5739.01(Y)	13
R.C. 5739.01(Y)(1)(a)	14
R.C. 5739.01(Y)(1)(c)	<i>passim</i>
R.C. 5739.071	7
R.C. 5741.02(A)	3
Other Authorities	Page(s)
Am. Sub. H.B. No. 152 (eff. July 1, 1993).....	6
Am. Sub. H.B. No. 291 (eff. July 1, 1983).....	6
Ohio Legis. Serv. Comm’n, Summary of Enactments, 120th General Assembly, 1993 Appropriations.....	7
Sub. S.B. No. 112 (eff. July 1, 1993)	6
Webster’s Third New International Dictionary (2002)	12

INTRODUCTION

This case is about the definition of taxable “electronic information services” under R.C. 5739.01(Y)(1)(c) (the “E.I.S. statute”), and therefore whether Marc Glassman, Inc. (“Glassman”), a retail pharmacy business, should be taxed on the purchase of such services. In its seminal decision in *Quotron Systems, Inc. v. Limbach* (1992), 62 Ohio St. 3d 447, and then six years later in *MIB, Inc. v. Tracy* (1998), 83 Ohio St. 3d 154, the Court held that services closely paralleling those at issue here were taxable services. Specifically, the Court held that those services perfectly mirrored the statutory definition of what is now defined separately as “electronic information services,” but formerly was defined as one kind of taxable “automatic data processing and computer service[.]”

Following *Quotron* and *MIB*, the Commissioner and the Board of Tax Appeals (“BTA”) both found that Glassman purchased taxable “electronic information services.” Under the E.I.S. statute, “electronic information services” are defined as “providing access to computer equipment by means of telecommunications equipment for the purpose of . . . examining or acquiring data stored in or accessible to the computer equipment.” Such services are precisely at issue here. The purchased services link Glassman’s computers to those of insurance companies, through an intermediary data services vendor, whereby Glassman electronically asks a question and receives an answer from insurance company computers. Glassman uses this information to complete sales of pharmaceutical items.

In its opinion, the appeals court failed to cite or follow either *Quotron* or *MIB*. In holding that the services Glassman received should not be taxed, the appeals court not only neglected to apply the plain meaning of the statute, but it also ignored these controlling precedents. If not reversed, the lower appellate court decision substantially threatens the Commissioner's enforcement of the sales and use tax law, which is largely dependent on voluntary compliance.

Suddenly, consumers of taxable “electronic information services” might follow this aberrant decision rather than the plain meaning of the statute and this Court’s decisions in *Quotron* and *MIB*.

For these and other reasons below, the appeals court’s judgment should be reversed.

STATEMENT OF THE CASE AND FACTS

A. Glassman purchased a service to allow its computers to access insurance company databases to see if a customer was insured.

Glassman is a corporation that owns and operates several pharmacies in Ohio. See Board of Tax Appeals Decision and Order (“BTA Op.”), attached as Ex. 4, at 2. During the relevant tax period, several of Glassman’s stores had in-store pharmacies that sold both prescription and non-prescription items. *Id.* When a customer came into a Glassman-owned pharmacy, Glassman needed to determine whether, and the extent to which, the customer’s insurance policy covered the item. Board of Tax Appeals hearing transcript (“Tr.”) 18-20, Supplement (“Supp.”) S-7. To make this process more efficient, Glassman purchased computer services from two different companies, initially from Envoy Corporation, and later, from a company called National Data Corporation or NDC Health. Tr. 19-20, 32, 43-45, Supp. S-7, S-10, S-13–14. (Envoy and NDC Health are referred to collectively as “NDC,” as they were in the appeals court; the parties agree that the “services provided by these two companies are substantially similar, so that their taxability is the same.” See Glassman Mem. in Opp. to Jurisdiction at 5.) The computer services allowed Glassman to access the insurance companies’ databases, through NDC, by means of telecommunications equipment consisting of various routers and telecommunications lines, to obtain confirmation about a Glassman’s customer’s insured status. Tr. 19-20, 32, 45, Supp. S-7, S-10, S-14. These databases, which contained that confidential insurance-eligibility information for Glassman’s customers, not only informed Glassman whether the customer was insured, but

also indicated to Glassman what amount of co-pay to charge the customer. Tr. 45-47, Supp. S-14.

Specifically, the computer services allowed a pharmacist, through a computer owned or leased by Glassman, to enter into its system the customer's personal, prescription, and insurance information. See BTA Op., Ex. 4, at 2-3. This information would be transmitted, over dedicated private communications lines, to NDC. *Id.* NDC then sent the customer's information to the insurance company providing coverage. *Id.* The insurance company would respond with data regarding insurance eligibility, amount of co-pay, and a unique authorization number to NDC. *Id.* To complete the process, NDC would send this information to Glassman over the same dedicated private communications lines. *Id.*

B. The Tax Commissioner and the Board of Tax Appeals found this service to be taxable, but the court of appeals reversed.

Based on the facts and the law, both the Tax Commissioner and the BTA found that "acquiring data stored in . . . computer equipment" occurred during the transactions between Glassman and NDC. BTA Op., Ex. 4, at 9-11. The BTA defined "data" by construing words and phrases according to the rules of grammar and common usage as mandated by R.C. 1.42. Quoting Webster's Third New International Dictionary, the BTA concluded that "data" is "a fact or principle granted or presented: something upon which an inference or an argument is based . . . detailed information of any kind." Under this definition, the BTA determined that the information transmitted by NDC constituted "data" as contemplated by R.C. 5739.01(Y)(1)(c). BTA Op., Ex. 4, at 9. Based on the facts, the BTA found, as had the Tax Commissioner, that Glassman had "access" to that data and benefited from the computer service provided by NDC, and therefore that the purchase was taxable under R.C. 5741.02(A). *Id.* at 10-11. Glassman appealed this decision to the Eighth District Court of Appeals.

The court of appeals, following an older BTA decision in *PNC Bank, Inc. v. Tracy* (July 7, 1995), BTA No. 93-T-1316, attached as Ex. 12, compared the current definition of “electronic information services” to a pre-1993 definition of “automatic data processing and computer services.” *Glassman v. Wilkins* (8th Dist.), 2006-Ohio-6591 (“App. Op.”), attached as Exs. 2, 3, ¶ 30.¹ The appeals court held that: (1) Glassman did not “examine or acquire” the information on the insurance companies’ computer systems, because data was not stored on either Glassman’s or NDC’s computer equipment, and (2) NDC had no “access” to the insurance companies’ data, as it “merely transmits a specific inquiry and receives a specific answer.” In other words, the appeals court seemed to view the “specific answer” regarding a customer’s insurability and copay amount as something other than “data” or “information.” *Id.* ¶ 39. The lower court did not discuss or cite this Court’s decisions in *Quotron* and *MIB*.

The Tax Commissioner appealed the Eighth District’s judgment, and this Court accepted discretionary review over the case.

¹ The time-stamped copy of the appeals court’s opinion, Ex. 2, does not include paragraph numbering, so the Commissioner has also attached the website version, with such numbering, as Ex. 3.

ARGUMENT

Appellant Tax Commissioner's Proposition of Law:

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

A. The plain text of the statute shows that Glassman's transactions are taxable as "electronic information services."

1. Both the plain reading of the E.I.S. statute and its legislative evolution demonstrate the General Assembly's intent to tax services such as those at issue here.

The sole issue before the Court is whether the services purchased by Glassman constitute "electronic information services" as defined in the E.I.S. statute and therefore should be taxed. During the audit period of January 1, 1999, through September 30, 2001, Ohio law included in the definition of "taxable sale" all transactions for consideration involving automatic data processing, computer services, *or* electronic information services. R.C. 5739.01(B)(3)(e) (Emphasis added). For the same period—and as it does today—the E.I.S. statute defined taxable "electronic information services" as follows:

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

- (i) Examining or acquiring data stored in or accessible to the computer equipment;**
- (ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.**

R.C. 5739.01(Y)(1)(c) (emphasis added).

Following the plain language of the E.I.S. statute, three requirements must be met for a service to constitute a taxable "electronic information service," all of which are easily met here. First, the service "provid[es] access . . . to computer equipment." Second, such access must be

provided “by means of telecommunications equipment.” Third, the purpose of the purchaser in acquiring the service must be for “examining or acquiring data stored in or accessible to such computer equipment.” As detailed in subpart A.2. below, the services purchased by Glassman from NDC perfectly track the description of taxable “electronic information services.”

The current version of Ohio’s E.I.S. statute is rooted in a 1983 amendment to R.C. 5739.01, which added a predecessor provision regarding “automatic data processing and computer services”. Specifically, the amendment included “automatic data processing and computer services” within the definition of “sale,” to which sales tax applied. The General Assembly defined taxable “automatic data processing and computer services” to include “providing direct access to computer equipment by remote or proximate access for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment. . . .” Am. Sub. H.B. No. 291, 140 Ohio Laws, Part II, 2872, 3220 (eff. July 1, 1983) (former R.C. 5739.01(Y)).

Then, in 1985, the General Assembly revised the definition of taxable “automatic data processing and computer services” to replace the requirement of “providing direct access to telecommunications equipment by remote or proximate access” with the simpler and more encompassing language “providing access to computer equipment.” Thus, the General Assembly eliminated any “direct” access requirement that might otherwise have limited the scope of the definition. Sub. S.B. No. 112, 140 Ohio Laws, Part I, 225, 233 (eff. Jan. 10, 1985).

Next, in 1993—and applicable to the tax assessment period here—the 120th General Assembly, in Amended Substitute House Bill Number 152, 145 Ohio Laws, Parts II-III, 3341, 4294 (eff. July 1, 1993), created a new descriptive term, “electronic information services,” in R.C. 5739.01(Y)(1)(c) to describe the taxation of services such as the one at issue. “Electronic

information services” was defined as “providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following: i. examining or acquiring data stored in or accessible to the computer equipment; ii. placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.” In defining “electronic information services,” the General Assembly used the term “data” in both subdivisions of the E.I.S. statute—(Y)(1)(c)(i) and (Y)(1)(c)(ii). Thus, the General Assembly directly equated the term “information,” as used in the descriptive phrase “electronic information services,” with the synonymous term “data” used in the subdivisions of that definition, thereby eliminating any possible distinction between those two terms for purposes of applying the statute.

The Ohio Legislative Service Commission’s comments analyzing the 1993 amendment pointed out that “[t]he act specifies that the sales and use tax is levied on the sale or use of electronic information services used in business.” Ohio Legis. Serv. Comm’n, Summary of Enactments, 1993 Appropriations Acts 346-47. Further, under R.C. 5739.071—passed when “electronic information services” was separated from other computer services—the provider of an electronic information service is refunded twenty-five percent of the tax it pays under either Chapter 5739 or Chapter 5741 on tangible personal property used to perform the service.

The definition in the E.I.S. statute is buttressed by a corresponding regulation, Ohio Administrative Code 5705-9-46(A)(3), and that regulation further cements the conclusion that the definition of “electronic information service” includes services such as those at issue here. The provision clearly states that “electronic information services” has the same meaning as in division (Y)(1)(c) of section 5739.01 of the Revised Code. The rule goes further, stating that the definition of “[e]lectronic information service” includes such services as providing Internet

access, providing access to database information, and providing access to electronic mail systems. This specific legislative change reflects the General Assembly's wish to emphasize as taxable sales the purchases of newly developed services by which computers connected to other computers, and perhaps linked to still other computers, are able rapidly to search through data stored in those computers, "examine or access" pertinent pieces of information, and quickly relay that information back to the purchaser of the service.

As the above legislative evolution of the E.I.S. statute shows, and under any plain reading of the statute, a service is taxable as an electronic information service under R.C. 5739.01(Y)(1)(c) if the service links computers to each other in order to access data for business use.

2. The service purchased by Glassman is an "electronic information service" and is therefore taxable.

Glassman received information electronically from NDC's computers. Glassman used that information to complete the sale of prescription items. A plain reading of R.C. 5739.01(B)(3)(e) indicates that the purchase of the ability to receive information constitutes a "taxable use or sale" of "electronic information services" as that term is defined in the E.I.S. statute.

Comparing the services at issue with the statute, it is apparent that the service Glassman purchases is an "electronic information service" and is therefore taxable. As explained above in the statement of facts, Glassman purchased computer services from NDC to access the insurance companies' databases by telecommunication equipment, i.e., by various routers and telecommunications lines. These databases contained confidential information about Glassman's customers, which Glassman used to determine the cost of the item for its customers. The system allowed a pharmacist, through a computer owned or leased by Glassman, to enter into its system the customer's personal, prescription, and insurance information. This information was then

transmitted via dedicated private communications lines to NDC's equipment, which relayed information to the insurance company providing coverage. The insurance company responded with data regarding insurance eligibility, amount of co-pay, and a unique authorization number to NDC. To complete the process, this information was sent back to Glassman via the same dedicated private communications lines.

Nothing in the E.I.S. statute requires that the service provider itself (e.g., NDC) must own the computer data and the computer equipment in which that data is stored. In addition, nothing in the statute limits the type of information/data required. Most important here, nothing in the statute sets a threshold quantum of data that must be involved for a transaction to count as accessing information. That is, the statute does not require that the purchaser buy massive data in each transaction. Finding out that someone is insured, and that her co-pay is \$10, is indeed "information" or "data."

Finally, Ohio Administrative Code 5703-9-46(A)(3), based on the E.I.S. statute after the 1993 changes, expressly includes "Internet access," something that often requires several computers to connect to each other to retrieve information, in the definition of "electronic information service." The definition of "electronic information services" under the rule includes a service that asks a question of one set of computers and returns an answer to another set of computers. The computer service purchased by Glassman, therefore, matches the definition of "electronic information services."

B. The Court already held in *MIB* and *Quotron* that transactions such as these are taxable.

The Court's decisions in *MIB* and *Quotron* are dispositive here for several reasons. Even before the law was changed to emphasize "electronic information services," the Court recognized a service was taxable if it transferred information through a series of computers. In

Quotron, 62 Ohio St. 3d at 447, the Court found a service taxable when a subscriber accessed information via “concentrators”—computers used to connect subscribers’ terminals to separately owned computers holding pertinent information. Quotron’s system included a series of computers linked to communication concentrators in different states on one end and to the securities and exchange computer systems in New York on the other end to obtain stock and commodities price quotes.

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

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

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

instead of answers about the price of stock as in *Quotron*, MIB provided answers about insurance coverage and accepted information about insurance.

The situation here is no different from that in *MIB*. The stand-alone computer in *MIB* was a “link,” just as NDC served as an essential “link” in the chain relaying information to and from Glassman’s computer system and the insurance companies’ computers. NDC Health provides an information service, linking Glassman’s computer to those of the insurance companies. The information provided to Glassman via this link allowed Glassman to know how correctly to charge its customer for prescription items. In *MIB*, as here, the purpose and the function of these services is the same—to enable Glassman, like MIB’s members, to access information/data necessary to complete a business transaction. The *MIB* Court’s discussion of the terms “access” and “acquiring” apply to the facts in either case. As such, Glassman has used its purchase of electronic information in business, and NDC has provided an electronic information service to Glassman. Following *MIB* and *Quotron*, the appeals court’s decision should be reversed.

C. The appeals court’s decision ignored *MIB* and *Quotron*, and was wrong.

The court of appeals, in its decision reversing the Tax Commissioner and the BTA, ignored *MIB* and *Quotron* and improperly interpreted the E.I.S. statute. In its decision, the court of appeals made at least two legal mistakes, each of which warrants reversal. First, the appellate court found that the insurance-eligibility information accessed by its pharmacy personnel did not constitute “data” within the meaning of the E.I.S. statute. But both the common usage of the term “data” and the General Assembly’s amendments of the statute described above indicate that the information Glassman accessed is, in fact, “data.”² The standard dictionary definition of “data” is

² The BTA’s pre-*MIB* decision, *PNC Bank, Ohio, N.A. v. Tracy* (July 7, 1995), BTA No. 1993-T-1316, unreported, no longer applies, as the BTA explained in its decision below. As the BTA noted, the *PNC* court’s definition of “data” conflicts with the common usage of the word, and the tax years at issue in *PNC* preceded the July 1, 1993, effective date of the General Assembly’s

“a fact or principle granted or presented: something upon which an inference or an argument is based . . . : detailed information of any kind.” Webster’s Third New International Dictionary (2002); see also BTA Op., Ex. 4, at 9. And, in *MIB*, this Court relied upon the same dictionary source, Webster’s Third New International Dictionary, as authority for the common usage of the terms “credit” and “access.” *MIB*, 83 Ohio St. 3d at 158, 160.

Moreover, the appeals court seemed to suggest that the information here, since it was just the answer “yes” to the question “is-the-customer-insured,” was somehow too “small” to count as data. As the appeals court stated, NDC “*merely* transmits a specific inquiry and receives a specific inquiry.” App. Op., Ex. 3, ¶ 39 (emphasis added). That view, however, is wrong both legally and factually. It is legally wrong because, as noted above, nothing in the E.I.S. statute requires the purchaser to obtain a large volume of data. Receiving answers to yes/no questions is enough. And it is factually wrong because Glassman also received more information, namely, a unique confirmation number for each transaction and the customer’s co-pay amount for her specific insurance policy. Notably, the appeals court referred to the co-pay information in stating the facts early in the opinion, *id.* ¶ 8, but it did not mention the co-pay in its later analysis, *id.* ¶ 39. While such additional co-pay information is not needed to resolve the dispute here, as the insurability answer is “information” standing alone, the extra co-pay and unique-approval-number information should leave no doubt that Glassman did receive “data.”

Second, the court of appeals improperly found that the purchased service did not provide “access to computer equipment” as required by the E.I.S. statute. The court reasoned that Glassman lacked “access” to the information because the data was not stored on Glassman’s

amendment of the sales tax law adopting the specific provision for “electronic information services.” See BTA Op., Ex. 4, at 8-9.

computer equipment.³ App. Op., Ex. 3, ¶ 39. But this reasoning is flawed. The relevant statutory language does not require that the data be “stored in” the computer equipment; all that is required is that the data be either “stored in” or “accessible to” the computer equipment. This is reflected in the current E.I.S. statute’s definition of “electronic information services” and prior versions of R.C. 5739.01(Y) defining the relevant part of the definition of “automatic data processing and computer services.” And the Court has already decided the issue of “access.” As described above, on facts completely analogous to this case, the *MIB* Court held the members of MIB had “access” to computer equipment even though no member could directly contact the computer containing information by means of electronic transmission. *Id.* at 157-158.

Nor should these transactions avoid the label “electronic information services” merely because Glassman and NDC cannot manipulate or modify the insurance-eligibility data here. Glassman argued this theory below, but it runs contrary to both common sense and precedent. First, the idea behind purchasing an “information service” is typically to *obtain* information, not to modify it. Indeed, it is likely more common that purchasers of data services merely *receive* the data; it is likely less common that those tapping into data change it in some way. Second, the Court did not look to the purchaser’s inability to modify the accessed database in *MIB* or *Quotron*; had the Court done so, the results would have been different. Specifically, the stock-quote recipients in *Quotron* did not have the ability to manipulate or modify the database of pre-existing information in that case. Thus, if the inability of the recipients of the data to manipulate

³ To the extent the “instantaneous” nature of the transmission of insurance-eligibility data is at issue here, the Glassman/NDC communications are surely no more “instantaneous” in nature than was the “real-time” stock quote data provided by the service at issue in *Quotron*. Indeed, the real-time stock quote data in *Quotron* came directly from the major stock exchanges and was changing by the nanosecond, far faster than is likely the case regarding the insurance-eligibility data at issue here. The “instantaneous” nature of the transmission of the data in *Quotron* did not affect the service’s tax status, and is not relevant to this analysis either.

or modify it were a decisive factor, *Quotron* would surely have been decided differently. And, as the Commissioner noted in his final determination here, although the absence of “processing” of data would be relevant regarding the definition of “automatic data processing services” as defined in R.C. 5739.01(Y)(1)(a), the definition of “electronic information services” does not include any such “processing” requirement.

Thus, the appeals court erred here in several ways. It erred in relying on *PNC*, and it erred in ignoring *MIB* and *Quotron*. It erred in finding that the data here was somehow not data, and in suggesting that it was not enough data. Thus, it erred in finding that Glassman did not purchase an “electronic information source,” and it erred in rejecting the Tax Commissioner’s determination that the transactions at issue were taxable.

For these and all other reasons above, the decision below should be reversed.

CONCLUSION

For all the above reasons, the appeals court's decision should be reversed.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio



WILLIAM P. MARSHALL (0038077)

Solicitor General

ELISE W. PORTER* (0055548)

**Counsel of Record*

ROBERT J. KRUMMEN (0076996)

Deputy Solicitors

BARTON A. HUBBARD (0023141)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

eport@ag.state.oh.us

Counsel for Appellant

Richard A. Levin,

Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Merit Brief of Appellant, Richard A. Levin, Successor to William W. Wilkins, Tax Commissioner of Ohio, was served by U.S. mail this 25th day of July, 2007, upon the following counsel:

Stephen A. Dimengo
David W. Hilkert
Buckingham, Doolittle & Burroughs, LLP
3800 Embassy Parkway
Suite 300
Akron, Ohio 44333



William P. Marshall
Solicitor General

In the
Supreme Court of Ohio

07-0328

MARC GLASSMAN, INC.,

Relator-Appellee,

v.

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

Respondent-Appellant.

Case No.

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

Court of Appeals Case
No. CA-06-087766

NOTICE OF APPEAL OF APPELLANT, RICHARD A. LEVIN, SUCCESSOR TO
WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO

STEPHEN A. DIMENGO (0037194)

**Counsel of Record*

DAVID W. HILKERT (0023486)

Buckingham, Doolittle & Burroughs, LLP

50 S. Main Street, P.O. Box 1500

Akron, Ohio 44309

330-258-6521

330-252-5460 fax

Counsel for Relator-Appellee

Marc Glassman, Inc.

MARC DANN (0039425)

Attorney General of Ohio

ELISE W. PORTER* (0055548)

Acting Solicitor General

**Counsel of Record*

ROBERT J. KRUMMEN (0076996)

Deputy Solicitor

JANYCE C. KATZ (0042425)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

Counsel for Appellant

Richard A. Levin,

Tax Commissioner of Ohio

FILED

FEB 20 2007

MARCIA J. MENDEL, CLERK
SUPREME COURT OF OHIO

EXHIBIT 1

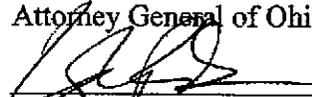
**NOTICE OF APPEAL OF APPELLANT
RICHARD A. LEVIN, SUCCESSOR TO WILLIAM W. WILKINS,
TAX COMMISSIONER OF OHIO**

Appellant gives notice of its discretionary appeal to this Court, pursuant to Ohio Supreme Court Rule II, Section 1(A)(3), from a decision of the Cuyahoga County Court of Appeals, Eighth Appellate District, journalized in Case No. 87766 on January 4, 2007. Date-stamped copies of the Eighth District's Judgment Entry and Opinion are attached as Exhibit 1, respectively, to the Appellant's Memorandum in Support of Jurisdiction.

For the reasons set forth in the accompanying Memorandum in Support of Jurisdiction, this case is one of public and great general interest.

Respectfully submitted,

MARC DANN (0039425)
Attorney General of Ohio



ELISE W. PORTER* (0055548)

Acting Solicitor General

**Counsel of Record*

ROBERT J. KRUMMEN (0076996)

Deputy Solicitor

JANYCE C. KATZ (0042425)

Assistant Attorney General

30 East Broad Street, 17th Floor

Columbus, Ohio 43215

614-466-8980

614-466-5087 fax

Counsel for Appellant

Richard A. Levin,

Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

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

Stephen A. Dimengo
David W. Hilkert
Buckingham, Doolittle & Burroughs, LLP
50 S. Main Street, P.O. Box 1500
Akron, Ohio 44309

Counsel for Relator-Appellee
Marc Glassman



Elise W. Porter
Acting Solicitor General

JAN - 4 2007

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87766

MARC GLASSMAN, INC.

PLAINTIFF-APPELLANT

vs.

WILLIAM W. WILKINS, TAX COMMISSIONER

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED**

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

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

RELEASED: December 14, 2006

JOURNALIZED: JAN - 4 2007

CA06087766

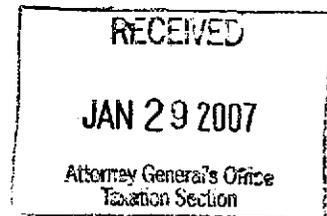
43187879



VL0627 00497



EXHIBIT 2



ATTORNEYS FOR APPELLANT:

David W. Hilkert, Esq.
Steven A. Dimengo, Esq.
Buckingham, Doolittle & Burroughs
50 S. Main Street
P.O. Box 1500
Akron, Ohio 44309

ATTORNEY FOR APPELLEE

Janyce C. Katz, Esq.
Asst. Attorney General
State Office Tower, 16th Floor
30 East Broad Street
Columbus, Ohio 43266-0410

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

JAN - 4 2007

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

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

DEC 14 2006

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

CA06087766

42836173



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

**NOTICE MAILED TO COUNSEL
FOR ALL PARTIES-COSTS TAXED**

VL0627 00498

ANN DYKE, A.J.:

Defendant-appellant, Marc Glassman, Inc. ("MGI"), appeals the Ohio Board of Tax Appeal's ("BTA") affirmance of the decision of plaintiff-appellee, William W. Wilkins, Tax Commissioner of Ohio ("Tax Commissioner"). For the reasons set forth below, we reverse.

The Department of Taxation conducted an audit of MGI's purchases made during January, 1999 through September 30, 2001. As a result of the audit, the Department assessed use taxes upon MGI for certain transactions.

MGI filed a petition for reassessment for a portion of the assessment. More specifically, MGI objected to the imposition of use tax on the transactions with NDC Health ("NDC") and Envoy Corporation ("Envoy").¹ The Tax Commissioner, in his Final Determination, found the services purchased by MGI to be taxable "electronic information systems" pursuant to R.C. 5739.01(B)(3)(e).

On January 14, 2005, MGI appealed the Tax Commissioner's Final Determination to the BTA. The BTA held an evidentiary hearing on June 29, 2005. At the hearing, MGI submitted documents from NDC explaining its role in the disputed service transactions. Additionally, Brian Kendro, Vice President

¹The services provided by these two companies are substantially similar, rendering their taxability the same. Hence, we will refer to these services providers collectively as "NDC."

of MGI, testified and explained the process MGI undergoes, on behalf of a customer, to seek authorization through NDC to fill a prescription.

In an ordinary transaction, a Marc's customer presents the pharmacist with a prescription and his or her insurance card. The information card usually contains, among other information, the insurance company name, the plan name, the member name and the member number. The pharmacist, for the customer, enters the pertinent information into a computer terminal owned or leased by MGI.

The information inputted by the pharmacist is transmitted to a frame relay network via a private dedicated communication line. From here, the information is routed directly to NDC.

NDC, which is connected to multiple insurance companies through various individual private communication lines, then routes the information received from MGI directly to the appropriate insurance company.

Upon receipt of the information, the insurance company processes the request and decides whether to authorize the prescription. Thereafter, the company sends its response to NDC. If the prescription is approved for the customer, an authorization number is sent to NDC along with the co-pay amount and eligibility.

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

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

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

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

MGI's first assignment of error states:

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

MGI's second assignment of error states:

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

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

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

R.C. 5741.02(A) imposes a tax on “the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided.” The consumer that benefits from the service is responsible for use tax on the price of that service. R.C. 5741.02(B). Under R.C. 5741.01(M) and 5739.01(X), the only services taxable in Ohio are those proffered

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

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

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

“* * * (3) All transactions by which:

“* * * (e) Automatic data processing, computer services, or electronic information services are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. * * *”

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

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

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

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

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

“(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, ‘personal and professional services’ means all services other than automatic data processing, computer services, or electronic information services[.] * * *”

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

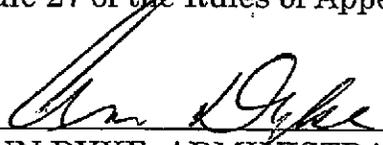
Judgment reversed.

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

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

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

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


ANN DYKE, ADMINISTRATIVE JUDGE

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

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

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

Court of Appeals of Ohio

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

JOURNAL ENTRY AND OPINION
No. 87766

MARC GLASSMAN, INC.

PLAINTIFF-APPELLANT

vs.

WILLIAM W. WILKINS, TAX COMMISSIONER

DEFENDANT-APPELLEE

**JUDGMENT:
REVERSED**

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

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

RELEASED: December 14, 2006

JOURNALIZED:

EXHIBIT 3

[Cite as *Glassman v. Wilkins*, 2006-Ohio-6591.]

ATTORNEYS FOR APPELLANT:

David W. Hilkert, Esq.
Steven A. Dimengo, Esq.
Buckingham, Doolittle & Burroughs
50 S. Main Street
P.O. Box 1500
Akron, Ohio 44309

ATTORNEY FOR APPELLEE

Janyce C. Katz, Esq.
Asst. Attorney General
State Office Tower, 16th Floor
30 East Broad Street
Columbus, Ohio 43266-0410
ANN DYKE, A.J.:

{¶ 1} Defendant-appellant, Marc Glassman, Inc. (“MGI”), appeals the Ohio Board of Tax Appeal’s (“BTA”) affirmance of the decision of plaintiff-appellee, William W. Wilkins, Tax Commissioner of Ohio (“Tax Commissioner”). For the reasons set forth below, we reverse.

{¶ 2} The Department of Taxation conducted an audit of MGI’s purchases made during January, 1999 through September 30, 2001. As a result of the audit, the Department assessed use taxes upon MGI for certain transactions.

{¶ 3} MGI filed a petition for reassessment for a portion of the assessment. More specifically, MGI objected to the imposition of use tax on the transactions with NDC Health (“NDC”) and Envoy Corporation (“Envoy”).¹ The Tax Commissioner, in

¹The services provided by these two companies are substantially similar, rendering their taxability the same. Hence, we will refer to these services providers collectively as “NDC.”

his Final Determination, found the services purchased by MGI to be taxable “electronic information systems” pursuant to R.C. 5739.01(B)(3)(e).

{¶ 4} On January 14, 2005, MGI appealed the Tax Commissioner’s Final Determination to the BTA. The BTA held an evidentiary hearing on June 29, 2005. At the hearing, MGI submitted documents from NDC explaining its role in the disputed service transactions. Additionally, Brian Kendro, Vice President of MGI, testified and explained the process MGI undergoes, on behalf of a customer, to seek authorization through NDC to fill a prescription.

{¶ 5} In an ordinary transaction, a Marc’s customer presents the pharmacist with a prescription and his or her insurance card. The information card usually contains, among other information, the insurance company name, the plan name, the member name and the member number. The pharmacist, for the customer, enters the pertinent information into a computer terminal owned or leased by MGI.

{¶ 6} The information inputted by the pharmacist is transmitted to a frame relay network via a private dedicated communication line. From here, the information is routed directly to NDC.

{¶ 7} NDC, which is connected to multiple insurance companies through various individual private communication lines, then routes the information received from MGI directly to the appropriate insurance company.

{¶ 8} Upon receipt of the information, the insurance company processes the request and decides whether to authorize the prescription. Thereafter, the company sends its response to NDC. If the prescription is approved for the customer, an authorization number is sent to NDC along with the co-pay amount and eligibility.

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

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

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

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

{¶ 13} MGI’s first assignment of error states:

{¶ 14} “The Board’s decision is contrary to the evidence and is unlawful because MGI did not receive or acquire data from NDC or Envoy, a necessary

finding for the Tax Commissioner to assess a use tax under R.C. 5739.01(B)(3)(e) as an electronic information services as described in R.C. 5739.01(Y)(1)(c).”

{¶ 15} MGI’s second assignment of error states:

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

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

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

{¶ 19} R.C. 5741.02(A) imposes a tax on “the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this

state of any service provided.” The consumer that benefits from the service is responsible for use tax on the price of that service. R.C. 5741.02(B). Under R.C. 5741.01(M) and 5739.01(X), the only services taxable in Ohio are those proffered in R.C. 5739.01(B)(3). *Ameritech Publishing, Inc. v. Wilkins*, 111 Ohio St.3d 114, 2006-Ohio-5337.

{¶ 20} R.C. 5739.01(B) states, in pertinent part, as follows:

{¶ 21} “(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:

{¶ 22} “* * * (3) All transactions by which:

{¶ 23} “* * * (e) Automatic data processing, computer services, or electronic information services are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. * * *.”

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

{¶ 25} “(c) ‘Electronic information services’ means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

{¶ 26} “(i) Examining or acquiring data stored in or accessible to the computer equipment;

{¶ 27} “(ii) Placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment.

{¶ 28} “(d) ‘Automatic data processing, computer services, or electronic information services’ shall not include personal or professional services.

{¶ 29} “(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[.] * * *”

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

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

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

{¶ 31} “(Y)(1) ‘Automatic data processing and computer services’ means: processing of other’s data, including keypunching or similar data entry services together with verification thereof; providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer.”

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

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

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

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

{¶ 36} NDC charged PNC a per transaction fee for forwarding a confidential credit authorization request and relaying PNC's response to the merchant.

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

{¶ 38} “* * * [PNC's] merchant customers do not receive access to [PNC's] computers through NDC. Consequently, the merchant cannot examine or acquire any credit card information stored in or available to [PNC's] computers. Additionally, NDC lacks access to [PNC's] computers. NDC is limited to sending off a specific inquiry and receiving a specific answer. NDC does not determine the credit worthiness of any account, nor can it access [PNC's] computers to inquire into the details of any account. Moreover, since [PNC's] response to a request is not generated until the request is received, NDC has no access to any information stored in [PNC's] computer which can be used by NDC to authorize the transaction.

In short, [PNC] performs the actual data processing, while NDC acts as an electronic intermediary, channeling requests to their proper destination and relaying the appropriate response. This service does not provide ‘access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment,’ and hence does not constitute automatic data processing.”

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

{¶ 40} Our determination as to MGI's first and second assignments of error are dispositive of this appeal. Thus, we decline to address its remaining assignments of error³ as moot. App.R. 12(A)(1)(c). Accordingly, this matter is reversed.

Judgment reversed.

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

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

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

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

ANN DYKE, ADMINISTRATIVE JUDGE

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

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

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

OHIO BOARD OF TAX APPEALS

Marc Glassman, Inc.,)	CASE NO. 2005-K-82
)	
Appellant,)	(USE TAX)
)	
vs.)	DECISION AND ORDER
)	
William W. Wilkins, Tax Commissioner of Ohio,)	
)	
Appellee.)	

APPEARANCES:

For the Appellant - Buckingham, Doolittle & Burroughs
 Steven A. Dimengo
 David W. Hilkert
 50 S. Main Street
 P.O. Box 1500
 Akron, Ohio 44309-1500

For the Appellee - Jim Petro
 Attorney General of Ohio
 Janyce C. Katz
 Assistant Attorney General
 State Office Tower-16th Floor
 30 East Broad Street
 Columbus, Ohio 43266-0410

Entered **JAN 20 2006**

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

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

EXHIBIT 4

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

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

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

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

³ Appellant's witness described the transactions and relationships between appellant and NDCHealth and Envoy as being essentially the same, the primary differences being the fact that it had a written contract and

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

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

“NDC will provide the following services to the Subscriber:

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

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

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

Footnote contd. _____

a direct communications connection with NDCHealth, while it had an oral agreement with Envoy, connecting to it via dial-up since it employed older technology.

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

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

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

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

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

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

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

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

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

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

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

“***

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

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

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

“***

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

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

“To set the record straight, MGI concedes that it is not relying upon a resale exception. (Assignment of Error No. 5.) Further, Assignment of

In reviewing appellant's appeal, we must acknowledge the Supreme Court's consistent admonition that findings made by the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp v. Limbach* (1989), 42 Ohio St.3d 121, 124. It is therefore incumbent upon an appellant to demonstrate, with competent and probative evidence, that the commissioner's findings are in error and that it is entitled to the relief requested. *Id.*; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215; *Standards Testing Laboratories, Inc. v. Tracy*, 100 Ohio St.3d 240, 2003-Ohio-5804; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding ("use") tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided. Given the complementary nature of these taxes, we will refer to the applicable sales tax provisions in considering the instant appeal. In doing so, we begin with R.C. 5739.01(B)(3)(e) which expressly includes within the definitions of "sale" and "selling," thereby subjecting to tax, all transactions for a consideration by which:

Footnote contd. _____

Error No. 3 in the notice of appeal simply reasserts, in broader terms, Assignments of Error Nos. 1 and 2. Thus, MGI agrees that Assignment of Error No. 3 is superfluous." *Id.* at 8.

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

“Automatic data processing, computer services,⁶ 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. ***”

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

“‘Electronic information services’ means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

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

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

Appellant advances three arguments in support of its claim that the services in issue do not constitute electronic information services, i.e., the information transmitted to

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

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

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

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

appellant is not “data,” appellant did not have access to such information stored on the NDCHealth’s or Envoy’s computer equipment, and the information received by appellant is not provided for use in appellant’s business. We will address each of these arguments in turn.

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

Footnote contd. _____

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

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

R.C. 1.42 provides that “words and phrases shall be read in context and construed according to the rules of grammar and common usage.” Webster’s Third New International Dictionary (2002) defines “datum,” the singular of data, as “a fact or principle granted or presented : something upon which an inference or an argument is based ***: detailed information of any kind.” Under this definition, one broader than that advocated by appellant, we find that the information transmitted by NDCHealth and Envoy indeed constitutes data as contemplated by R.C. 5739.01(Y)(1)(c) as it delineates the extent of a customer’s coverage upon which appellant relies in promptly providing the requested product and in collecting payment, either full or a co-pay amount, from its customers. Of the cases cited by appellant in support of its argument, we acknowledge *PNC Bank, Ohio*, supra, is factually similar to this matter.⁸ However, this decision, as well as the remainder of the cases cited, involved consideration of whether the services provided were taxable automatic data processing or computer services and predated the General Assembly’s amendment of R.C. 5739.01(B)(3)(e) so as to include with taxable transactions those involving the sale of electronic information services.

Alternatively, appellant argues that it did not have “access” to such data. In advancing this claim, appellant acknowledges that “[w]hile MGI could not search or examine NDC’s computer equipment, it most likely did have statutory ‘access’ to NDC’s computer equipment under the standard for access set forth by the Ohio State Supreme

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

Court.” Appellant’s brief at 1. Appellant nevertheless asserts that such access was not provided for the purpose of acquiring data *stored in* or *accessible to* such equipment. Appellant maintains that NDCHealth and Envoy did not store the information since it was transmitted instantaneously nor was such information accessible to these companies from the insurance providers with which they were in contact since to do so would likely be in contravention of privacy interests.

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

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

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

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

Finally, appellant argues that the services provided by NDCHealth and Envoy were not provided for use in appellant's business. Appellant indicates that it does not benefit from such services and that it instead simply acts as an agent for its customers who are the beneficiaries of such services. We disagree. Although appellant claims otherwise, it does indeed benefit from its acquisition of the services provided by NDCHealth and Envoy in that they allow appellant to conduct retail pharmaceutical sales on a timely and accurate basis by determining the nature and extent of customer insurance coverage, thereby resulting in customer satisfaction and retention.

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

Mr. Dunlap, dissenting.

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

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

taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed.”). Thus, “[w]hen faced with the General Assembly’s selection of an in-artful word, we must opt for the meaning that favors the taxpayer.” *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St. 3d 193, 195.

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

BOARD OF TAX APPEALS			
RESULT OF VOTE	YES	NO	DATE
Ms. Margulies	plm		1/14/06
Mr. Eberhart	RJE		1-18-06
Mr. Dunlap		WED	1-9-06

I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.


 Julia M. Snow, Board Secretary

BPA

FINAL DETERMINATION

Date: NOV 17 2004

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

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

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

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

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

Pharmacy purchases

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

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

0000

- 2 -

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

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

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

“‘Electronic information service’ means providing access to computer equipment by means of telecommunications equipment for the purpose of either of the following:

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

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

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

00002

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

Accordingly, the assessment is affirmed as issued.

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

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

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

William W. Wilkins
 WILLIAM W. WILKINS
 TAX COMMISSIONER

/s/ William W. Wilkins

William W. Wilkins
 Tax Commissioner

§ 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 production, transmission, transportation, or distribution system for the delivery of a public utility service;

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

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

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

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

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

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

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

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

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

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

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

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

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

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

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

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

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

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

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

5703-9-46 Sales and use taxes: automatic data processing, computer services, and electronic information services

(A) As used in this rule:

(1) "Automatic data processing" means:

(a) Processing others' data, including all activities incident to processing of data such as keypunching, keystroke verification, rearranging, or sorting of previously documented data for the purpose of data entry or automatic processing, changing the medium on which data is stored, and preparing business documents such as reports, checks, or bills, whether these activities are done by one person or several persons; or

(b) Providing access by any means to computer equipment for the purpose of processing data.

(2) "Computer services" means:

(a) Specifying computer hardware configurations, which is the service of instructing others in the proper set-up, installation, and start-up of computer hardware;

(b) Evaluating technical processing characteristics, which is the service of reviewing, testing or otherwise ascertaining the operating capacity or characteristics of computer hardware or systems software. It does not include conducting feasibility studies or analysis of hardware or software needs or alternatives;

(c) Computer programming, which is, for purposes of the definition of "computer services," the service of writing, changing, debugging, or installing systems software; or

(d) Training computer programmers and operators in the operation and use of computer equipment and its system software.

Computer services must be provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems to fall within the scope of this rule.

(3) "Electronic information services" has the same meaning as in division (Y)(1)(c) of section 5739.01 of the Revised Code. "Electronic information service" includes such services as providing Internet access, providing access to database information, and providing access to electronic mail systems.

(4) "Systems software" includes all programming that controls the basic operations of the computer, such as arithmetic, logic, compilation or similar functions, whether it is an integral part of the computer hardware or is contained on magnetic disks or other storage media. "Systems software," solely for purposes of Chapter 5739, and 5741, of the Revised Code because of division (Y)(2)(e) of section 5739.01 of the Revised Code, does not include application software programs that are intended to perform business functions or control or monitor processes.

(5) "Personal and professional services" has the same meaning as in division (Y)(2) of section 5739.01 of the Revised Code.

(6) "Provider", for purposes of this rule, means a vendor or seller who provides or supplies automatic data processing, computer services, electronic information services, or personal or professional services for a consideration, and "provision" means the sale of such services.

(7) "Business" means the ongoing conduct of commercial, manufacturing, mining, agriculture, professional, service, or similar enterprise, whether or not the person or persons conducting such enterprise are for-profit or nonprofit entities and 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 an individual in managing and investing the individual's own funds.

(B) For purposes of Chapter 5739, and 5741, of the Revised Code:

(1) The provision of automatic data processing services, computer services, or electronic information services in this state for a consideration for use in business by the consumer is a sale that is subject to the sales tax.

(2) The receipt of the benefit of these services in this state for use in business by the consumer constitutes a use subject to the use tax.

(3) When a transaction includes the provision of automatic data processing, computer services, or electronic information services:

(a) The true object of the transaction is the receipt of automatic data processing, computer services, or electronic information services if such services render a significant benefit to the consumer;

(b) The true object of the transaction is the receipt of personal or professional services to which the automatic data processing, computer services, or electronic information services are merely incidental or supplemental if:

(i) The automatic data processing, computer services, or electronic information services are merely utilized by the provider in the performance or delivery of such personal or professional services;

(ii) The benefit sought to be received by the consumer is the personal or professional service; or

(iii) The automatic data processing, computer services, or electronic information services themselves provide no significant benefit to the consumer.

(4) A transaction may include separable components such that the true object of one or more separately stated components is the receipt of automatic data processing, computer services, or electronic information services and the true object of any other separately stated components is the receipt of personal and professional services or consequential tangible personal property or other taxable services. A transaction separable in this manner is a "mixed transaction." The various components of a mixed transaction shall be separately stated in the contract or initial billing and the price applicable to each component shall similarly be separated. It shall be sufficient for purposes of this rule to separate components to the extent they are separate categories under section 5739.01(B) of the Revised Code. Such categories include, but are not limited to, all tangible personal property; all repair and installation services; all personal and professional services; and all automatic data processing, computer services, and electronic information services.

(5) The provision of computer services for consideration is a sale, regardless of whether the provider is also a vendor of computer equipment or software and regardless of whether the work is performed on or off the premises of the consumer, and whether the person performing the service acts under the immediate supervision of the provider or the consumer. Services performed by an employee for the employer are not sales.

(C) Every person in this state who is making sales of automatic data processing, computer services, or electronic information services for use in business must be licensed pursuant to section 5739.17 of the Revised Code. Every person outside this state who is providing automatic data processing, computer services, or electronic information services in this state, and who has substantial nexus with this state as provided in division (H) of section 5741.01 of the Revised Code must be registered as a seller pursuant to section 5741.17 of the Revised Code.

(D) For purposes of Chapter 5739, and 5741, of the Revised Code, the provision of automatic data processing, computer services, or electronic information services does not constitute manufacturing.

(E) A provider of automatic data processing, computer services, or electronic information services may claim exemption on purchases of automatic data processing, computer services, or electronic information services when both the following are met:

(1) The purchased service is an integral part of the automatic data processing, computer service, or electronic information services being provided; and

(2) The total cost of the purchased service will be included in the price of the service provided.

(F) A provider of automatic data processing, computer services, or electronic information services may claim resale on any purchase of tangible personal property that is or is to be transferred permanently to the consumer of the service as an integral part of the performance of the service.

HISTORY: 2003-04 OMR par. #10 (R-E), eff. 5-6-04; 1992-93 OMR 1163 (A), eff. 3-21-93; 1992-93 OMR 824 (A), eff. 12-23-92; 1985-86 OMR 452 (E), eff. 11-1-85*

AN ACT

To amend sections 9.833, 101.26, 102.02, 103.05, 109.42, 109.57, 109.81, 109.85, 109.91, 111.16, 111.18, 113.07, 117.13, 120.03, 120.51, 120.52, 120.53, 120.54, 121.04, 121.10, 121.37, 121.48, 122.01, 122.04, 122.081, 122.21, 122.22, 122.24, 122.26, 122.27, 122.97, 123.011, 123.024, 124.04, 124.05, 125.081, 124.09, 124.11, 124.134, 124.14, 124.15, 124.152, 124.18, 124.181, 124.25, 124.32, 124.385, 124.386, 124.387, 124.81, 124.82, 124.83, 124.84, 124.87, 125.01, 125.02, 125.03, 125.04, 125.041, 125.06, 125.07, 125.08, 125.09, 125.11, 125.111, 125.31, 125.93, 126.10, 126.21, 127.12, 127.13, 127.16, 131.35, 145.581, 149.43, 152.31, 154.20, 164.08, 171.05, 173.14, 173.26, 181.21, 181.22, 309.08, 317.09, 317.32, 323.153, 323.154, 329.02, 505.011, 715.61, 742.56, 911.02, 913.02, 913.23, 915.24, 917.23, 991.02, 991.03, 991.04, 1306.03, 1309.04, 1309.21, 1309.40, 1309.42, 1309.43, 1321.20, 1337.10, 1503.35, 1533.10, 1533.11, 1533.111, 1533.112, 1533.32, 1551.11, 1701.73, 1702.38, 1703.04, 1703.07, 1703.22, 1724.10, 1742.12, 2151.011, 2151.18, 2151.312, 2151.34, 2151.353, 2151.38, 2151.418, 2301.27, 2301.28, 2301.29, 2301.30, 2301.31, 2301.32, 2301.35, 2301.38, 2301.51, 2301.52, 2301.53, 2301.54, 2301.55, 2301.56, 2305.06, 2305.07, 2743.19, 2743.191, 2743.70, 2744.01, 2744.081, 2903.33, 2921.13, 2921.42, 2923.35, 2929.51, 2951.02, 2967.18, 2967.26, 3301.04, 3301.07, 3301.071, 3301.074, 3301.0711, 3301.0714, 3301.0715, 3301.0716, 3301.11, 3301.12, 3301.16,

4734.21, 4736.06, 4736.12, 4740.05, 4740.09, 4741.03, 4745.01, 4747.04, 4747.05, 4747.06, 4747.07, 4747.10, 4751.04, 4753.11, 4755.13, 4757.15, 4759.02, 4759.08, 4761.07, 4765.43, 4769.09, 4907.474, 4907.475, 4911.07, 4919.75, 4919.81, 4919.99, 5101.11, 5101.14, 5101.141, 5101.161, 5101.35, 5101.80 to 5101.84, 5101.86, 5103.02, 5103.03, 5104.01, 5104.07, 5104.32, 5104.34, 5104.38, 5104.39, 5107.02, 5107.03, 5107.05, 5111.011, 5111.02, 5111.021, 5111.022, 5111.03, 5111.11, 5111.13, 5111.20, 5111.22, 5111.23, 5111.231, 5111.235, 5111.24, 5111.241, 5111.25, 5111.251, 5111.255, 5111.257, 5111.26, 5111.261 to 5111.264, 5111.27 to 5111.29, 5111.31, 5111.33, 5111.34, 5111.341, 5111.45, 5111.56, 5111.58, 5111.77, 5111.771, 5111.78, 5111.79, 5111.80, 5111.811, 5111.82, 5112.01, 5112.03, 5112.10, 5112.11, 5112.18, 5112.19, 5112.20, 5112.21, 5113.03, 5113.031, 5113.032, 5113.06, 5113.11, 5115.05, 5115.11, 5119.22, 5119.31, 5119.39, 5119.40, 5119.62, 5120.101, 5120.22, 5120.24, 5120.51, 5123.19, 5123.25, 5123.60, 5123.77, 5126.08, 5126.12, 5126.14, 5126.15, 5139.01, 5139.04, 5139.05, 5139.06, 5139.07, 5139.11, 5139.13, 5139.18, 5139.22, 5139.28, 5139.281, 5139.33, 5139.34, 5139.36, 5139.39, 5139.86, 5145.162, 5149.061, 5153.01, 5153.16, 5153.161, 5155.261, 5505.203, 5513.04, 5701.13, 5705.192, 5705.21, 5705.215, 5705.216, 5713.24, 5719.07, 5727.56, 5733.031, 5733.05, 5733.067, 5733.18, 5733.22, 5739.01, 5739.02, 5739.13, 5739.131, 5741.01, 5741.022, 5741.15, 5741.17, 5743.05, 5747.01, 5747.022, 5747.03, 5747.06, 5747.07, 5747.072, 5747.13, 5747.15, 5749.07, 5749.13, 5749.15, 5907.13, 5907.14, 5909.01, 5909.02, 5909.03, 5909.05, 5909.06, 5909.09, 5909.10, 5909.12, 5909.13, 5909.14, 5909.15, 5909.16, 6109.01, 6109.07, 6109.31, 6109.33, 6111.032, 6111.035, 6111.09, and 6111.44; to amend section 3315.41 as enacted by Am. Sub. H.B. 262 of

of reinstatement and as a prerequisite thereto designate an agent in accordance with such section.

Any officer, shareholder, creditor, or receiver of any such corporation may at any time take all steps required by this section to effect such reinstatement, and in such case the designation of an agent upon whom process may be served shall not be a prerequisite to the reinstatement of the corporation.

Sec. 5739.01. As used in this chapter:

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

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

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

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

(3) All transactions by which:

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

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

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

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

(e) Automatic data processing ~~and~~, 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 ~~or~~ computer services, OR ELECTRONIC INFORMATION SERVICES rather than the receipt of personal or professional services to which automatic data processing ~~or~~, 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, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.

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

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

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

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

(Y)(1)(a) "Automatic data processing ~~and computer services~~" 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 ~~or examining or acquiring data stored in or accessible to such computer equipment; and~~

(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. "~~Automatic~~

(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 ~~and~~, 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 ~~and~~, 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,

exhibits. The intent of this provision is to allow such expenditures by the
Ohio Arts Facilities Commission specifically for exhibits which will become
integral part of the Center, and which will be designed, developed, and
stotyped by personnel employed by the Toledo Center of Science and
Industry.

Kenneth H. Lipp Jr.
Speaker of the House of Representatives.

Stanley J. Gronoff
President of the Senate.

passed June 29, 1993

approved July 1st, 1993 4:25 AM
July 1st

Joseph V. Vranovich
Governor.

This section numbering of law of a general and permanent
nature is complete and in conformity with the Revised Code. *

Robert M. Shapiro
Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus,
Ohio, on the 13th day of July, A. D. 1993.

Bob Taft
Secretary of State.

File No. 30 Effective Date July 1, 1993

(certain sections
effective other than July 1, 1993.)

(Amended Substitute House Bill Number 291)

A N A C T

To amend sections 101.72 to 101.75, 101.78, 102.06,
118.09, 119.03, 120.03, 120.04, 120.06, 120.14,
120.18, 120.24, 120.28, 120.33, 120.34, 121.08,
122.33, 124.09, 124.11, 124.15, 125.071, 125.22,
126.04, 126.06, 127.16, 129.55, 129.63, 129.73,
131.32, 131.33, 131.41, 141.152, 152.01, 152.09,
152.10, 152.28, 154.08, 154.20, 169.05, 173.021,
173.07, 175.01, 175.04, 175.05, 319.301, 321.24,
340.02, 340.03, 991.02, 1125.28, 1155.131, 1309.26,
1309.38, 1321.21, 1345.05 to 1345.08, 1501.011,
1501.031, 1501.05, 1513.01, 1513.13, 1707.37,
1711.12, 1713.01, 1713.02, 1733.321, 1739.01,
2117.06, 2151.38, 2743.70, 2915.08, 2941.51,
2947.062, 2949.14, 2949.15, 2949.17, 2949.19,
2949.20, 2949.201, 2951.13, 3301.07, 3301.17,
3301.41 to 3301.47, 3313.22, 3313.24, 3313.29,
3313.90, 3313.911, 3313.92, 3317.01, 3317.011,
3317.02, 3317.022, 3317.023, 3317.024, 3317.06,
3317.07, 3317.11, 3317.13, 3317.16, 3317.63,
3319.03, 3323.05, 3323.09, 3332.02, 3333.12,
3351.07, 3354.02, 3354.09, 3357.02, 3357.09,
3358.02, 3713.02, 3713.03, 3717.51, 3732.04,
3733.07, 3733.25, 3734.01, 3734.04, 3734.07,
3734.12, 3734.13, 3734.15, 3737.71, 3769.03,
3769.10, 3773.31, 3773.32, 3773.33, 3773.34,
3773.36, 3773.47, 3773.51, 3773.53, 3773.54 to
3773.56, 3791.07, 4101.084, 4101.10, 4104.18,
4105.17, 4121.02, 4141.042, 4141.11, 4301.01,
4301.17, 4301.351, 4301.401, 4303.05, 4303.09,
4303.12, 4303.182, 4501.07, 4701.04, 4703.04,
4707.05, 4709.02, 4709.08, 4709.10, 4709.11,
4709.13, 4709.131, 4709.14, 4709.15, 4709.19,
4709.20, 4715.14, 4717.01, 4717.04, 4717.06,
4717.08, 4717.10, 4717.99, 4723.31, 4725.04,
4725.10, 4731.83, 4732.11, 4732.14, 4732.16,
4734.05, 4734.07, 4735.12, 4735.211, 4739.14,
4741.16, 4741.17, 4741.19, 4751.05 to 4751.08,
4753.11, 4906.03, 4906.06, 5101.14, 5101.81,
5101.83, 5101.89, 5111.02, 5111.022, 5111.03,
5111.23, 5111.24, 5111.25, 5111.26, 5111.27,
5111.28, 5111.31, 5111.33, 5113.02, 5119.03,
5119.04, 5119.16, 5119.39, 5119.40, 5119.81,
5120.09, 5121.04, 5122.43, 5123.03, 5123.04,
5123.092, 5123.23, 5123.231, 5123.60, 5126.02,
5126.12, 5126.13, 5126.14, 5139.01, 5139.02,
5139.03, 5139.031, 5139.04, 5139.06, 5139.08,
5139.11, 5139.13, 5139.17, 5139.18, 5139.19,
5139.34, 5139.35, 5143.07, 5149.02, 5149.07,
5505.171, 5528.30, 5528.36, 5701.08, 5703.052,
5703.30, 5703.35, 5707.03, 5707.04, 5709.01,
5709.44, 5711.01, 5711.04, 5711.11, 5711.22,
5715.36, 5725.10, 5725.25, 5727.12, 5727.24,
5727.27, 5727.28, 5727.31, 5727.33, 5727.34,
5727.37, 5727.38, 5727.40, 5727.45, 5728.11,
5731.01, 5731.011, 5731.02, 5731.05, 5731.09,
5731.14, 5731.15, 5731.16, 5731.18, 5731.21.

The above boxed text was disapproved July 1, 1983, by Governor Celeste.

Sec. 5733.16. For the purposes of sections ~~5727.39~~ 5727.38 to 5727.62, inclusive, OF THE REVISED CODE and this chapter, domestic corporations are deemed organized upon the filing of articles of incorporation in the office of the secretary of state, and foreign corporations are deemed admitted to do business in this state when the statement for admission has been filed with the secretary of state or a certificate of compliance with the laws of this state has been obtained from him. Each domestic corporation shall be required to file its first report and pay the tax in and for the calendar year immediately succeeding the date of its organization, and each foreign corporation shall similarly report and pay in and for the calendar year immediately succeeding its admission. Failure on the part of any foreign corporation for profit and any foreign corporation not for profit referred to in section 5733.01 of the Revised Code to proceed according to law to obtain from the secretary of state proper authority to do business or to own or use property in this state shall not excuse such corporation from liability to make proper excise or franchise tax report or return or pay a proper excise or franchise tax or penalty, if such liability would have attached had such proper authority been obtained.

Sec. 5733.28. If any taxpayer required to file a report under this chapter fails to make and file such report within the time therein prescribed, including any extension of time granted by the tax commissioner, or if any taxpayer fails to pay the amount of tax required to be paid under this chapter, except for section 5733.02 of the Revised Code by the dates prescribed therein, unless it is shown that the failure was due to reasonable cause and not willful neglect, A PENALTY OF five per cent of the tax required to be shown on the report shall be added to the tax for each month or fraction thereof elapsing between the due date, including extension thereof, and the date on which filed, or between the time prescribed for payment and the date of payment, provided the total addition in either event shall not exceed twenty-five per cent of the tax. For purposes of this section, the tax required to be shown on the report shall be reduced by the amount of any part of the tax which is paid on or before the date, including extensions thereof, prescribed for filing the return.

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

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

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

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

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

(3) All transactions by which:

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

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

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

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

(e) AUTOMATIC DATA PROCESSING AND COMPUTER SERVICES ARE OR ARE TO BE PROVIDED FOR USE IN BUSINESS. NOTWITHSTANDING ANY OTHER PROVISION OF THIS CHAPTER, SUCH TRANSACTIONS THAT OCCUR BETWEEN MEMBERS OF AN AFFILIATED GROUP ARE NOT SALES WHEN THE TRUE OBJECT OF THE TRANSACTION IS THE RECEIPT BY THE CONSUMER OF AUTOMATIC DATA PROCESSING OR COMPUTER SERVICES RATHER THAN THE RECEIPT OF PERSONAL OR PROFESSIONAL SERVICES TO WHICH AUTOMATIC DATA PROCESSING OR COMPUTER SERVICES ARE INCIDENTAL OR SUPPLEMENTAL. FOR THIS PURPOSE, PERSONAL AND PROFESSIONAL SERVICES INCLUDES FEASIBILITY STUDIES, CONSULTING AND DESIGN SERVICES, TECHNICAL INSTRUCTION AND AID, ACCOUNTING OR LEGAL SERVICES, OR ANY OTHER SITUATION WHERE THE SERVICE PROVIDER RECEIVES DATA OR INFORMATION AND STUDIES, ALTERS, ANALYZES, INTERPRETS OR ADJUSTS SUCH MATERIALS. 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, ONE CORPORATION OWNS OR CONTROLS ANOTHER IF IT OWNS MORE THAN FIFTY PER CENT OF THE OTHER CORPORATION'S COMMON STOCK WITH VOTING RIGHTS.

(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 is never a construction contract. The transfer of copyrighted motion picture films for exhibition purposes is not a sale, except such films as are used solely for advertising purposes. The transfer of title or possession or both of tangible personal property or the granting of a license to use or consume tangible personal property by an electronic data processor in conveying the results of the electronic processing of others' data by such processor is not a sale and the electronic data processor is deemed to be rendering a

authority. County population shall be measured by the most recent census taken by the United States census Bureau.

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

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

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

(Y) "AUTOMATIC DATA PROCESSING AND COMPUTER SERVICES" MEANS THE PROCESSING OF OTHERS' DATA; PROVIDING DIRECT ACCESS TO COMPUTER EQUIPMENT BY REMOTE OR PROXIMATE ACCESS FOR THE PURPOSE OF PROCESSING DATA OR EXAMINING OR ACQUIRING DATA STORED IN OR ACCESSIBLE TO SUCH COMPUTER EQUIPMENT; DESIGNING, SELLING, LEASING, MODIFYING, OR DEBUGGING OF SPECIALIZED OR CUSTOMIZED COMPUTER PROGRAMS OR OTHER SOFTWARE; AND CONSULTATION, SYSTEMS ANALYSIS, AND TRAINING SERVICES PROVIDED IN CONJUNCTION WITH THE DESIGN, INSTALLATION, REVISION, CONVERSION, SALE, LEASE, OR OPERATION OF TAXABLE COMPUTER EQUIPMENT OR SYSTEMS.

Sec. 5739.11. AS USED IN THIS SECTION "FOOD SERVICE OPERATOR" MEANS A VENDOR WHO CONDUCTS A FOOD SERVICE OPERATION UNDER CHAPTER 3732. OF THE REVISED CODE.

Each vendor shall keep complete and accurate records of sales, together with a record of the tax collected thereon, which shall be the amount due under sections 5739.01 to 5739.31 of the Revised Code, and shall keep all invoices, bills of lading, and other such pertinent documents. Alternatively, any vendor FOOD SERVICE OPERATOR who has not been convicted under section 5739.99 of the revised code REVISED CODE may, WITH RESPECT TO THE VENDOR'S FOOD SERVICE OPERATION, keep a sample of invoices, bills of lading, and other such documents PRIMARY SALES RECORDS. Such sample shall consist of all SALES invoices, bills of lading GUEST CHECKS, CASH REGISTER TAPES, and other such documents for each of fourteen days in every calendar quarter. The specific days to be included in the sample shall be determined by the tax commissioner and entered in his THE COMMISSIONER'S journal within ten days after the close of every calendar quarter. The tax commissioner shall notify each vendor SUCH OPERATOR registered pursuant to section 5739.17 of the Revised Code WHO REQUESTS SUCH NOTIFICATION of the days to be included in each sample through the same means as used to deliver sales tax returns at the time the first return after BY THE LAST DAY OF THE MONTH FOLLOWING the close of each calendar quarter is delivered to each vendor. The notice shall also contain a statement that destruction of primary records for time periods other than the specified sample period is optional and that some vendors OPERATORS may wish to keep all such records for four full years so as to be able to clearly demonstrate that they have fully complied with Chapters 5739. and 5741. of the Revised Code. The tax commissioner shall further make his SUCH determination known through a general news release.

Passed June 30, 1983

Approved July 12, 1983
8:46pm.

Richard J. Celeste

Governor.

This section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

David A. Johnston

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 1st day of July, A. D. 1983.

Samuel Brown

Secretary of State.

File No. 32

Effective Date July 1, 1983

Enrolled pursuant to S.J.R. No. 2

(Substitute Senate Bill No. 112)

AN ACT

To amend sections 5123.09 and 5739.01 of the Revised Code and to amend Section 25 of Am. Sub. H.B. 291 of the 115th General Assembly, as amended by Section 10 of Am. Sub. S.B. 311 of the 115th General Assembly, as amended by Section 22 of Am. Sub. H.B. 798 of the 115th General Assembly, to clarify responsibilities regarding the management of institutions of the Department of Mental Retardation and Developmental Disabilities, to clarify the exceptions from the sales tax on automatic data processing and computer services, to authorize the Attorney General to purchase two parcels of real property located in Madison County, and to authorize the conveyance of a parcel of state-owned real estate located in Clinton Township, Seneca County, to M. J. Brown in exchange for his conveyance to the state of a parcel of real estate of equal size, to require the Department of Youth Services to fund construction of and assist in developing two rehabilitation centers and a juvenile center, and to make an appropriation.

Be it enacted by the General Assembly of the State of Ohio:

SECTION 1. That sections 5123.09 and 5739.01 of the Revised Code be amended to read as follows:

Sec. 5123.09. Subject to the rules of the department of mental retardation and developmental disabilities, each institution under the jurisdiction of the department shall be under the control of a managing officer to be known as a superintendent or by other appropriate title. Such managing officer shall be appointed by the ~~chief of the division of mental retardation and developmental disabilities programs with the approval of the~~ director of mental retardation and developmental disabilities, and shall be in the unclassified service and serve at the pleasure of the director ~~or the chief of the division~~. Each managing officer shall be of good moral character and have skill, ability, and experience in his profession. Appointment to the position of managing officer of an institution may be made from persons holding positions in the classified service in the department.

The managing officer, under the director, ~~and the chief of the division~~ shall have entire executive charge of the institution for which such managing officer is appointed, except as provided in section 5119.16 of the Revised Code. Subject to civil service rules AND RULES ADOPTED BY THE DEPARTMENT, the managing officer shall appoint the necessary employees and he or the director ~~or the chief of the division~~ may remove such employees for cause. If required by the director of mental retardation and developmental disabilities, the managing officers shall reside in the institution in which they are employed and devote their entire time to the interests of their particular institution. A report of all appointments, resignations, and discharges shall be filed with the appropriate division at the close of each month.

After conference with the managing officer of each institution ~~and the director, the chief of the division~~ shall determine the number of employees to be appointed to the various institutions and clinics.

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

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

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

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

to use or consume tangible personal property is or is to be granted;

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

(3) All transactions by which:

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

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

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

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

(e) Automatic data processing and computer services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing or computer services rather than the receipt of personal or professional services to which automatic data processing or computer services are incidental or supplemental. ~~For this purpose, personal and professional services include feasibility studies, consulting and design services, technical instruction and aid, accounting or legal services, or any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such materials.~~ 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, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.

(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 serv-

tially for the advancement of the main business or calling of, those who own or control them.

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

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

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

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

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

(Y)(1) "Automatic data processing and computer services" means ~~the~~ processing of others' data, INCLUDING KEY-PUNCHING OR SIMILAR DATA ENTRY SERVICES TOGETHER WITH VERIFICATION THEREOF; providing ~~direct~~ access to computer equipment ~~by remote or proximate access~~ for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment; ~~designing, selling, leasing, modifying, or debugging of specialized or customized computer programs or other software; and consultation, systems analysis, and training~~ AND services CONSISTING OF SPECIFYING COMPUTER HARDWARE CONFIGURATIONS AND EVALUATING TECHNICAL PROCESSING CHARACTERISTICS, COMPUTER PROGRAMMING, AND TRAINING OF COMPUTER PROGRAMMERS

AND OPERATORS, provided in conjunction with AND TO SUPPORT the ~~design, installation, revision, conversion,~~ sale, lease, or operation of taxable computer equipment or systems. "AUTOMATIC DATA PROCESSING AND COMPUTER 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 AND COMPUTER SERVICES, INCLUDING BUT NOT LIMITED TO:

(a) ACCOUNTING AND LEGAL SERVICES SUCH AS ADVICE ON TAX MATTERS, ASSET MANAGEMENT, BUDGETARY MATTERS, QUALITY CONTROL, INFORMATION SECURITY, AND AUDITING AND ANY OTHER SITUATION WHERE THE SERVICE PROVIDER RECEIVES DATA OR INFORMATION AND STUDIES, ALTERS, ANALYZES, INTERPRETS, OR ADJUSTS SUCH MATERIAL;

(b) ANALYZING BUSINESS POLICIES AND PROCEDURES;

(c) IDENTIFYING MANAGEMENT INFORMATION NEEDS;

(d) FEASIBILITY STUDIES INCLUDING ECONOMIC AND TECHNICAL ANALYSIS OF EXISTING OR POTENTIAL COMPUTER HARDWARE OR SOFTWARE NEEDS AND ALTERNATIVES;

(e) DESIGNING POLICIES, PROCEDURES, AND CUSTOM SOFTWARE FOR COLLECTING BUSINESS INFORMATION, AND DETERMINING HOW DATA SHOULD BE SUMMARIZED, SEQUENCED, FORMATTED, PROCESSED, CONTROLLED AND REPORTED SO THAT IT WILL BE MEANINGFUL TO MANAGEMENT;

(f) DEVELOPING POLICIES AND PROCEDURES THAT DOCUMENT HOW BUSINESS EVENTS AND TRANSACTIONS ARE TO BE AUTHORIZED, EXECUTED, AND CONTROLLED;

(g) TESTING OF BUSINESS PROCEDURES; AND

(h) TRAINING PERSONNEL IN BUSINESS PROCEDURE APPLICATIONS.

THE SERVICES LISTED IN DIVISIONS (Y)(2)(a) TO (h) OF THIS SECTION, ARE NOT AUTOMATIC DATA PROCESSING OR COMPUTER SERVICE.

SECTION 2. That existing sections 5123.09 and 5739.01 of the Revised Code are hereby repealed.

The section numbering of law of a general and permanent nature is complete and in conformity with the Revised Code.

David A. Johnston

Director, Legislative Service Commission.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 11th day of January, A. D. 19 85.

Julius Braun

Secretary of State.

File No. 340

Effective Date January 10, 1985

SUMMARY OF ENACTMENTS

120th General Assembly

1993 Appropriation Acts

SENATE MEMBERS

Stanley J. Aronoff, *Chairman*
Robert J. Boggs
Richard H. Finan
Theodore M. Gray
Roy Ray
Eugene J. Watts
Alan J. Zaleski

HOUSE MEMBERS

Vern Riffe, *Vice-Chairman*
William G. Batchelder
Jo Ann Davidson
William L. Mallory
Barney Quilter
Patrick A. Sweeney

Robert M. Shapiro, *Director*

Ohio Legislative Service Commission

EXHIBIT 11

TABLE OF CONTENTS

	PAGE
Introduction.....	xiii
H.B. 107	
Workers' Compensation Law revisions.....	1
H.B. 152 <i>Beginning p. 52</i>	
<u>General</u>	
Reporting requirements for political subdivision self- insurance health benefit programs and self- insurance liability insurance pools.....	52
Prohibited appointments and employments by members of the General Assembly.....	53
Late filing fees for ethics disclosure statements.....	53
Foreign corporation fee changes.....	54
Corporate and Uniform Commercial Code Filing Fund.....	54
Statement of continued existence of domestic corporations.....	54
Abolition of the Ohio Funds Management Board.....	56
Testimony costs of employees of the Auditor of State.....	56
Office of Inspector General as a separate agency.....	56
Ohio Steel Industry Advisory Commission.....	57
State facilities for veterans organizations.....	57
State Personnel Board of Review.....	57
Civil service and state employee benefits changes.....	57
Pay raise for exempt employees on July 1, 1993.....	57
Increased vacation leave for certain exempt employees.....	58
Flexible hours employees.....	58
Support personnel in unclassified civil service.....	59
State job classification plan.....	59
Transfers and promotions.....	60
Adjustment of pay rate.....	60
Application for examination.....	60
Reinstatement.....	61
Disability leave.....	61
CETA employee retirement services credits.....	62
Grant of benefits to permanent employees.....	62
Abolition of positions.....	63
Payment for compensatory time.....	63
Health insurance coverage for state employees.....	63
Health Care Benefit Pilot Project at the University of Toledo.....	63
Public employee and retirant long-term care insurance.....	64
Department of Administrative Services.....	64
PERS.....	64
PPDPF, SERS, STRS, and SHPRS.....	65
Coordination of state employee health care benefits.....	66
Expansion of HMO service areas.....	67

EPA recommendations for revisions to statutes governing solid and infectious wastes and construction and demolition debris.....323
Environmental Board of Review filing and transcription fees.....324
Repeal of application fee for air pollution control permits and variances.....324
Compliance reviews by EPA-certified engineers.....324
Public water system licenses.....327
 Drinking Water Protection Fund and Surface Water Protection Fund.....328
NPDES permit discharge fees.....329
Additional EPA fees.....331
Public water system license fees.....332
Other fees related to drinking water protection and water pollution control.....334
Quality Improvement Council.....336
Effluent limitations.....337
Miscellaneous water pollution control permit provisions...340
Approval of plans for extension of water and sewerage systems owned or operated by political subdivisions....340
Use of money in the Water Pollution Control Administration Fund.....340

Taxation

Tax exemptions--homes for the aged.....341
Replacing continuing property tax levies.....342
School district property taxes for ongoing permanent improvements.....342
Ballot issue to levy a county school financing district tax and reduce member school district taxes.....343
 Resolution on the reduction.....344
 Tax Commissioner certification of effective rate....344
 Ballot language.....344
 Decrease in CSFD levy.....345
 Tax reduction factor instructions.....345
 Inclusion of CSFD millage in 20-mill requirement....345
Due date for amended corporation franchise tax annual reports.....345
Allocation for corporate franchise tax of certain lease receivables.....346
Delayed phase-in of the corporation franchise tax subsidiary credit.....346
Sales and use tax refunds for electronic information services providers.....346
Application of the sales tax to warranty and service contract transactions.....347
Sales and use tax exemption for building maintenance and janitorial service.....348
Exemption of certain employment services from sales taxation.....348
Payment of sales taxes on physical fitness and sports club memberships.....348
Sales tax exemption for sales made by school groups.....349

Nonappropriation provisions of
Am. Sub. H.B. 152

Reps. Sweeney, Boggs, Miller, Koziura, Cain, Beatty, Mallory, Fox, Campbell, Rankin, W. Jones, Stinziano, Cera, Troy, Healy, Thompson, McLin, Sykes.

Sens. Gray, Ray.

Makes appropriations for the 1993-1995 biennium and provides authorization and conditions for the administration of state programs. (Effective: July 1, 1993; certain provisions effective other than July 1, 1993. Certain provisions vetoed.)

GENERAL

Reporting requirements for political subdivision self-insurance health benefit programs and self-insurance liability insurance pools (secs. 9.833 and 2744.081)

Continuing law authorizes political subdivisions to establish and maintain individual or joint self-insurance health benefit programs and joint self-insurance liability insurance pools. The administrators of the health benefit programs and of the liability insurance pools are required to maintain reserve funds in accordance with statutorily prescribed standards to cover potential claims.

Under prior law, the administrator of each health benefit program was required to submit to the Superintendent of Insurance, within 90 days after the last day of the program's fiscal year, a report of the amounts reserved and disbursed under the program and a written report of a member of the American Academy of Actuaries. Similar reports had to be submitted to the Superintendent, on or before the last day of March for the preceding year, by the administrator of a liability insurance pool. The Superintendent had to review the reports to determine whether the reserves of each program or pool were adequate in accordance with reserve standards that applied to private insurance companies. If he disapproved of the reports, he had to order the reporting authority to comply with the reserve standards. Prior law also required a joint self-insurance liability pool to pay the reasonable costs and expenses incurred by the Superintendent in reviewing the pool's reserve fund reports or the costs and expenses of any other investigation that the Superintendent considered necessary as part of the review.

The act eliminates the requirement that the reserve fund report of a political subdivision individual or joint self-insurance health benefit program or joint self-insurance liability insurance pool be submitted to the Superintendent of Insurance, and the requirement that the Superintendent review or

liability. Under previous law, corporations had to file amended reports within 120 days of either (1) the date the federal adjustment was agreed to or finally determined, or (2) the date a refund was issued (in the case of a federal tax overpayment) or an assessment was made (in the case of an underpayment).

The act extends the 120-day deadline to one year. If an adjustment results in an overpayment of Ohio franchise tax, applications for refund, which previously had to be filed within the 120-day period, now must be filed within the one-year period prescribed for filing amended reports.

Under the act, the change in the deadline would have affected only amended reports required by adjustments filed for taxable years ending on or after July 1, 1993; however, this provision was vetoed, so no express rule for its application is set forth.

Allocation for corporate franchise tax of certain lease receivables (sec. 5733.05; Section 161)

The act provides that in determining corporate franchise tax liability by the net worth method, a lessor's receivables from sales-type, direct financing, and leveraged leases accounted for in accordance with generally accepted accounting principles as set forth in Financial Accounting Standards Board Statement 13 must be allocated as in or out of Ohio in accordance with the location of the property subject to the lease. This provision first applies to taxable years ending on or after July 1, 1993.

Delayed phase-in of the corporation franchise tax subsidiary credit (sec. 5733.067)

Under continuing law, a corporation is allowed a credit against the corporation franchise tax if it or its parent owns or controls more than 50% of a subsidiary corporation and both the corporation and the subsidiary pay the tax on the net worth basis. Previous law phased in the credit according to the following schedule: corporations were allowed 50% of the credit for tax years 1991, 1992, and 1993, 75% for tax year 1994, and 100% for tax year 1995 and thereafter.

The act delays the phase-in of the credit for two years. Under the act, corporations are allowed 50% of the credit for tax years 1991, 1992, 1993, 1994, and 1995, 75% for tax year 1996, and 100% for tax year 1997 and thereafter.

→ Sales and use tax refunds for electronic information services providers (secs. 5739.01 and 5739.071)

Under continuing law, the sales and use tax is levied on the sale or use of automatic data processing and computer services used in business, which are defined to include providing access to computer equipment for the purpose of examining or acquiring

data stored in or accessible to the computer equipment. The act creates and provides special tax refund treatment for a new category of computer-related services, called electronic information services. "Electronic information services" is defined as providing access to computer equipment by means of telecommunications equipment for the purpose of either (1) examining or acquiring data stored in or accessible to the computer equipment, or (2) placing data into the computer equipment to be retrieved by designated recipients with access to the equipment. The act specifies that the sales and use tax is levied on the sale or use of electronic information services used in business.

In addition, the act requires the Tax Commissioner to refund to a provider of electronic information services 25% of the sales and use taxes it pays on purchases made on or after July 1, 1993, of computers, computer peripherals, software, telecommunications equipment, and similar items, as long as the computers and other property are primarily used to acquire, process, or store information for use by business customers or to transmit or disseminate information to business customers. The Commissioner also must refund 25% of the taxes the provider pays on the installation or repair of the computers and other property and on purchases of maintenance agreements for them. The provider must apply for the refund in the same manner and subject to the same time limitations as for any other sales and use tax refund. If a provider is authorized under a direct payment permit to pay its sales and use taxes directly to the state instead of to the vendor of the goods it purchases, the act allows the provider to list on its return and pay tax on 75% of the price of property, installations, repairs, and agreements as described above, in lieu of paying the full amount of tax and then seeking a 25% refund.

Application of the sales tax to warranty and service contract transactions (sec. 5739.01)

Am. Sub. H.B. 904 of the 119th General Assembly repealed a sales tax exemption for sales "in which the purpose of the consumer is . . . 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 act specifies how the sales tax applies in light of this repeal.

Under the act, 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. Unless the tangible personal property being repaired or replaced is a component part of an item covered under another person's warranty, the purchase of tangible personal property or services for use or consumption in the

PNC Bank, Ohio, N.A., f.k.a. The Central Trust Company, N.A., Appellant, v. Roger W. Tracy, Tax Commissioner of Ohio, Appellee.
Case No. 93-T-1316 (SALES & USE TAX)

STATE OF OHIO -- BOARD OF TAX APPEALS

1995 Ohio Tax LEXIS 892

July 7, 1995

[*1]

APPEARANCES:

For the Appellant - Larry H. McMillin, Frost & Jacobs, 2500 PNC Center, 201 East Fifth Street, Cincinnati, Ohio 45202-4182

For the Appellee - Betty D. Montgomery, Attorney General of Ohio, By: Steven L. Zisser, Assistant Attorney General, State Office Tower, 16th Floor, 30 East Broad Street, Columbus, Ohio 43266-0410

OPINION:

DECISION & ORDER

This matter is before the Board of Tax Appeals upon a notice of appeal filed under date of November 19, 1993, by appellant, PNC Bank, Ohio, N.A. Appellant appeals a final determination of the Tax Commissioner, dated October 21, 1993, wherein the Tax Commissioner affirmed, with modification, a sales and use tax assessment previously levied for the period of January 1, 1986 through December 31, 1988.

The Board of Tax Appeals now considers this matter upon the notice of appeal, the statutory transcript certified to the Board by the Tax Commissioner, and the record of the evidentiary hearing. Appellant was represented by counsel, who offered the testimony of Cindy Massey and Joanne Nordloh, both of whom are employed by appellant, and Ronald Grass of the National Data Corporation. The Tax Commissioner was represented by counsel, who moved [*2] the Board to affirm the Tax Commissioner upon the record. Both parties were also afforded an opportunity to file briefs in this matter; however, appellant was the only party to submit a brief for this Board's consideration.

Appellant is a national bank located in Cincinnati, Ohio. Appellant provides numerous banking services, among which are the issuance of credit cards to various customers and the provision of credit card services to merchants who accept credit cards in retail transactions. During the audit period, appellant contracted with the National Data Corporation ("NDC") for various services concerning appellant's "MasterCard" and "Visa" credit card operations. NDC is located in Atlanta, Georgia.

On October 13, 1989, the Tax Commissioner issued an assessment against appellant in the amount of \$1,003,269.97, including interest and penalties. Among those items assessed were charges made to appellant by NDC for the provided credit card services. Appellant filed a timely petition for reassessment, and, on October 21, 1993, the Tax Commissioner issued his final determination. Therein, the Tax Commissioner modified his assessment, reducing the total assessment to \$858,947.93. [*3]

In its notice of appeal, appellant contends the Tax Commissioner erred in assessing tax on several categories of transactions made with NDC, including transactions related to credit card authorizations, the settlement of merchant accounts, and the purchase of merchant credit card terminals. Appellant asserts that each of these transactions is excepted from taxation. Each of these types of transactions will be treated separately below.

EXHIBIT 12

Initially, we begin our review of this matter by noting that R.C. 5739.02 levies a sales tax on all retail sales made in Ohio. A similar use tax is imposed by R.C. 5741.02. If a transaction is not subject to sales tax, it follows that the transaction, if made in Ohio, is also not subject to use tax. R.C. 5741.02(C). n1

n1 Since the analysis of the applicable sales and use tax provisions is essentially identical in the context of the present matter, we shall refer only to the applicable sales tax provisions throughout the remainder of this decision and order.

In reviewing a taxpayer's appeal before this Board, we observe that the findings of the Tax Commissioner are presumptively valid. Consequently, it is incumbent upon a taxpayer challenging[*4] a determination of the Tax Commissioner to rebut that presumption. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St. 3d 121. When no competent and/or probative evidence is developed and properly presented to the Board to establish the Tax Commissioner's determination as "clearly unreasonable or unlawful," the determination is presumed to be correct. *Id.*

Credit Card Authorizations

Appellant's first contention of error relates to certain payments made to NDC for credit card authorizations. The Tax Commissioner assessed appellant on these transactions because he found they constituted taxable automatic data processing under R.C. 5739.01(B)(3)(e).

Under certain circumstances, both Visa and MasterCard require merchants to obtain credit authorizations before accepting a credit card as payment in a retail sale. In many cases, banks establish a "floor limit" on purchases. For any charge below a certain amount, no authorization is required. However, if a purchase exceeds the predetermined limit, the merchant must have the charge authorized by the bank which issued the credit card to the purchaser.

Merchants may utilize one of two authorization processes. One is known [*5]as "voice" authorization. The other is called an "electronic" authorization. If a merchant observes the voice authorization process, the merchant calls an NDC operator, either at a local number or an "800" line, to request an authorization. The merchant supplies the NDC operator with specific information, including: a sixteen digit merchant identification number, the type of credit card being used, the credit card account number, the expiration date of the card, and the amount of the proposed sale. The NDC operator inputs this information into a computer terminal. The information is then transmitted, via computer, to the bank which issued the credit card. In transmitting the authorization request, NDC may either directly contact the issuing bank's computer or NDC may contact computers located at MasterCard and Visa. The MasterCard or Visa computers will then route the request to the issuing bank's computer. In the instant matter, NDC had direct access to appellant's computer. Thus, if the purchase is made by a card issued by appellant, NDC routes the authorization request directly. If, however, the merchant receives a card issued by another bank, the routing of the request varies [*6] depending upon whether NDC has direct access to that bank's computers.

Once the card issuing bank receives the request, the information is processed and a decision whether to authorize the transaction is made. The bank then transmits back to NDC's computer (either directly or through Visa and MasterCard) one of four possible responses. The bank may authorize the credit, in which case it also transmits an authorization number. It may deny credit. It may instruct the merchant to call the issuing bank for further instructions. Finally, it may direct the merchant to retain the card and send it to the bank. Once NDC receives the transmission, the NDC operator verbally advises the merchant of the response. If the response is for the merchant to call the bank, often the NDC operator will place the call and relay information between the merchant and the bank. If an authorized, denied, or retain response is received, the merchant acts accordingly.

Electronic authorizations are similar to voice authorizations; however, the request is transmitted electronically from the merchant to NDC by way of a "terminal." A terminal is a small box containing a number pad, a display, and a device that can[*7] read information off of a magnetic strip on the back of a credit card. The terminal also has sufficient memory to store NDC's phone number and the merchant's identification number. When a merchant desires to make a sale, the credit card is "swiped" through the terminal. The terminal then reads the account number, expiration date, and other relevant information from the card. The merchant will then enter the purchase amount and press a "send" button. Once the terminal is activated, it will dial NDC and transmit the information to NDC's computers. As with voice authorizations, this information is then transmitted to the issuing bank's computer directly or through Visa or

MasterCard. The bank's response is then transmitted back to NDC, and NDC transmits the response back to the terminal. Again, the possible responses include an authorization number, a denial, a retain credit card instruction, or a call-for-referral instruction.

NDC charges appellant for its authorization services on a per transaction basis. Appellant asserts that these transactions are not subject to taxation as they constitute the provision of a service rather than automatic data processing. Appellant points out that[*8] NDC does not participate in the decision to extend credit, nor does NDC have access to any data in the bank's computer. The Tax Commissioner asserts that NDC's activities constitute automatic data processing because the transactions involve providing access to computer equipment for the purpose of examining or acquiring data.

Initially, appellant asserts the resolution of this matter depends upon statutory construction. In short, appellant asks us to determine whether the services provided by NDC are made taxable by the terms of the taxation statutes, with any statutory ambiguity resolved in favor of appellant. We do view the issue as one of definition. In our review of this matter, we must determine whether the services rendered by NDC fall within the class of transactions made taxable as sales of "automatic data processing" by R.C. 5739.01(B)(3)(e) and R.C. 5741.02(C)(2). This is not a case where a taxpayer asserts an exception or exemption from taxation, nor are we faced with any ambiguity. If the services rendered by NDC fall within the definition of "automatic data processing," they are properly subject to sales and use tax. If we find the services are not within the definition[*9] of "automatic data processing," then the Tax Commissioner must be reversed.

During the audit period, R.C. 5739.01(B) read, in pertinent part, as follows:

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

"(3) All transactions by which:

"(e) Automatic data processing and computer services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing or computer services rather than the receipt of personal or professional services to which automatic data processing or computer services are incidental or supplemental. * * *"

R.C. 5739.01(Y)(1) defines automatic data processing and computer services in the following manner:

"(Y)(1) 'Automatic data processing and computer services' means: processing of other's data, including keypunching or similar data entry services together with verification thereof; providing access to computer equipment for the purpose of processing data or examining or acquiring data stored [*10] in or accessible to such computer equipment * * *.

'Automatic data processing and computer services shall not include personal or professional services.' (Emphasis added.)

As previously stated, in determining whether appellant's transactions with NDC for credit card authorizations are subject to tax, we must determine whether the authorization transactions fall within the definition of "automatic data processing or computer services." For the reasons that follow, we find they do not.

The leading case concerning automatic data processing is Quotron Systems, Inc. v. Limbach (1992), 62 Ohio St. 3d 447, in which the Supreme Court upheld a determination that the taxpayer provided an automatic data processing service. Therein, the taxpayer was engaged in providing price information on stocks and commodities to its subscribers. A subscriber could inquire into a stock price from a computer terminal. This inquiry would be transmitted to one of the taxpayer's computers via "concentrators" (computers used to connect subscribers terminals with the taxpayer's computers) located in Ohio. The Court found that the transactions involved automatic data processing because the

subscriber [*11] had access to the computers for the purpose of examining or acquiring information. Specifically, the Court held:

"Quotron first argues that the statute imposes the tax on the services only when the vendor rendering the service processes another's data or permits the customer to use the vendor's equipment to process the customer's data.

"The Statute's language does not support this reading. The statute includes as an adp or computer service the service that Quotron provides - access to Quotron's computer equipment to examine or acquire stock price data stored in or accessible to that computer equipment. Consequently, the statute taxes the service that Quotron sells." *Id.* at 448. (Emphasis added.)

However, not all uses of computers constitute automatic data processing. Where a computer offers no access to computer equipment for the purpose of processing, examining, or acquiring data, automatic data processing does not occur. *Reuters America, Inc. v. Limbach* (Nov. 28, 1994), B.T.A. Case No. 92-H-1414, unreported (computer system used as a telecommunications network did not perform automatic data processing because the computer acted merely as an electronic connection[*12] through which subscriber's messages pass).

We find the instant matter to be distinguishable from the situation in *Quotron*, *supra*. Appellant's merchant customers do not receive access to appellant's computers through NDC. Consequently, the merchant cannot examine or acquire any credit card information stored in or available to appellant's computers. Additionally, NDC lacks access to appellant's computers. NDC is limited to sending off a specific inquiry and receiving a specific answer. NDC does not determine the credit worthiness of any account, nor can it access appellant's computers to inquire into the details of any account. Moreover, since appellant's response to a request is not generated until the request is received, NDC has no access to any information stored in appellant's computer which can be used by NDC to authorize the transaction. In short, appellant performs the actual data processing, while NDC acts as an electronic intermediary, channelling requests to their proper destination and relaying the appropriate response. This service does not provide "access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible[*13] to such computer equipment," and hence does not constitute automatic data processing. See *Reuters America, Inc.*, *supra*.

In reaching our determination, we observe that the Tax Commissioner has reached a similar conclusion in a situation analogous to the one currently before us. In Tax Comm. Op. No. 92-0007 (Apr. 30, 1992), unreported, the Tax Commissioner rendered an opinion as to a taxpayer's provision of motor vehicle reports to insurance companies. When an insurance company desired information pertaining to a person's driving record, the taxpayer would obtain the necessary information from the state's department of motor vehicles. The insurance company customer would transmit its request to the taxpayer through a computer. The taxpayer would then transmit the request to the Ohio Bureau of Motor Vehicles. The Bureau would process the information and transmit it to the taxpayer by computer. The taxpayer would then sort the information and transmit a report back to the insurance company. In opining the transactions to be excepted from taxation, the Tax Commissioner stated the following:

"In normal transactions as described by Taxpayer, no tangible personal property is transferred[*14] to its insurance company customers. Taxpayer is providing a service which, to be subject to sales or use tax, must be among the services enumerated in R.C. 5739.01(B)(3).

"Arguably, Taxpayer's activity could be considered to fall under R.C. 5739.01(B)(3)(e), 'automatic data processing services,' as that service is defined in Adm. Code Rule 5703-9-46(A)(1)(b): 'Providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment.' However, a close examination of Taxpayer's operation shows that customers are not granted computer access to the information they seek. Rather, their computers are used solely as a mode of communicating the request for information. Upon receiving a request, Taxpayer takes steps to procure the information. A day later, the requested information is transmitted, via computer, to the customer.

"In conclusion, Taxpayer's transactions with its customers do not meet the definition of 'sale' in R.C. 5739.01(B), and hence cannot be subject to Ohio sales or use tax."

While the opinion of the Tax Commissioner has no precedential value, we find it to be persuasive and to be supportive[*15] of our determination. For all of the foregoing reasons, we find that the subject transactions with NDC

are not subject to use tax and that the Tax Commissioner's determination with respect to these transactions must be reversed. n2

n2 NDC was also assessed tax on transactions involving credit card authorizations. For our discussion of NDC's liability for such transactions, see *National Data Corporation v. Tracy, B.T.A. Case No. 93-T-1317*, unreported, announced this date.

Merchant Processing

Appellant's second contention of error relates to other services provided by NDC. When a terminal is used to electronically authorize a credit purchase, the terminal stores certain information, including the merchant number, the card's account number, the transaction date, the amount of the transaction, and the authorization code. At the end of the business day, the merchant can verify the number and amount of charges against the information captured by the terminal. If there is a match, the merchant pushes a "send" button, and the stored information is transmitted by telephone to NDC's computer. This process is known as "settlement."

Once NDC receives the merchant's settlement, [*16] the information is stored in NDC's computer until the end of its business day. At the end of the day, the computer processes the information stored and reformats that information as specified by each of NDC's bank customers. For appellant, NDC separates each transaction out by merchant and further breaks the information down by credit card type. Once formatted, the information is transmitted, via computer, to appellant.

Appellant uses the report it receives from NDC to credit each merchant's account with the charges received during the business day. Additionally, any charges authorized by NDC which were made by a credit card issued by appellant will be posted to the cardholder's account. Finally, appellant transmits to MasterCard and Visa information concerning charges reported by one of appellant's merchants which were made on a credit card issued by another bank. In this way, appellant may seek reimbursement of the charge amounts from the card issuing banks.

NDC charges appellant for the sorting and formatting of merchant settlements. Appellant then recoups these costs either through a discount rate which is charged to a merchant on each transaction, or, for larger accounts, by[*17] directly billing the merchant for the sorting service. Discount rates vary from merchant to merchant. Usually, the higher volume merchants have a smaller discount rate applied. For the larger merchants, appellant usually enters into an agreement in which the merchant agrees to reimburse appellant for costs related to the processing of credit purchases.

Appellant concedes that the merchant processing charges fall within the definition of automatic data processing. n3 Nevertheless, appellant asserts that the transactions are excepted from taxation because the services were resold to its merchants. The exception from taxation appellant relies upon is set forth in R.C. 5739.01(E)(1), which provides in pertinent part:

"(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 in the form in which the same is, or is to be, received by him[.]"

n3 See, also, *Citizen's Financial Corp. v. Kosydar* (1975), 43 Ohio St. 2d 148, and *The Fifth Third Bank v. Lindley* (Jun. 1, 1977), B.T.A. Case No. E-82, unreported, concerning the taxability of similar transactions. [*18]

Central to the exception embodied in R.C. 5739.01(E)(1) is the requirement that for a resale to exist, the benefit of the service provided must be resold in the same form as received by the initial purchaser. The evidence in the instant case fails to support such a conclusion. Appellant purchases a computerized report which lists the daily charge transactions by merchant. However, appellant's merchants do not receive the same list. The merchants receive something entirely different; they receive the appropriate credits and debits to their bank accounts. Moreover, NDC's processed report is

transferred from its computers into appellant's computers. Appellant has provided this Board with no evidence indicating that the daily report is then transferred to its merchants in this same form of media. Consequently, we are unable to determine that the processing is resold in the same form received by appellant.

Next, we observe that the benefit of NDC's services is retained by appellant rather than sold to appellant's merchants. Appellant not only uses the reports to credit its merchant's accounts, but it also uses the report received from NDC to debit the accounts of appellant's cardholders[*19] and to seek reimbursement of charges received on cards issued by other banks. Appellant has come forward with no evidence indicating that the benefit of NDC's service is resold in any form to the cardholders or other banks. Appellant retains and uses the benefits of the processing services for its own purposes. It does not simply purchase the services for transfer to its customers. Having retained the benefits furnished by NDC's processing services, appellant had as its primary intent the use of the processing services for the administration of its accounts rather than the resale of the services to another. See *Dresser Industries, Inc. v. Lindley* (1984), 12 Ohio St. 3d 68 (holding that a purchase is excepted under R.C. 5739.01(E)(1) as a sale for resale where the primary intent of the purchaser is to resell the thing to another rather than to utilize the thing for the purchaser's benefit). Therefore, we find that the subject charges are not excepted from taxation under R.C. 5739.01(E)(1).

Alternatively, appellant implies in its brief that NDC's sorting of the charge data is the last act in the consummation of a retail sale, as the sale is not complete until appellant receives[*20] the charges electronically and credits the merchant's account. We disagree. R.C. 5739.01(E)(2) excepts from taxation all items used "directly in making retail sales." R.C. 5739.01(O) defines "making retail sales" as:

"[T]he 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, but it does not include the delivery of items thereafter nor 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."

Accordingly, an item is used in making retail sales if it is used directly to affect the retail sale. *Hyatt Corp. v. Limbach* (1994), 69 Ohio St. 3d 537, 539; *NCR Corp. v. Lindley* (1985), 18 Ohio St. 3d 332. In the case of credit card purchases, the retail sale occurs when the purchaser presents a credit card and that card is authorized for use by the bank. At that moment, the purchaser is obligated to pay the charge and the merchant is obligated to deliver the item or service purchased. NDC's sorting of charge data is not contemporaneous[*21] with the sale nor does it play any role, directly or indirectly, in consummating the sale between the merchant and the purchaser. As the processing occurs well after the retail sale, appellant may not avail itself of the exception under R.C. 5739.01(E)(2).

Credit Card Terminals

Appellant's third assignment of error relates to its purchase of 665 electronic terminals. As previously stated, these terminals are used by merchants to authorize credit purchases and to settle charge transactions at the end of the business day. At the evidentiary hearing, appellant offered testimony indicating that 425 of these terminals were transferred to one of its largest merchants. These terminals were charged to an expense account to which the merchant's reimbursements were applied. The remaining 240 terminals were held by appellant and offered to its other merchants for purchase or rental. Appellant did not use these remaining terminals for its own purposes. Appellant contends that the purchase of the terminals was for resale to its merchant customers and should therefore be excepted from taxation under R.C. 5739.01(E)(1). We agree.

In *The Central Trust Company, N.A. v. Limbach* (Jun. [*22] 7, 1993), B.T.A. Case No. 90-Z-1644, unreported, the taxpayer had been assessed tax on credit card imprinters and sales slips purchased for subsequent transfer to retail merchants. Therein, we held the purchases excepted from tax because the taxpayer's purpose was to "resell" the items to merchants for use in making retail sales. See, also, *Bank One, Akron, N.A. v. Limbach* (Dec. 31, 1992), B.T.A. Case no. 89-N-944, unreported. We find the 425 terminals delivered to appellant's merchant to be resold, by rental, in the same form as appellant received the terminals. Although not yet resold, the record also supports a finding that the remaining 240 terminals were purchased for the subsequent transfer to retail merchants. As a result, we find the purchase of credit card terminals to be excepted under R.C. 5739.01(E)(1). The tax assessed on the purchase must be removed from the assessment.

File Charges and Post Office Box Rental

Appellant next objects to the Tax Commissioner's assessment of use tax on charges for the maintenance of NDC's computer files and for the rental of a post office box. The files, referred to as "merchant records," are used exclusively by NDC at its[*23] Atlanta, Georgia, location to keep track of information needed in performing its various services. Each record identifies, inter alia, the bank, the types of credit cards the merchant is authorized to accept, the type of authorization process used, whether the merchant performs electronic settlements, and a list of other services offered by NDC which a bank has authorized NDC to perform for the merchant. When any type of request comes into NDC from a merchant, NDC checks the file to ensure that the requested service has been authorized by the bank. Neither appellant nor appellant's merchants are given access to the merchant records. NDC charges appellant for the update and storage of the data.

NDC also separately bills appellant for the rental of a post office box. The box, located in Atlanta, Georgia, is used for the receipt of the paper copies of charge slips collected by merchants. The charge slips are made at the time of the retail sale and include an imprint of the credit card as well as other relevant data. After a merchant settles its daily charges electronically, the merchant mails these paper slips to NDC. NDC then stores these slips for appellant at its Atlanta location. [*24]

Appellant contends that no use tax is owed on either the file charges or the post office box because no property was delivered, stored, used, or consumed in Ohio nor was a benefit realized in Ohio for any service provided. R.C. 5741.02(C)(2) and (3). In *Union Central Life Ins. Co. v. Lindley* (1984), 12 Ohio St. 3d 80, the Supreme Court considered a similar issue. Therein, the taxpayer was assessed use tax on transactions involving both computer systems modification requests and magnetic tape. The requests had been fulfilled by a third party, which the taxpayer had hired to carry out certain data processing services, at the third party's computer center in Dallas, Texas. Likewise, the magnetic tape expenditures related to charges made to the taxpayer by the third party for the amount of magnetic tape used in providing services at the Dallas computer center. In finding the expenditures to be excepted from use tax, the Court held as follows:

"[W]e must reverse that portion of the board's ruling which relates to the systems modification requests and magnetic tape. The latter charges did not include any transfer of property to Ohio. The modification requests were for the design[*25] of program changes which was purely a service. Any tangible product which resulted from such requests would be limited to the device used for recording the program which was located in Texas. Similarly, the magnetic tape did not reach Ohio as it was used only in Texas." *Id.* at 83.

In the instant matter, the storage and maintenance of the computer files is limited to NDC's computer in Georgia. Moreover, NDC uses those files to perform functions solely connected with its activities at its Atlanta, Georgia location. Similarly, the post office box is used exclusively for the receipt of documents in Georgia. As the documents are stored in Georgia, the property has not reached Ohio. Therefore, we find the Tax Commissioner erred in assessing appellant use tax on the subject charges.

Unallocated Research

Appellant next opposes the assessment of use tax on charges categorized as "unallocated research." Unallocated research refers to the retrieval of charge slips by NDC for appellant. As previously stated, after a merchant settles its daily charges, it sends its paper charge slips to NDC for storage. If a credit card holder later challenges a charge on his or her account, the card[*26] holder, or the card issuing bank, may request the charge slip from appellant. In such cases, appellant contacts NDC, and NDC retrieves the original paper slip from storage and sends it to appellant. NDC then charges appellant for this "research." Appellant maintains that the retrieval of the slip is a service not subject to use tax.

Based upon our review of the record, we find NDC's retrieval of original business records to be a personal service. Therefore, the subject transactions are excepted from taxation. R.C. 5739.01(B). As the Tax Commissioner erred in his determination, the use tax levied on these transactions should be removed from the assessment.

Unallocated Facsimiles

After a period of time, NDC microfilms the original paper charge slips and discards them. Accordingly, if a charge slip is requested, a copy is made from the microfilm and sent to appellant. NDC charges appellant for the copying of a microfilmed slip under the category of "unallocated facsimilies."

Appellant contends the facsimile charges are for mixed service and property transactions, of which the service is the primary component. As a result, appellant asserts the transactions to be excepted from[*27] taxation. However, we observe that the facsimile transactions concern the making and transfer of copies. Such transactions are expressly made taxable in their entirety under R.C. 5739.01(B)(4):

"(B) 'Sale' and 'selling' include * * * (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[.]"

Based upon the foregoing, we find the subject transactions to be properly subject to use tax. Accordingly, the Tax Commissioner's determination is affirmed. Cf. *Park National Bank v. Limbach* (Feb. 9, 1988), B.T.A. Case No. 86-H-1260, unreported.

Non-Recurring Charges

Appellant next claims that the Tax Commissioner improperly assessed use tax on certain "non-recurring charges," as there is no proof of delivery in Ohio. These transactions are not described by appellant, nor can we determine from the record what constitutes a "non-recurring" charge. As appellant has come forward with no additional evidence to refute the Tax Commissioner's finding, we must conclude that appellant has failed to satisfy its burden [*28] of proof that the Tax Commissioner's determination is clearly erroneous. *Alcan*, supra. Accordingly, the Tax Commissioner's finding is affirmed.

TELEX Charges

Appellant next challenges the Tax Commissioner's assessment of use tax on TELEX charges. Again, appellant offers no evidence concerning the details of this charge. Consequently, we find that appellant has failed to overcome the presumption in favor of the Tax Commissioner. *Alcan*, supra.

Remission of Penalties

Finally, appellant requests that "[t]o the extent that the assessment of any of the * * * transactions is corrected, the statutory penalty relating to such corrections should be eliminated[.]" (Appellant's Brief, page 27.) The request is meritorious. Therefore, the statutory penalties previously assessed on the credit card authorization transactions, on the purchase of merchant terminals, on file charges, on the rental of the post office box, and on charges for unallocated research are ordered removed from the penalty assessment.

Conclusion

Based upon the foregoing, the Board of Tax Appeals determines and orders that the final determination of the Tax Commissioner must be, and the same hereby [*29]is, modified in accord with the foregoing decision and order; and in all other respects, the Tax Commissioner's final determination is affirmed.