

SUPREME COURT OF OHIO

MARC GLASSMAN, INC.,

Appellee,

v.

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

Appellant.

Case No. 07-0328

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

Court of Appeals Case
No. CA-06-087766

**AMICUS CURIAE BRIEF OF OHIO PHARMACISTS ASSOCIATION,
OHIO CHAMBER OF COMMERCE AND OHIO COUNCIL OF RETAIL
MERCHANTS IN SUPPORT OF MARC GLASSMAN, INC. AND
URGING AFFIRMANCE OF THE COURT OF APPEALS**

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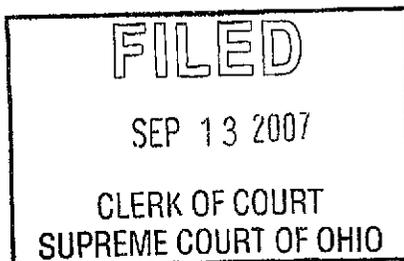
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I. INTRODUCTION

By this appeal, the Tax Commissioner seeks to expand unilaterally and dramatically the scope of the sales and use tax to encompass business transactions whenever, in his words, “the service links computers to each other in order to access data for business use” (Brief of Appellant at 8), or upon any receipt of information electronically. (Id.) The requested expansion, however, is contrary to R.C. 5739.01, ignores the statute’s development, and cannot be reconciled with prior declarations of this Court, the Board of Tax Appeals (“BTA”), and even a prior Tax Commissioner with regard to computer-related transactions.

The initial imposition of a new tax of this overwhelming magnitude should not be the result of Tax Commissioner fiat through the audit of an individual taxpayer, with potential retroactive application to other taxpayers. Such departure from existing law on such a fundamental scale, should be a matter of public discussion and debate, and most importantly, legislative decision. For all of these reasons and for those stated below, the decision of the Court of Appeals should be affirmed.

II. STATEMENT OF INTEREST

The Ohio Pharmacists Association was formed September 2, 1879. Its mission is to unite the profession of pharmacy, and encourage interprofessional relations while promoting public health through education, discussion and legislation. The Association represents over 3000 pharmacists working in various practice sites, and conducts educational programs designed to keep pharmacists up to date on various areas in pharmacy, including medications, legislation, and economic issues. The Ohio Pharmacists Association joins together pharmacists, many of whom are still independent business persons, who would be directly and adversely impacted

by the taxation of required insurance company approvals for the sale of prescription medications.

Founded in 1893, the Ohio Chamber of Commerce is Ohio's largest and most diverse statewide business advocacy organization. The Chamber works to promote and protect the interests of its 4,000 business members while building a more favorable Ohio business climate. As an independent and informed point of contact for government and business leaders, the Ohio Chamber is a respected participant in the public policy arena. Through its member-driven standing committees and the Ohio Small Business Council, the Chamber formulates policy positions on issues as diverse as education funding, taxation, public finance, health care, environmental regulation, workers' compensation and campaign finance. The advocacy efforts of the Ohio Chamber of Commerce are dedicated to the creation of a strong pro-jobs environment – an Ohio business climate responsive to expansion and growth.

The Ohio Council of Retail Merchants, representing more than 3,100 retailers, is the voice of the retail industry in Ohio. Founded by leading merchants in 1922, its purpose is to make certain that courts, state legislators, other government officials, other trade groups, the news media, and the public hear the voice of retailing.

The taxation of the electronic approval of transactions would impact a significant number of the members of the three Amici organizations and expose them to the unexpected assessments and penalties potentially going back four years. The tax proposed by the Commissioner is not insignificant. Ohio pharmacies processed tens of millions of transactions last year alone. Most of those transactions were approved with the use of a computer link like that used by National Data Corporation ("NDC") for Marc Glassman, Inc. Further, businesses in locations adjoining

other states, which do not tax these transactions, would be placed at a competitive disadvantage when compared with pharmacies as well as other retailers across those state borders.¹

Moreover, no reason exists to expect that the Tax Commissioner would be content to extend the sales tax to only insurance authorizations or even credit authorizations. The Tax Commissioner's arguments in favor of taxation of Marc Glassman exhibit every indication that the Tax Commissioner seeks a license to extend the sales tax far beyond that contemplated by the General Assembly or the taxpayers that would be called upon to pay the new tax.

III. STATEMENT OF THE ISSUE

This appeal arises from the Tax Commissioner's assessment of use tax against Marc Glassman for charges imposed by NDC for the receipt of insurance authorizations by which the pharmacists obtain the confirmation of insurance coverage and the amount of the co-pay for particular patient transactions. The Tax Commissioner relies on the following language as it defines a taxable electronic information service ("EIS") to support the assessment:

(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:

....

(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;

¹ Research has failed to uncover any other jurisdiction that is attempting to tax the verification of insurance information or other similar electronic authorizations.

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

The issue, therefore, is whether Marc Glassman obtained access to the computer equipment within the meaning of the statute.

IV. LAW AND ARGUMENT

Proposition of Law

The Use Of A Computer To Respond To A Specific Inquiry, In The Absence Of A Grant Of Access To The Underlying Data Files Upon Which The Response Is Made, Is Not Subject To The Ohio Sales And Use Taxes.

A. The Decision of the Court of Appeals Below Should Be Affirmed.

The Court of Appeals correctly understood that historically distinctions have been drawn by this Court, the General Assembly and even the Tax Commissioner in the taxation of transactions involving the use of computers. Any attempt by the Tax Commissioner to claim that the type of transactions at issue here always has been taxable ignores the relevant authorities.

1. The Decision of the Court of Appeals Below is Correct.

A transaction is taxable as an electronic information service ("EIS") when the customer is able to access (search) data either by (1) the receipt of a report of that data (the electronic counterpart to a written report) or (2) access to a searchable data base (the electronic counterpart to a collection of written materials that are constantly updated). In contrast, when a company such as NDC uses a computer to provide a specific response to a customer's inquiry, but does not permit its customer access to the underlying data upon which that answer is based, no tax is owed. The following cases demonstrate the distinction.

In *Quotron Systems, Inc. v. Limbach* (1992), 62 Ohio St. 3d 447, stockbrokers and other subscribers obtained access to libraries of information available on demand, such as stock data from various exchanges and related financial information. The subscribers had access to the data

in the subscribed libraries. The search would be on a stock-by-stock basis in the same manner in which one can input a single search in LEXIS/NEXIS or WESTLAW, and the subscriber could alter the search to any stock within the library and could directly conduct the search of the database. In other words, rather than merely receiving an answer, Quotron subscribers had access to the underlying information.² This Court found these transactions that allowed access to the databases to be subject to sales tax.

In *Amerestate, Inc v. Tracy* (1995), 72 Ohio St. 3d 222, this Court found that the Real Estate Pace reports that could be purchased either in hard copy or by electronic transmission were subject to sales tax irrespective of the method of delivery. The data consisted of reports of real estate sales, information and other data from county auditors and court records, post offices, census reports and appraisers' reports. Moreover, the subscribers to the electronic versions of the Pace Report had electronic access to the underlying data that was accumulated. Therefore, subscribers received both a report and had the ability to fashion a search in the data files as they wished.

In *MIB, Inc. v. Tracy* (1998), 83 Ohio St. 3d 154, this Court affirmed the BTA in finding that MIB was providing a taxable automatic data processing ("ADP") service when it acted as a depository and information clearinghouse for its membership and maintained a data bank that its members could access to verify the statements made by insurance applicants. Again, in *MIB*, the taxpayer was provided with a report and had access to a searchable database.

² Subscribers to Quotron paid for access to particular libraries, e.g., New York Stock Exchange, American Stock Exchange, or various commodity exchanges. Quotron subscribers did not pay on a transactional basis but paid fees consisting of three elements: (1) a basic service charge, (2) a separately stated charge based on the number of keyboards, display screens or other types of desk units connected to the Quotron data files and (3) a separately stated charge for the various libraries to which the subscriber had access. Quotron made the data files available to the customer. This service thus substituted for a desk book or periodical with the stock quotations.

Other examples of EIS, which are all taxable, include the services provided by Internet service providers, LEXIS and NEXIS. Significantly, in these situations, the subscriber has access to the data, controls the search, and is not limited to an ultimate answer to a discrete question. The taxation of these types of transactions is well-settled.

In contrast, other computer-related transactions are not subject to tax. These transactions involve simply the electronic transfer of information that does not involve allowing the requesting party access to the underlying data supporting the answer given. For example, two months after the *Quotron* decision, the former Tax Commissioner issued Opinion of the Tax Commissioner 92-0007 (April 30, 1992), App. at 44, which held that the provision of a specific electronic Motor Vehicle Report to an insurance company in response to a specific request was not taxable. The Tax Commissioner concluded that the transmittal of the reports was not taxable because the customers did not have access to the computers of the Bureau of Motor Vehicles (“BMV”). The BMV merely used the computers to send the report rather than granting access to the data.

In 1995, the BTA decided a case with facts similar to those of the present appeal in favor of the taxpayer, finding that electronic credit authorization was not providing automatic data processing.³ *PNC Bank, Ohio, N.A. v. Tracy*, Case No. 93-T-1316 (July 7, 1995), unreported (App. at 19). In *PNC Bank*, the BTA concluded that NDC’s credit authorization was not taxable because the customer could not examine and acquire the data but merely received a response to a specific inquiry. The BTA noted that the electronic credit authorization is an alternative to voice authorization provided by telephone operators. Slip. Op. at 4-6; App. at 22-24. *PNC Bank* was not appealed by the Tax Commissioner. The *PNC Bank* transactions with NDC, like the

³ At that time, the statute referred only to “automatic data processing.” As discussed below, the term “electronic information services” (“EIS”) was carved out from ADP for reasons not relevant to this appeal. EIS and the former ADP, for purposes of this case, apply the same analysis.

transactions at issue here, are the electronic equivalent of picking up the phone and obtaining an answer to a question, a transaction that is not subject to tax unless the call is to a 900 number call, which is a wholly different concept.⁴

The clear distinction between *Quotron/Amerestate/MIB* on the one hand and the Tax Commissioner's Opinion 92-0007 (April 30, 1992) and *PNC Bank* on the other hand, was accepted by this Court in *MIB*. As this Court stated:

In support of its argument, *MIB* cites Tax Commr. Op. No. 92-0007 (Apr. 30, 1992), and *PNC Bank, Ohio, N.A. v. Tracy* (July 7, 1995), BTA No. 93-T-1316. After reviewing these cases, we find them not helpful or persuasive because neither is analogous to the fact pattern presented by this case.

In *Quotron* [citation omitted], customers were able to access *Quotron's* computers to receive current pricing information on securities and commodities. In *Amerestate*, [citation omitted] customers were able to contact *Amerestate's* computer to download and print the information desired. In both of these cases, we held that the services provided were taxable as automatic data processing and computer services.

MIB, 83 Ohio St. 3d at 157. The Court of Appeals decision below, like this Court in *MIB*, recognized the distinction between accessing data (taxable) and receiving a response to a specific inquiry (not-taxable).

Likewise, this distinction was recognized by the dissenter to the BTA decision below. The dissenter, Mr. Dunlap, was an attorney examiner at the BTA for many years, during part of which he served as Chief Attorney Examiner. Mr. Dunlap analyzed the issue as follows:

Neither appellant [Marc Glassman] 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

⁴ The taxation of 900 number transactions, is set forth in R.C. 5739.01(B)(3)(i) and is defined in R.C. 5739.01(FF). App. at 1, 7.

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* [citation omitted] 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.

Slip Op. at 12; Merit Brief of Appellant Tax Commissioner, Exh. 4.

The Tax Commissioner’s position that all transactions involving computers are taxable is an unjustified deviation from prior law, and should be rejected by this Court.

2. Neither The Statute Nor Its Legislative History Supports The Tax Commissioner’s Effort to Expand The Sales Tax To Every Transfer Of Information By Computer.

The Tax Commissioner attempts to support his expansionist view by reference to the “legislative evolution” of the tax. He states:

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 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.

Brief of Appellant at 8.

According to the Tax Commissioner, the legislative history supports his view that all that he need do is to find the existence of two linked computers in order to impose the tax. The legislative history, however, simply cannot support that reading. Part of the Tax Commissioner’s error is the failure to consider the entire legislative history. As is frequently the case, the legislative history begins even before enactment of the statute in question.

a. Early Case Law Explains How The Statute Developed.

In a series of cases before ADP or EIS were specifically considered by any sales tax statute, this Court concluded that transactions that would be taxable absent computer involvement were not immunized because of the presence of computers. The fact patterns in

these cases ultimately influenced the language employed in the sales tax statute relating to electronic information.

For audit periods prior to 1976, the application of the sales tax to data processing necessarily was addressed in the context of the transfer of tangible personal property, as services generally were not taxable. Issues arose with respect to services performed by data processors including inputting and verifying the client's information, computerizing that information by summarizing, computing, extracting, sorting and sequencing the data, and producing, for example, printouts, payroll reports, or financial statements. See, e.g., *Miami Citizens National Bank & Trust Company v. Lindley* (1977), 50 Ohio St. 2d 249 (pre-1976 audit regarding taking of information from a customer's records, reorganizing, computerizing and returning the information to the customer in printed form was subject to sales tax as the sale of tangible personal property).

Also, data processors that made their computers available to others in what was known as "time-sharing" of the computer were also deemed to be engaged in taxable transfers of property. See *Babcock & Wilcox Co. v. Kosydar* (1976), 48 Ohio St. 2d 251 (use of a computer by the taxpayer's engineering department personnel for purposes of conducting calculations and design functions was a license to use the computer and therefore a taxable transaction as the use of tangible personal property); see also *Citizens Financial Corp. v. Kosydar* (1975), 43 Ohio St. 2d 148 (data processing company was making taxable sales when it provided data to its clients irrespective of whether it was provided to the customer by hard copy (computer printouts) or provided "on-line" via the data processor's equipment).

In contrast, none of the early cases would support the imposition of a tax on the type of transactions described in the Tax Commissioner's Opinion No. 0007, the *PNC Bank* decision

or the present appeal. No tax would be due on authorizations for transactions, which absent computers, would have been communicated by telephone. Moreover, the ADP/EIS statutes that were subsequently and ultimately adopted would not change this conclusion.

b. The Statutes That Followed – Amended House Bill 1347 (1976) to the Present Day – Do Not Support The Tax Commissioner’s Expansive View Of The Tax.

In 1976, the Ohio General Assembly enacted Amended House Bill Number 1347 of the 111th General Assembly, 136 v. H 1347 (1976) (App. at 9). This amendment provided the following definition of “sale” and “selling” in R.C. §5739.01(B):

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 electronic processing of others' data by such processor is not a sale, and the electronic data processor is deemed to be rendering a service.

On August 1, 1976, the Tax Commissioner in a Directive explained the effect of the statute:

The change in the definition of “sale” and “selling” provides for the classification of data processing transactions as services if: (1) the data processor is converting data supplied by the client for the client; and (2) the tangible personal property and license to use or consume is charged to the supplier of the data (client); and (3) such tangible personal property and license to use or consume is used in conveying the results of the electronic processing of client's data to the client.

App. at 16. In short, this amendment had the effect of reversing the earlier decisions of the Court that treated computer-provided reports (off-line) and licenses to use computers (on-line) as taxable and declared these transactions to be exempt. This exemption was short lived.

In 1983, the General Assembly reversed fields and reinstated the tax on transactions that had been exempted in 1976, placing the computer-generated reports and computer time-sharing (access to computers) on the same footing as the receipt of other written reports and other rentals of tangible person property. The legislation effectively reinstated the pre-1976

decisions. The new tax statute, however, was not based on a finding of the delivery of tangible personal property to support the tax. Instead, the service of “automatic data processing” became subject to tax.⁵ This statute, R.C. 5739.01(B)(3)(e), after amendments and before the 1993 legislation to be discussed below, provided as follows:

(B) ‘Sale’ includes[s] all of the following transactions for a consideration:

(3) All transactions by which:

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

In addition, former R.C. 5739.01(Y)(1) provided:

“Automatic data processing” * * * means: * * * processing of others’ data, including keypunching or similar data entry services together with verification thereof; providing access to computer equipment for the purpose of processing data or examining or acquiring data stored in or accessible to such computer equipment. “Automatic data processing[”] . . . shall not include personal or professional services.

In 1993, the General Assembly separated EIS from the remainder of ADP so that the computers used in providing EIS, but not other computers, would qualify for an incentive in the form of a refund of twenty-five percent (25%) of the sales and use tax paid. The statute did not expand the reach of the tax on ADP but classified certain transactions that formerly were ADP as EIS and provided a refund opportunity for those computers used for EIS while denying the benefit to computers providing ADP as more narrowly defined.

⁵ The General Assembly also enacted a tax on “computer services” that covered specific transactions relevant to supporting hardware and software and which has no bearing on the outcome of this case.

The ADP and EIS services combined after 1993 in essence were the same as ADP before the amendment for purposes of this appeal. See also Legislative Service Commission Report for Amended House Bill 152, App. to the Merit Brief of Appellant at Exh. 11.

Reflecting the 1993 change, the operative language of R.C. 5739.01 is 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 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.

(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.

....

(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.

Contrary to the Tax Commissioner's insistence, the presence of computers, without more, does not make otherwise exempt transactions taxable. The statute provides that the use of computers for authorization and statement of insurance coverage does not trigger the tax absent

the kind of data processing contemplated by the statute or access to the computer, meaning access to the databases or other data files “resident” on the computer. The statute, by its terms and in its application since 1983, never has been applied to the use of computers absent “access” to the computer in the sense of time sharing (*Babcock & Wilcox Company v. Kosydar*) or access to the data files on a computer such as in *Quotron* or *MIB*. The Tax Commissioner’s position that all transactions involving computers are taxable overreaches and must be rejected by this Court.

B. The Tax Commissioner Unilaterally Attempts To Expand The Tax Base.

1. The Tax Commissioner Has Acknowledged That His Interpretation Would Expand Significantly The State’s Ability To Collect Sales Tax.

The Tax Commissioner does nothing to hide the enormously expansionist view of the tax on EIS that he desires. He states:

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.

Brief of Appellant at 8.

The Tax Commissioner’s statement reflects no qualifiers or limitations—the receipt of information electronically without more is said to be taxable. The Tax Commissioner makes clear that to him “receipt of information electronically” equals “access to the computers” within the meaning of the statute, despite the precedents to the contrary. In this conclusion of law, the Tax Commissioner goes too far.

Curiously, the Tax Commissioner purports to rely on the terms of his rule, Ohio Adm. Code 5703-9-46. App. at 17. That rule, however, affirms the distinction discussed above. The rule provides in relevant part:

(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.

.....⁶

(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.**

The text of the Rule simply does not reveal an intent to impose tax on insurance authorization or similar transactions.

Tellingly, the Tax Commissioner acknowledged that his proposed reading of the sales tax statute would be a departure from well-settled law. In his Memorandum in Support of Jurisdiction, the Tax Commissioner contends that if this Court affirmed the Court of Appeals, the State will be unable to collect millions upon millions of dollars. Memorandum at 5-6. The Tax Commissioner does not suggest that these taxes currently are being paid and that refunds would arise from the Court of Appeals decision. In recognizing that the treatment of all computer-assisted authorizations as taxable could provide a new stream of revenue to the State of Ohio, the

⁶ Discussion of "computer services" omitted.

Tax Commissioner admits that this revenue has not been collected to date, contrary to the arguments that suggest that he simply reads the plain language of the 1993 statute to reach his current position.

Because electronic authorizations never have been subject to taxation to date, the Commissioner's effort to make them taxable now raises several serious concerns. Initially, no statutory change has been made (or identified by the Tax Commissioner) to undo the historic distinction between (i) access to a searchable computer database and/or the receipt of a report and (ii) the receipt of an answer to a specific inquiry without access to the underlying data, such as the transaction at issue here. Rather, the Tax Commissioner seeks to create this new obligation from the reinterpretation of the existing statutory framework. This Court should reject that effort for several reasons.

2. A New Tax Cannot Be Imposed By Implication From An Existing Statute.

The Tax Commissioner's claim that electronic authorizations are included within the current definition of EIS runs afoul of one of the most fundamental precepts of tax law: taxes cannot be imposed by implication. Ohio sales tax is imposed on all tangible personal property not exempted, but the sales tax is limited only to those services that are specifically identified by the Ohio General Assembly by statute. R.C. 5739.01. Imposing a new sales tax by inferring the tax on the service at issue is improper. See, e.g., *Watson v. Tax Commissioner* (1939), 135 Ohio St. 377, 381 (in finding taxation by implication improper, the Court found it of "commanding if not controlling importance that the statute under consideration is one imposing taxes upon classes of property specifically enumerated"). As this Court stated in *Caldwell v. Ohio* (1926), 115 Ohio St. 458, 461,

[A] taxation statute should not be extended by implication beyond its clear import, or to enlarge its operation so as to embrace subjects of taxation not specifically named. This rule is so well settled as not to be longer debatable.

In *Caldwell*, the issue was whether the benzol ingredient of benzol gas was taxable under the gasoline tax act. In finding that the language used by the legislature to define gasoline was less than clear, the Court stated, "The language employed should receive a fair interpretation, but its operation will never be extended by implication to embrace subjects not specifically named." *Id.* at 462.

The corollary principle to the aversion to taxation by implication is the acknowledged rule of statutory construction that tax statutes are to be construed in favor of taxpayers. This Court expressed this rule in *Storer Communications, Inc. v. Limbach* (1988), 37 Ohio St. 3d 193 at 195:

When faced with the General Assembly's selection of an inartful word, we must opt for the meaning that favors the taxpayer:

"Strict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed." (Paragraph one of the syllabus in *Davis v. Willoughby*, 173 Ohio St. 338, approved and followed.) *Gulf Oil Corp. v. Kosydar* (1975), 44 Ohio St. 2d 208, 73 O.O.2d 507, 339 N.E.2d 820, paragraph one of the syllabus.

Here, the Tax Commissioner would like this Court to extend the meaning of EIS by implication, based upon the language used in the sales tax statute that does not describe the transaction, unless one reads the language more broadly than originally intended or heretofore construed. Given the historical development of the statute, and its long standing interpretation, such an implication violates long-standing rules of statutory construction and should be rejected.

3. The Tax Commissioner Should Be Barred From Imposing A New Tax Through Audit.

The means that the Commissioner has chosen to impose this new tax further illustrates the impropriety of the Tax Commissioner's action. When the Commissioner decided that he wished to tax these types of electronic authorizations, he did not approach the General Assembly to amend the statute, nor did he amend his Rule. Rather, the Tax Commissioner simply changed his policy through audit. Specifically, the Tax Commissioner chose to pursue the litigation of an audit of an single taxpayer – in which penalties and interest were at issue – to argue that this new sales tax is appropriate.

The audit process, however, is not the proper platform from which new taxes should be launched. Proceeding in this fashion, the Tax Commissioner seeks to expand the tax base without a directive from the General Assembly or, even, review by the Joint Committee on Agency Rule Review ("JCARR") of the Tax Commissioner's Rule. The imposition of a new tax through audit proceeds absent the policy debate associated with this change from entry into the public sphere, and a change to be imposed without the reaching of a legislative consensus. This function, however, squarely belongs with the General Assembly and not with the Tax Commissioner.

All three Amici have an active legislative presence. These organizations, as representatives of persons and entities who are subject to a myriad of legislation, believe that their voices are heard (but not always embraced) by the legislators of this State, and that the General Assembly is the appropriate place for new taxes and regulations to originate. Under the Tax Commissioner's approach, however, committee hearings and floor debate are eliminated; and JCARR review is avoided on a tax that by the Commissioner's own calculation will cost the businesses of this state tens of millions of dollar by means of retroactive assessments. Entities,

including Amici and its members, that will be impacted by this new tax effectively are prevented from participating in a discussion of the issues.

This Court previously found that the Tax Commissioner must proceed, at the very least, through the proper rule-making process. *McLean Trucking Co. v. Lindley* (1982), 70 Ohio St.2d 106. In *McLean Trucking*, the Tax Commissioner had attempted to apply an apportionment formula based upon a Special Instruction that he had issued. The Court found that the issuance of such a Special Instruction could not legally be binding upon the taxpayer because the Tax Commissioner failed to follow the statutory rule-making procedure. Here, of course, the attempt by the Tax Commissioner to expand the definition of EIS is far more egregious. In this case, the Tax Commissioner made no announcement of a change in tax policy. He merely assessed the new tax against Marc Glassman. This mechanism for attempting change in tax policy is improper.

Moreover, this Court previously has sent a prior Tax Commissioner back to the General Assembly when he attempted to argue for an expansive interpretation of a taxing provision in the course of litigation. *Watson*, 135 Ohio St. at 382 (“The argument that anything received which could be reduced to cash is equivalent to cash . . . [and] should be taxable as a ‘cash dividend,’ is an argument which might well be addressed to the Legislature to secure an amendment to the statute”). This should be the response of the Court here. Any expansive re-definition of EIS should be subjected to deliberation by elected officials, not made through litigation generated from the audit of an individual taxpayer.

4. Taxation By Implication And By Audit Undermine Legitimate Reliance Of Business On Settled Precedent.

Businesses rely on settled tax principles to conform their behavior and to shape business decisions. As demonstrated above, the law of Ohio has been consistent for the last twenty years

– access to computers for purposes of receiving a specific response to a specific inquiry without access to the underlying data file from which the response is drawn – is not a taxable transaction.

The acceptance of taxation by implication removes the ability to rely on long-standing procedures and expectations. The imposition of a new tax after statutory amendment or enactment allow for prospective planning and compliance. As one commentator stated:

Statutes made for the advancement of trade and commerce, and to regulate the conduct of merchants, ought to be perfectly clear and intelligible to persons of their description. By the use of ambiguous clauses in laws of that sort, the legislature would be laying a snare of the subject, and a construction which conveys such an imputation ought never to be adopted. Judges, therefore, where clauses are obscure, will lean against forfeitures, leaving it to the legislature to correct the evil, if there be any.

Cooley, *A Treatise on the Law of Taxation*, (2003 Ed.) at 200 (quoting Dwarris on Statutes, 742).

The Tax Commissioner’s view – that any transaction where two computers have been linked is taxable – is an enormous leap in the taxation of EIS that business interests have had no reason to anticipate. Changes of this magnitude, and the attendant exposure to the assessment of four years of back taxes, interest and penalties, would be a serious financial burden for any entity in Ohio that links to a computer or uses computers.

V. CONCLUSION

The case law and the legislative history, as well as settled expectations, compel a finding that the *PNC Bank* case remains good law and that the Court of Appeals’ decision below should be affirmed. The Tax Commissioner’s alternative that all transactions in which information is received electronically, or whenever “computers are linked together,” are taxable greatly overstates the application of the tax. The Tax Commissioner suggests a rule that is far broader than that of other states and applies the sales and use tax far beyond what the General Assembly

intended. Moreover, he has inappropriately attempted to impose a new tax without the approval of the General Assembly. For all of these reasons, the decision of the Court of Appeals should be AFFIRMED.

Respectfully submitted,



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This is to certify that a copy of the foregoing Amicus Curiae Brief was served upon the following by ordinary U.S. mail this 13th day of September, 2007:

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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.	:	

**APPENDIX TO BRIEF OF AMICUS CURIAE OHIO PHARMACISTS ASSOCIATION,
OHIO CHAMBER OF COMMERCE AND
OHIO COUNCIL OF RETAIL MERCHANTS**

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§ 5739.01 Definitions.

As used in this chapter:

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

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

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

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

(3) All transactions by which:

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

(b) An item of tangible personal property is or is to

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) In the case of a person who produces, rather than purchases, printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of all tangible personal property

and services purchased for use or consumption in the production of that printed matter. That person is not entitled to claim exception under division (E)(8) of this section for any material incorporated into the printed matter or any equipment, supplies, or services primarily used to produce the printed matter.

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

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

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

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

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

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

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

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

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

(7) To incorporate the thing transferred as a material or a part into, or to use or consume the thing transferred

directly in the production of, magazines distributed as controlled circulation publications;

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

(9) To use the thing transferred, as described in section 5739.011 [5739.01.1] of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale;

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

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

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

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

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

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

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

Sales conducted through a coin-operated device that activates vacuum equipment or equipment that dispenses water, whether or not in combination with soap or other cleaning agents or wax, to the consumer for the consumer's use on the premises in washing, cleaning, or

waxing a motor vehicle, provided no other personal property or personal service is provided as part of the transaction, are not retail sales or sales at retail.

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

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

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

The tax collected by the vendor from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state and of counties levying an additional sales tax pursuant to section 5739.021 [5739.02.1] or 5739.026 [5739.02.6] of the

Revised Code and of transit authorities levying an additional sales tax pursuant to section 5739.023 [5739.02.3] of the Revised Code. Except for the discount authorized in section 5739.12 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of such tax.

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

(3) In the case of a sale of any watercraft or outboard motor by a watercraft dealer licensed in accordance with section 1547.543 [1547.54.3] of the Revised Code, in which another watercraft, watercraft and trailer, or outboard motor is accepted by the dealer as part of the consideration received, "price" has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the watercraft, watercraft and trailer, or outboard motor received in trade. As used in division (H)(3) of this section, "watercraft" includes an outdrive unit attached to the watercraft.

(I) "Receipts" means the total amount of the prices of the sales of vendors, provided that cash discounts allowed and taken on sales at the time they are consummated are not included, minus any amount deducted as a bad debt pursuant to section 5739.121 [5739.12.1] of the Revised Code. "Receipts" does not include the sale price of property returned or services rejected by consumers when the full sale price and tax are refunded either in cash or by credit.

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

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

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

(M) "Hotel" means every establishment kept, used,

maintained, advertised or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether such rooms are in one or several structures.

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

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

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

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

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

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

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

(U) "Transit authority" means a regional transit au-

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

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

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

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

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

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

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

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

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

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

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

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

or information and studies, alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

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

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

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

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

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

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

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

(Z) "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;

(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

(AA) "Telecommunications service" means the transmission of any interactive, two-way electromagnetic communications, including voice, image, data, and information, through the use of any medium such as wires, cables, microwaves, cellular radio, radio waves, light waves, or any combination of those or similar media. "Telecommunications service" includes message toll service even though the vendor provides the message toll service by means of wide area transmission type service or private communications service purchased

from another telecommunications service provider, but does not include any of the following:

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

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

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

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

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

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

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

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

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

(EE) "Private investigation and security service" means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749, of the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing

the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices. "Private investigation and security service" does not include special duty services provided by off-duty police officers, deputy sheriffs, and other peace officers regularly employed by the state or a political subdivision.

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

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

(HH) "Qualified research and development equipment" means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 [5739.01.1] of the Revised Code, or used for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

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

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

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

(2) Medical and health care services.

(3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service

provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.

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

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

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

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

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

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

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

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

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

(SS) "Newspaper" means an unbound publication

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

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

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

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

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

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

HISTORY: GC § 5548-1; 115 v PHL, 306; 116 v 41; 116 v 248; 116 v PHL, 69; 116 v PHL, 323; 119 v 369; 121 v 247; 122 v 439; 122 v 725; Bureau of Code Revision, 10-1-53; 125 v 305 (EFF 10-13-53); 126 v 157; 128 v 421; 128 v 1303 (EFF 7-29-59); 129 v 582(973) (EFF 1-10-61); 129 v 1164 (EFF 1-1-62); 132 v S 350 (EFF 9-1-67); 132 v H 919 (EFF 12-12-67); 135 v S 241 (EFF 10-30-73); 135 v S 161 (EFF 11-21-73); 135 v S 244 (EFF 6-13-74); 135 v S 544 (EFF 6-29-74); 136 v H 1 (EFF 6-13-75); 136 v H 1347 (EFF 8-27-76); 136 v H 1005 (EFF 8-27-76); 137 v H 1 (EFF 8-26-77); 138 v S 16 (EFF 10-29-79); 138 v H 904 (EFF 12-14-79); 138 v H 1032 (EFF 10-1-80); 139 v H 275 (EFF 8-1-81); 139 v H 694 (EFF 11-15-81); 139 v H 694, §§ 205, 206 (EFF 8-1-82); 139 v H 552 (EFF 11-24-81); 139 v H 552, §§ 25, 26 (EFF 8-1-82); 139 v H 671 (EFF 12-19-81); 139 v H 671, §§ 3, 4 (EFF 8-1-82); 139 v S 530 (EFF 6-25-82); 139 v S 530, §§ 28, 29 (EFF 8-1-82); 140 v H 291 (EFF 7-1-83); 140 v H 794 (EFF 7-6-84); 140 v S 112 (EFF 1-10-85); 141 v H 335 (EFF 12-11-85); 141 v H 54 (EFF 9-17-86); 142 v H 159 (EFF 3-13-87); 142 v H 171 (EFF 7-1-87); 142 v S 92 (EFF 10-20-87); 142 v H 274 (EFF 7-20-87); 142 v H 689 (EFF 2-25-88); 142 v S 386 (EFF 3-29-88); 143 v H 111 (EFF 7-1-89); 143 v H 531 (EFF 7-

1-90); 143 v H 365 (EFF 4-1-90); 144 v H 298 (EFF 6-1-91); 144 v S 361 (EFF 7-1-93); 144 v H 791 (EFF 3-15-93); 144 v H 904 (EFF 1-1-93); 145 v S 122 (EFF 6-30-93); 145 v H 152 (EFF 7-1-93); 145 v H 715 (EFF 4-22-94); 145 v H 632 (EFF 7-22-94); 146 v H 61 (EFF 10-25-95); 146 v S 266 (EFF 11-20-96); 147 v H 215 (EFF 9-29-97); 147 v S 173 (EFF 1-1-2000); 148 v H 612. EFF 9-29-2000.

AN ACT

To amend section 5739.01 of the Revised Code
relative to electronic data processing.

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

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

Sec. 5739.01. (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 transactions by which title or possession, or both, of tangible personal property, is or is to be transferred, or a license to use or consume tangible personal property is or is to be granted; and include all transactions by which lodging by a hotel is or is to be furnished to transient guests; and include 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; 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; and include 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 5739.08 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, and the construction contractor is the consumer thereof. 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 SERVICE. Other than as provided in this section, "sale" and "selling" do not include professional, insurance, or personal service transactions which involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

(C) "Vendor" means the person by whom the transfer effected or license given by a sale is or is to be made or given; if two or more persons are engaged in business in the same retail establishment under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor.

Physicians, dentists, hospitals, and veterinarians who are engaged in selling tangible personal property as received from others, such as eye glasses, mouth washes, dentifrices, or similar articles, are vendors.

(D) "Consumer" means the person to whom the transfer effected or license given by a sale is or is to be made or given, or to whom the admission is granted.

Physicians, dentists, hospitals, and blood banks operated by nonprofit institutions and persons licensed to practice veterinary medicine, surgery, and dentistry are consumers of all tangible personal property purchased by them in connection with the practice of medicine, dentistry, the rendition of hospital or blood bank service, or the practice of veterinary medicine, surgery, and dentistry.

(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 in the form in which the same is, or is to be, received by him;

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

directly in farming, agriculture, horticulture, and floriculture, or exploration for, and production of, crude oil and natural gas; or directly in making retail sales or directly in the rendition of a public-utility service, except that the sales tax levied by section 5739.02 of the Revised Code shall be collected upon all meals, drinks, and food for human consumption sold upon Pullman and railroad coaches;

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

(4) To use or consume the thing directly in industrial cleaning of tangible personal property; to use or consume the thing directly in cleaning of the tangible personal property used in the rendition of towel and linen service or supply; such service or supply is not a rental, but is deemed a personal service transaction;

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

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

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

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

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

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

(H) "Price" means the aggregate value in money of anything paid or delivered, or promised to be paid or delivered, in the complete performance of a retail sale, without any deduction on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid or allowed after the sale is consummated, or any other expense. Price does not include the consideration received for labor or services used in installing or applying the property sold if the consideration for such services is separately stated from the consideration received or to be received for the tangible personal property transferred in the retail sale. Such separation must appear in the sales agreement or on the initial invoice or initial billing rendered by the vendor to the consumer. Price is the amount received inclusive of the tax,

provided the vendor establishes to the satisfaction of the tax commissioner that the tax was added to the price.

The tax collected by the vendor from the consumer under sections 5739.01 to 5739.31 of the Revised Code, is not part of the price, but is a tax collection for the benefit of the state and of counties levying an additional sales tax pursuant to section 5739.021 of the Revised Code and of transit authorities levying an additional sales tax pursuant to section 5739.023 of the Revised Code, and except for the discount and credits authorized in section 5739.12 of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of such tax.

(I) "Receipts" means the total amount of the prices of the sales of vendors, provided that cash discounts allowed and taken on sales at the time they are consummated are not included, and receipts does not include the sale price or property returned by consumers when the full sale price and tax are returned either in cash or by credit.

(J) "Retail establishment" means any premises in which the business of selling tangible personal property is conducted, or in or from which any retail sales are made.

(K) "Advance payment credit" means credit for payments made by a vendor during the period covered by a return which were made in anticipation of the tax liability required to be reported on that return and payments made to a clerk of a court of common pleas pursuant to section 4505.06 of the Revised Code.

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

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

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

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

(P) "Making retail sales" means the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated 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.

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

(R) "Industrial cleaning" means the business or occupation of removing soil or dirt from articles of tangible personal property belonging to others.

(S) "Manufacturing" or "processing" means the transformation or conversion of material or things into a different state or form from that in which they originally existed and, for the purpose of the exceptions contained in division (E) (2) of this section, includes the adjuncts used during and in, and necessary to carry on and continue, production to complete a product at the same location after such transforming or converting has commenced.

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

(U) "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 306.08 of the Revised Code.

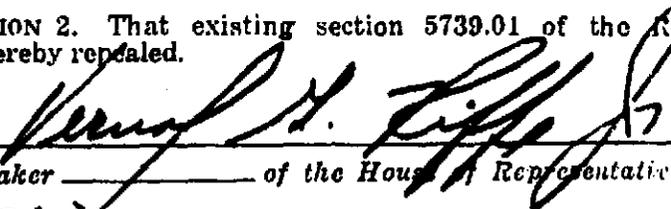
(V) "Transit authority" means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit board is appointed pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the 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.

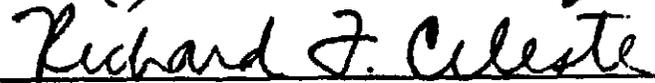
(W) "Legislative authority" means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county which is a transit authority, the board of county commissioners.

(X) "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.

SECTION 2. That existing section 5739.01 of the Revised Code is hereby repealed.

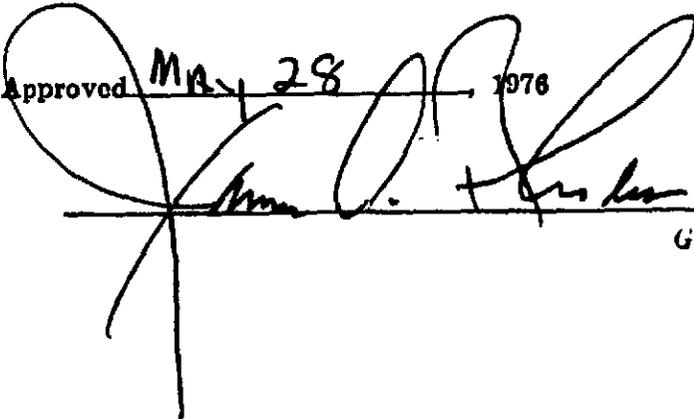


Speaker _____ of the House of Representatives.



President _____ of the Senate.

Passed April 28, 1976

Approved May 28, 1976


Governor.

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


Director, Legislative Service Commission.

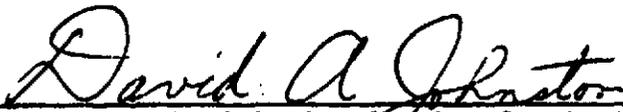
Filed in the office of the Secretary of State at Columbus,
Ohio, on the 28th day of May, A. D. 1976.


Secretary of State.

File No. 335.

Effective Date August 27, 1976.

Section 5739.01 of the Revised Code is amended by this act and also by Am. H. B. 1005 of the 111th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable, so that they are required by that section to be harmonized to give effect to each amendment.


Director, Legislative Service Commission

August 1, 1976

SUBJECT: Electronic Data Processor - (H.B. 1347)

Amended House Bill Number 1347 was passed by the General Assembly of the State of Ohio and having been signed by the Honorable James A. Rhodes, Governor of the State of Ohio, now has an effective date of August 27, 1976.

The amendment to Section 5739.01 (B) Ohio Revised Code adds the following words to the definition of "sale" and "selling."

"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 service."

Restated the above quoted portion would read as follows.

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 is not a sale if such transfer or license is in conveying the results of the electronic processing of others (client) data.

The change in definition of "sale" and "selling" provides for the classification of data processing transactions as services if: (1) the data processor is converting data supplied by the client for the client; and (2) the tangible personal property and license to use or consume is charged to the supplier of the data (client); and (3) such tangible personal property and license to use or consume is used in conveying the results of the electronic processing of client's data to the client.

Since such data processor is performing a service instead of selling the results of the processing, he cannot claim his supplies and equipment as exempt. All supplies and equipment used or consumed by such data processor in the performance of such services are subject to sales tax at the time of purchase by the data processor.

When the data processor sells or rents supplies or equipment to the customer in transactions separate from the services specified by the amendment, such sales are subject to taxation.

(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,

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

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 pam. #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*

RC 119.032 rule review date(s): Exempt

OHIO BOARD OF TAX APPEALS

JUL 7 1995

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

APPEARANCES:

For the Appellant	- Larry H. McMillin
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For the Appellee	- Betty D. Montgomery
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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 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.

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.

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).¹

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

¹ 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.

taxpayer challenging 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 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 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 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 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 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 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 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 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 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 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 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.²

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, 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

² 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.

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 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.³ 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[.]"

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

³ 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.

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 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 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 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. 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 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.

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 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 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 facsimiles."

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 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 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

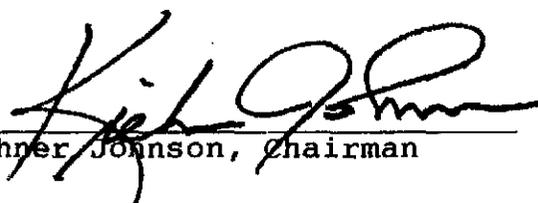
Finally, appellant requests that "[t]o the extent that the assessment of any of the * * * transactions is corrected, the statutory penalty relating to such corrections should be eliminated[.]" (Appellant's Brief, page 27.) The request is meritorious. Therefore, the statutory penalties previously assessed 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 is, modified in accord with the foregoing decision and order; and in all other respects, the Tax Commissioner's final determination is affirmed.

I hereby certify the foregoing to be a true and correct copy of the action of the Board of Tax Appeals of the State of Ohio, this day taken, with respect to the above matter.


Kiehner Johnson, Chairman

Opinion of the Tax Commissioner

Date Issued: April, 30, 1992

Opinion No: 92-0007

Tax: Sales/Use

XXXX
XXXX
XXXX

Subject: Electronic Reports

This request for an opinion of the Tax Commissioner was received on March 16, 1992 from XXXX, writing on behalf of its division known as XXXX (hereinafter "Taxpayer"). Specifically, Taxpayer wishes to know whether or not Ohio sales or use tax is applicable to transactions whereby it provides to its customers certain reports called "Motor Vehicle Reports" (MVR).

Taxpayer's Description of Transactions in Question:

Taxpayer obtains and provides MVR's to its customers. The customers are insurance companies that want to know the history of particular drivers who apply for automobile insurance. Taxpayer obtains the necessary information from the state departments of motor vehicles and sends it to its customers on "Driver Record Information Reports." (A sample of such a report was enclosed with the opinion request.)

The customer types a request for an MVR on its computer terminal located in the insurance company's office. The request is then transmitted over regular telephone lines to Taxpayer's mainframe computer in XXXX. There, Taxpayer's computer accumulates all customer requests and sorts them by state once a day for subsequent delivery to each state.

In Ohio, the State of Ohio Bureau of Motor Vehicles has the computer capability to enable Taxpayer to transmit MVR requests directly to the Ohio Bureau of Motor Vehicles via telephone lines from XXXX, to Columbus, Ohio. The Ohio Bureau of Motor Vehicles processes these requests and transmits information electronically directly back to Taxpayer in XXXX.

This information is accumulated by Taxpayer's computer and then sorted by customer. At this time, the state traffic violation codes are translated into a standardized format for certain customers that have requested a standardized format. Some customers do not request such standardized format. Taxpayer has found that standard violation codes facilitate the interpretation of motor vehicle traffic violation codes by translating each state's varying traffic violation codes into standard violation codes for its customers.

The MVR information is then transmitted from Taxpayer in XXXX to its customers. These customers are located throughout the country. Usually the information is transmitted electronically via telephone lines to the customer, where it is stored on computer disc or fed

directly to a printer in the customer's office.

The entire process described herein takes about 24 hours. A MVR requested on one day is usually delivered to a customer by the next day.

Tax Commissioner's Analysis:

In normal transactions as described by Taxpayer, no tangible personal property is transferred 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.

The tax consequences stated in this opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of the Taxpayer to be aware of such changes. R.C. 5703.53(E).

Roger W. Tracy
Tax Commissioner