In the

Supreme Court of Ohio

OHIO GROCERS ASSOCIATION, et al.,	:	Case No. 2008-2018
Plaintiffs-Appellees,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
RICHARD A. LEVIN, Ohio Tax Commissioner,	:	Court of Appeals Case No. 07AP-813
Defendant-Appellant.	:	

MERIT BRIEF OF DEFENDANT-APPELLANT, RICHARD A. LEVIN, OHIO TAX COMMISSIONER

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INTRODUCTION

The Ohio Constitution contains a narrow prohibition on taxes imposed "upon the sale or purchase" of food. The Ohio Grocers Association and the other Appellees ("Grocers") ask the Court to turn that narrow exemption into a gaping loophole that would uniquely exempt the Grocers from a business tax—the commercial activity tax, or CAT—that all businesses must pay for the privilege of doing business in Ohio. The Court should say no, because the Grocers' argument disregards the text, history, and operation of the provisions governing Ohio's franchise and sales taxes, as well as principles of fair taxation that Ohio has long embraced.

Since 1902, Ohio has imposed a general corporate franchise tax—a tax on the privilege of doing business in the State—on Ohio's businesses, including grocers and all manners of food retailers, wholesalers, and manufacturers. Although that franchise tax involved several factors and, since 1972, two alternate methods of calculation, the tax always included the measurement of a company's sales as a core part of the calculation. Thus, regardless of the other factors, the presence of the sales factor meant that, all else equal, every dollar of additional sales in Ohio triggered a corresponding increase (less than dollar for dollar) in corporate franchise tax owed.

The CAT, enacted as part of a broad, growth-friendly tax reform effort in 2005, replaces the corporate franchise tax for most businesses, including the Grocers. It is a franchise tax based on the privilege of doing business, but it uses a streamlined formula to better promote Ohio's economy and better represent the true value of a company's privilege to do business. It applies to all types of businesses (not just corporations) and removes disincentives to capital investment and employment by eliminating the property and payroll factors that were part of the corporate franchise tax formula. And just as sales were a factor in the corporate franchise tax formula, a company's sales affect the CAT calculation, because the CAT values the privilege of doing business primarily by measuring a company's gross receipts, including receipts from food sales,

non-food sales, and other non-sales forms of income. All of the CAT's features, including its tiered structure and credits, show that the CAT is, like its predecessor, a franchise tax on the privilege of doing business.

Meanwhile, since 1934, Ohio has imposed on retail transactions an entirely separate form of tax—a sales tax—and pursuant to a 1936 constitutional amendment, the State has exempted retail food sales from the sales tax. The 1936 amendment was an immediate reaction to the initial adoption of a sales tax in 1934; the people sought to undo the new sales tax's application to most food sales. The very title of the 1936 amendment's ballot language, as well as its summary and supporting arguments, described the amendment as a partial repeal of the sales tax. The enacted language provides that "no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold." Within weeks, the General Assembly moved to comply with the amendment by amending only the sales tax statute; it left untouched the corporate franchise tax, which at that point had been in place for 34 years. Grocers continued to pay the corporate franchise tax. Similarly, when a 1994 constitutional amendment expanded the sales tax prohibition to cover wholesale food sales along with retail, no one challenged the corporate franchise tax. Only now, after the CAT replaced the corporate franchise tax for most businesses, have the Grocers claimed that the ban on taxing food sales somehow exempts them from paying a privilege-of-doing-business tax.

The Court should hold that the CAT is unaffected by the constitutional bans on taxing food sales at retail or wholesale, because the CAT simply does not tax food sales. To prevail here, the Grocers must show one of two things: either that (1) the constitutional ban on food-sales taxes applies not only to run-of-the-mill sales taxes, but also to *franchise* taxes, of which the CAT (like its predecessor, the corporate franchise tax) is an example; or (2) the CAT is not actually a

franchise tax, but is instead a sales or transactional tax that falls squarely within the constitutional prohibition. The Grocers fail on both theories. Both constitutional bans apply only to taxes upon the sale of food, not franchise taxes, and the CAT is a franchise tax, not a sales tax.

First, the constitutional limits apply only to sales taxes, not franchise taxes. The plain text of each provision—sections 3(C) and 13 of Article XII—bars "excise" taxes only "upon the sale or purchase" of food at retail or "upon any wholesale sale or wholesale purchase of food." This text in no way bars collecting franchise taxes from businesses that sell food. The reference to "excise" taxes, meanwhile, is beside the point, because excise tax is an umbrella term that encompasses both sales and franchise taxes. The limitations on food-sales taxes apply to those excise taxes that are also sales taxes, but they do *not* apply to excise taxes that are franchise taxes. History and case law confirm this understanding: Franchise taxes have always been applied to grocers or food-related corporations without question, and sales of food have always been included as part of the formula for measuring franchise tax liability.

Second, the CAT is a franchise tax, not a sales tax, so the bans on food-sales taxes do not apply to it. The CAT, like all franchise taxes, is imposed on the privilege of doing business, not on the incidence of each sale or transaction. The Court has repeatedly endorsed this distinction. Further, several of the CAT's operational features show that, unlike a sales tax, it is not charged on every dollar of sales. For example, typically, the CAT is not charged at all to entities with under $150,000 of annual taxable gross receipts, and it is charged at a flat amount of merely $150—not as a percentage of receipts or any other figure—for businesses with taxable gross receipts between $150,000 and $1 million. And it is reduced by several credits of the type that applied to the old corporate franchise tax, such as credits for job creation.

None of this is changed by the fact the CAT uses taxable gross receipts as a yardstick to measure the degree to which a company benefits from the privilege of doing business in Ohio. In fact, the Court has long endorsed such a measurement device, and it has repeatedly explained that including some factor for measurement is *not* the same as taxing that factor. If the Grocers are right, and this measurement device converts the CAT into a sales tax, then much of the Court's tax law jurisprudence is called into question, and the future effects beyond this case could be overwhelming. For example, the Grocers' view provides no workable standard to assess how and when food sales, or other receipts from transactions or property not themselves directly taxable, may be included in measurements used for franchise taxes.

In sum, the Grocers' view not only defies history and common sense, as well as the Court's teachings, but adopting it would sow uncertainty throughout Ohio's tax laws and administration. Moreover, the Grocers had always paid the personal property tax, and all incorporated grocers had paid the corporate franchise tax, so exempting them from the CAT would give them an unwarranted windfall. And that free ride for the Grocers would most likely mean that other businesses would face a higher CAT rate to make up the difference. For these and other reasons below, the CAT is constitutional, and in calculating the Grocers' taxes, nothing is wrong with measuring *all* of the Grocers' taxable gross receipts, including those generated by selling food. The Court should therefore uphold the CAT, and it should require the Grocers, along with every other Ohio business, to pay their fair share of business taxes.

STATEMENT OF THE CASE AND FACTS

A. The terms "franchise tax," "sales tax," and "excise tax" have generally accepted meanings that precede their application in this case.

The ultimate dispute in this case—namely, whether the CAT violates the prohibition against sales or excise taxes on food sales—implicates the contours of the terms "franchise taxes," "sales taxes," and "excise taxes." While the parties may disagree about (1) how to classify the CAT and (2) which taxes are affected by the constitutional prohibitions against sales taxes on food, each of the terms at issue has a generally accepted meaning.

A "franchise tax" is a "tax upon the privilege of existing or the privilege of doing certain things," such as a "tax on the privilege of doing business in a state." *Black's Law Dictionary,* 659 (6th ed. 1990). Such taxes are calculated in different ways by different States. "Though the value of the franchise, for purposes of taxation, may be measured by the amount of business done, or the amount of earnings or dividends, or by the total value of the capital stock of the corporation in excess of its tangible assets, a franchise tax is not a tax on either property, capital, stock, earnings, or dividends." *Id.*

Separately, a "sales tax" is a "state or local-level tax on the retail sale of specified property or services. . . . Generally, the purchaser pays the tax, but the seller collects it, as an agent for the government. . . ." *Id.* at 1339. The term "excise tax," meanwhile, is a broader term that includes, among others, franchise taxes and sales taxes. Specifically, it is a "tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege." *Id.* at 563. It includes any "tax on the manufacture, sale, or use of goods," or any tax "on the carrying on of an occupation or activity," or "a tax on the transfer of property." *Id.* "In current usage the term has been extended to include various license fees and practically every internal revenue tax except the income tax (e.g., federal alcohol and tobacco excise taxes, I.R.C. § 5001 et seq.)." *Id.*

B. Ohio has, by Constitution and statute, authorized and imposed franchise and sales taxes, and it has also barred certain taxes on sales of food.

Over the 20th century, Ohio imposed various taxes upon its businesses and citizens, including franchise and sales taxes. Also, Ohioans amended the Constitution to bar sales taxes on sales of food. These statutory and constitutional changes are presented here chronologically.

Ohio imposed franchise taxes on specialized industries, such as public utilities and foreign insurance companies, in the mid-19th century, and it first imposed a general corporate franchise tax in 1902. See G.C. 5522 *et seq.*, 95 Ohio Laws 124, 124-128. A 1912 constitutional amendment expressly authorized such taxes: "Laws may be passed for excise and franchise taxes . . ." Ohio Const., art. XII, § 10 (as enacted; now § 3(C)). The corporate franchise tax applied to incorporated grocers, as it did to all corporations, from its enactment until its repeal and phase-out (discussed below).

In 1934, Ohio enacted its first sales tax. See G.C. 5546-1 *et seq.*, 115 Ohio Laws Pt. II 306. Like any sales tax, it applied to the sales transaction. At first, it was levied on all food sales, except produce sold by farmers and sales of milk and loaf bread.

Ohio's citizens amended the Constitution in 1936 to bar the new sales tax from applying to food sales. The ballot language included arguments for and against the amendment, and both sides addressed the recently imposed sales tax. See Ohio Sec'y of State, Certified Ballot Language (Nov. 3, 1936) (copy certified Feb. 27, 2009) (Ex. 11, Appx. at A-110). "Let us repeal the sales tax on food," began the proponents. *Id.* Opponents also began by referring to "[t]he repeal of the sales tax on food." *Id.* Together, they referred to the "sales tax" eight times. *Id.* The amendment became Article XII, Section 12, and read, "On or after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold." *Id.* Within weeks, the General Assembly amended Ohio's sales

tax statute to conform with the constitutional amendment. See G.C. 5546-2 (H.B. No. 694, 116 Ohio Laws Pt. II, 323, 325). Only the sales tax statute was amended; the corporate franchise tax statute was not.

In 1976, Ohioans amended the Constitution to combine and re-number the clause authorizing franchise and excise taxes with the clause barring excise taxes on food sales. The merger resulted in the current Section 3(C) of Article XII, which reads:

> Laws may be passed providing for . . . .
>
> (C) *Excise and franchise taxes* and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; *except* that *no excise tax* shall be levied or collected *upon the sale or purchase of food* for human consumption off the premises where sold.

Ohio Const. art. XII, § 3(C) (emphasis added). Because this merger did not alter the substance of either clause, it did not lead to any conforming statutory amendment.

The next relevant amendment was in 1994, when Ohioans enacted a constitutional ban on taxing wholesale purchases or sales of food. That amendment was a reaction to the General Assembly's imposition of a tax on wholesale purchases of soft drinks. A common pleas court upheld that tax against a challenge based on Section 3(C) of Article XII, as it held that soft drinks were food, but that Section 3(C) barred only taxes upon *retail* sales, not wholesale sales. *Cameron Coca-Cola Bottling Co. v. Tracy* (July 28, 1993), Franklin Co. C.P. 93CVH02-729 (Ex. 20, Appx. at A-178) at 25-26. In response, Ohioans added Section 13 to Article XII, which provides:

> *No sales or other excise taxes* shall be levied or collected (1) *upon any wholesale sale or wholesale purchase of food* for human consumption, its ingredients or its packaging; (2) *upon any sale or purchase of such items sold to or purchased by a manufacturer, processor, packager, distributor or reseller of food* for human consumption, or its ingredients, for use in its trade or business; or (3) in any retail transaction, on any packaging that contains food for human consumption on or off the premises where sold. For purposes of this section, food for human consumption shall include nonalcoholic beverages. This section shall not affect the extent to which the

> levy or collection of sales or other excise taxes on the retail sale or retail purchase of food for human consumption is permitted or prohibited by Section 3(C) of this Article.

Ohio Const. art. XII, § 13 (emphasis added). Thus, this provision extended the ban on taxing retail food sales to ban taxing wholesale food sales also. As the last sentence confirms, it did not expand or contract the scope of the older 1934 ban on taxing retail sales of food. The General Assembly later repealed the tax on wholesale purchases of soft drinks to conform with the constitutional amendment. The corporate franchise tax continued to apply to soft drink sellers.

C. The General Assembly adopted the CAT in 2005 as the centerpiece of sweeping tax reform meant to replace growth-deterrent taxes with a business-friendly, low-rate tax.

Ohio adopted the CAT in 2005 as part of a sweeping tax reform aimed at revitalizing Ohio's economy. In the years preceding the change, Ohio's business and government leaders were increasingly concerned that Ohio's tax structure created disincentives for businesses to locate in, and remain in, Ohio. In particular, leaders worried that Ohio's business taxes disproportionately affected those companies with large capital investments in inventory, machinery, and equipment in the State—including many of the manufacturers that already faced challenges in the global economy. The disincentives, especially the disproportionate effect on capital-intensive industries, arose from the two major business taxes in Ohio.

First, Ohio had a tangible personal property tax, levied annually on the value of a company's personal property in the State. Second, Ohio's corporate franchise tax used a formula that included measurement of a company's assets as well as the size of its payroll in Ohio, thus creating disincentives for companies to invest in equipment and to create jobs in Ohio.

Over years, a consensus grew among business and government leaders that both the tangible personal property tax and the corporate franchise tax contributed to Ohio's economic woes, including lagging growth and lost jobs. The tangible personal property tax was considered

a deterrent to investing capital in machinery, because that machinery was taxed. The corporate franchise tax was considered a deterrent to capital investment, as well as to job creation, because an increase in capital investment or payroll in Ohio resulted in an increase in franchise tax. Thus, a consensus developed to replace these taxes, and in 2005, the General Assembly passed, and then-Governor Taft signed, a sweeping tax reform package developed with significant input from the business community. See Am. Sub. H.B. 66 (effective June 30, 2005).

The centerpiece of the tax reform package was the CAT, which is codified at R.C. Chapter 5751. The philosophy behind the CAT is simple: replace investment-deterrent taxes with a low-rate, broad-based franchise tax. Thus, for most businesses, Am. Sub. H.B. 66 phased out the old corporate franchise tax and the tangible personal property tax over a four- to five-year period, and, in turn, phased in the CAT over a five-year period. R.C. 5733.01(G)(1) & (2); R.C. 5711.22 (E)-(G); R.C. 5751.031.

The CAT, like the corporate franchise tax it replaces for most businesses, as well as the independent public utilities excise tax, R.C. Chapter 5727, and the domestic and foreign insurance company franchise taxes, R.C. 5725.18 *et seq.* and R.C. Chapter 5729, is structured as part of the family of "franchise taxes"—taxes on the privilege of doing business in Ohio. R.C. 5751.02(A). While each franchise tax differs in some ways, the CAT shares many features with these other franchise taxes. As with all other Ohio franchise taxes, it does not tax individual transactions, such as sales; it taxes the privilege of doing business for a defined period of time, with the value of that privilege measured by a business's results over that time. Like the public utilities excise tax and the insurance company franchise taxes, it measures a person's gross receipts (called "gross premiums" in the insurance context). Like the corporate franchise tax, it offsets tax liability with specified credits. And it complements the other franchise taxes: any

business subject to the public utilities excise tax or the insurance company franchise tax is not subject to the CAT. See R.C. 5751.01(E).

The CAT applies to any person with taxable gross receipts over $150,000. R.C. 5751.01(E)(1). Each person with taxable gross receipts over $150,000 in a calendar year must register for and pay the CAT. R.C. 5751.04(A). A taxpayer must, by default, file quarterly returns; a taxpayer with taxable gross receipts over $1 million may elect to be a calendar year taxpayer. R.C. 5751.05(A) & (B); 5751.051(A)(1) & (2). A taxpayer must pay the CAT itself; it cannot bill or invoice the tax to another person. R.C. 5751.02(B).

The CAT is structured on a tiered basis. Businesses with taxable gross receipts between $150,000 and $1 million pay a fixed minimum tax of $150. R.C. 5751.03(B). Those with taxable gross receipts over $1 million pay the $150 minimum tax, plus 0.26 percent for taxable gross receipts over $1 million when the tax is fully phased in (which occurs in April 2009). R.C. 5751.03(A).

Credits permitted as offsets against the tax liability include a jobs creation credit, R.C. 5751.50(A), a jobs retention credit, R.C. 5751.50(B), a credit for qualified research expenses, R.C. 5751.51, a credit for a borrower's qualified research and development loan payments, R.C. 5751.52, and a credit for unused franchise tax net operating loss deductions, R.C. 5751.53. In other words, the remaining unused carry-forward losses that were used as deductions year-to-year within the old corporate franchise tax scheme may in some cases be used as credits under the CAT.

Money generated by the CAT goes into the "commercial activities tax receipts fund." R.C. 5751.20(B). The money in that fund is credited first to funds for schools and local governments, replacing the funds that those entities formerly collected from the tangible personal property tax.

R.C. 5751.20(B). Excess funds go to the general revenue fund. If revenues are insufficient to replace lost tangible personal property taxes for schools and local governments, those shortfalls are covered by general revenue fund subsidies. R.C. 5751.21; R.C. 5751.22.

D. The Grocers sued, claiming that the CAT violates the bans on taxing food sales to the extent that gross receipts generated by food sales are included in calculating CAT liability. The trial court rejected that challenge, but the Tenth District reversed.

The Ohio Grocers Association, Carfagna's Inc., CFZ Supermarkets, Inc., Reading Food Services, Inc., and The Sanson Co. (together, "Grocers") sued in the Franklin County Court of Common Pleas. The Grocers sought declaratory relief that the CAT, as "applied to receipts from the sale of food for human consumption off the premises where sold," Complaint at 7, violates the 1936 prohibition against any "excise tax . . . levied or collected upon the sale or purchase of food" as well as the 1994 prohibition against taxing wholesale and retail food sales. See Ohio Const. art. XII, §§ 3(C) and 13. They asked for an "order invalidating the CAT when applied to receipts (a) from the sale of food for human consumption off the premises where sold, (b) from the wholesale sale of food for human consumption off the premises where sold, and/or (c) from any sales of packaging that contains food for human consumption." Complaint at 7. They also sought to enjoin the Tax Commissioner for "levying, collecting, or enforcing the CAT with regard to receipts from the sales" it identified, and they sought refunds of any amounts paid under the CAT with regard to receipts from such sales. *Id.* at 7.

On cross-motions for summary judgment, the trial court denied the Grocers' motion and granted the Tax Commissioner's motion. The court held that, although the CAT is calculated based on a business's taxable gross receipts, it is not a transactional tax, but rather is a franchise tax levied upon the privilege of doing business in Ohio. See Decision Denying Pls.' Mot. for Summ. J. (filed Sept. 15, 2006) and Decision Granting Def.'s Cross-Mot. for Summ. J. (filed Dec. 15, 2006), Aug. 24, 2007, Franklin Cty. Court of Common Pleas ("Com. Pl. Op.," Ex. 4,

Appx. at A-17) at 7. The court, therefore, held that the CAT does not run afoul of the Ohio Constitution's prohibitions on excise taxes levied upon certain food transactions. The trial court noted that "there are both theoretical and practical differences between a tax on sales and a gross receipts tax, which are economically significant, and which cause the CAT to be substantively different from a traditional sales tax." *Id.* at 11. The trial court highlighted various differences, including that (1) the CAT is calculated using taxable gross receipts from a set measurement period, and is not pegged to any single, specific transaction or sale of food; (2) the CAT is imposed directly on the business and not on the consumer; and (3) taxable gross receipts are broader than receipts from the sale of food because they include other sources of revenue, such as the sale of services and non-food items. *Id.* at 10-11; R.C. 5751.01(F).

The Tenth District Court of Appeals reversed the trial court, finding the CAT unconstitutional "when applied to gross receipts derived from the sales of food." *Ohio Grocers Ass'n v. Wilkins* (10th Dist.), 178 Ohio App. 3d 145, 2008-Ohio-4420 ("App. Op.," Ex. 3, Appx. at A-5), ¶ 21. According to the Tenth District, "by its very operation when applied to gross receipts derived from the sales of food, a transactional tax is precisely what the CAT becomes. This is so because the tax is measured *solely* by gross receipts and is based on aggregate sales, including those from the sales of food." *Id.* (emphasis added). It concluded that "the CAT when applied to gross receipts from the wholesale sale of food and from the retail sale of food for human consumption off premises where sold, operates as, and is, an excise tax levied or collected upon the sale or purchase of food, which is prohibited by Sections 3 and 13 of Article XII of the Ohio Constitution." *Id.* at ¶ 27. Although the appellate court entered judgment for the Grocers, it later stayed its judgment, so the CAT has continued to be collected.

The Tax Commissioner appealed to this Court, which agreed to accept the case for review.

ARGUMENT

The Tax Commissioner's Proposition of Law:

The CAT is a franchise tax imposed on the privilege of doing business in the State of Ohio, not a transactional excise tax. Article XII, Sections 3(C) and 13 of the Ohio Constitution do not bar imposing the CAT on retailers and wholesalers of food, and specifically, do not bar the State from considering all gross receipts, including those generated by sales of food, in measuring a food seller's CAT liability.

No one doubts that Ohio may levy a franchise tax against the Grocers, along with all other businesses, for the privilege of doing business in Ohio, and no one doubts that any such tax must include some measurement of the value of that privilege to each grocer. The issue is whether the CAT may measure that value by considering all of the Grocers' gross receipts in Ohio, including receipts generated by sales of food, without violating the constitutional ban on taxing food sales at retail or wholesale. The answer is yes, because the CAT simply is not a tax on food sales. As noted above, the Grocers can prevail only if they show either that: (1) the ban on food-sales taxes applies to *franchise* taxes, such as the CAT; or (2) the CAT is not actually a franchise tax, but is instead a sales or transactional tax. However, the Grocers fail on both theories: The food-sales amendments apply only to sales taxes, not franchise taxes, and the CAT is a franchise tax, not a sales tax. Thus, applying the CAT to the Grocers does not violate the ban on taxing food sales.

A. Article XII, Sections 3(C) and 13 of the Ohio Constitution prohibit only transactional taxes upon the retail or wholesale sale or purchase of food for human consumption.

Before the CAT can be declared unconstitutional as applied to retailers and wholesalers of food, the Grocers bear the burden of proving beyond a reasonable doubt that the CAT violates Article XII, Sections 3(C) and 13 of the Ohio Constitution. See *Columbia Gas Transmission v. Levin*, 117 Ohio St. 3d 122, 2008-Ohio-511, ¶ 41. The Grocers cannot discharge that burden because Sections 3(C) and 13 in no way contemplate the prohibition of a franchise tax measured

in part by gross receipts from food sales. As the plain language of these provisions shows, and as their historical context confirms, Sections 3(C) and 13 prohibit only a sales tax on food.

1. The plain language of Sections 3(C) and 13 prohibits only transactional taxes on retail or wholesale food sales and purchases, and those Sections do not apply to franchise taxes.

By their plain language, Sections 3(C) and 13 apply only to transactional taxes on food sales. Section 3 both authorizes the General Assembly to impose taxes and limits the scope of that power:

> Laws may be passed providing for . . . .
>
> (C) *Excise and franchise taxes* and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; *except* that *no excise tax* shall be *levied* or collected *upon the sale* or purchase of food for human consumption off the premises where sold.

Ohio Const. art. XII, § 3(C) (emphasis added). Section 13 further limits the General Assembly's ability to tax food as follows:

> *No sales or other excise taxes* shall be *levied* or collected (1) *upon any wholesale sale* or wholesale purchase of food for human consumption, its ingredients or its packaging; (2) *upon any sale* or purchase of such items sold to or purchased by a manufacturer, processor, packager, distributor or reseller of food for human consumption, or its ingredients, for use in its trade or business; or (3) *in any retail transaction*, on any packaging that contains food for human consumption on or off the premises where sold. For purposes of this section, food for human consumption shall include nonalcoholic beverages. This section shall not affect the extent to which the levy or collection of sales or other excise taxes on the retail sale or retail purchase of food for human consumption is permitted or prohibited by Section 3(C) of this Article.

Ohio Const. art. XII, § 13 (emphasis added).

When construing constitutional provisions, the Court "appl[ies] the same rules of construction that [it] appl[ies] in construing statutes." *State v. Jackson,* 102 Ohio St. 3d 380, 2004-Ohio-3206, ¶ 14. Because "words in a statute do not exist in a vacuum," the Court "presume[s] that . . . the General Assembly intended for the entire statute to be effective. Thus,

all words should have effect and no part should be disregarded." *D.A.B.E., Inc. v. Toledo-Lucas County Bd. of Health,* 96 Ohio St. 3d 250, 2002-Ohio-4172, ¶ 19 (citation omitted). The Court "read[s] words and phrases in context according to the rules of grammar and common usage." *State ex rel. Lee v. Karnes*, 103 Ohio St. 3d 559, 2004-Ohio-5718, ¶ 23 (per curiam). "Where the language of a statute or constitutional provision is clear and unambiguous, it is the duty of courts to enforce the provision as written." *Rocky River v. State Emp. Relations Bd.* (1989), 43 Ohio St. 3d 1, 15.

The Court narrowly construes tax exemptions, whether statutory or constitutional, just as it does with all "[e]xceptions to the operation of laws." *State ex rel. Keller v. Forney* (1923), 108 Ohio St. 463, syllabus ¶ 1 (explaining general rule in non-tax area); *Welfare Fed'n of Cleveland v. Glander* (1945), 146 Ohio St. 146, 177 (applying strict construction rule to "constitutional and statutory provisions for exemption from taxation"). "[T]he presumption is that what is not clearly excluded from the operation of the law is clearly included in the operation of the law." *Keller*, 108 Ohio St. at 467. Accordingly, "one claiming [an] exemption or exception [from taxation] must affirmatively establish his right thereto:" *Nat'l Tube Co. v. Glander* (1952), 157 Ohio St. 407, syllabus ¶ 2; see also *Cincinnati Cmty. Kollel v. Levin,* 113 Ohio St. 3d 138, 2007-Ohio-1249, ¶ 9 (same). Consequently, a tax will not violate either Section 3(C) or 13 unless it is "plainly and persuasively" included within the limitations those sections impose on the General Assembly's broad power of taxation. *Keller*, 108 Ohio St. at 467.

a. Section 3(C) distinguishes between franchise taxes and excise taxes upon sales and allows the General Assembly to impose franchise taxes on businesses that sell food.

Because no part of a provision should be disregarded, *D.A.B.E.,* 2002-Ohio-4172, at ¶ 19, the Court should give meaning to the fact that Section 3(C)'s first clause authorizes "excise *and* franchise taxes," while the second clause uses only the term "excise taxes" when prohibiting the

levy of an "excise tax . . . upon the sale or purchase of food." Ohio Const. art. XII, § 3(C) (emphasis added). That contrast has only one logical meaning: that the prohibition against excise taxes on food sales does not touch franchise taxes.

Moreover, the rule that "words used more than once in the same provision have the same meaning throughout the provision, unless there is clear evidence to the contrary," *State ex rel. Maurer v. Sheward*, 71 Ohio St. 3d 513, 521, 1994-Ohio-496 (per curiam), means that the terms "excise tax" and "franchise tax" must have independent meaning in Section 3(C). By excluding the term franchise tax from the prohibition on sales-based excise taxes, Section 3(C) leaves intact the General Assembly's authority to impose franchise taxes measured in part by taxable gross receipts from food sales and purchases.

This Court elsewhere has applied the same interpretive principles to constitutional provisions that include mutually exclusive terms and treat one or more of those terms differently from the others. In *Maurer*, 71 Ohio St. 3d 513, for instance, the Court rejected the argument that the then-current version of Article 3, Section 11 of the Ohio Constitution, authorized the General Assembly to regulate commutations. Section 11 empowered the Governor to grant "reprieves, commutations, and pardons," but allowed the General Assembly to limit that power by enacting "regulations, as to the manner of applying for *pardons*." Ohio Const. art. III, § 11 (emphasis added). The Court contrasted the Governor's power "to grant *three* types of clemency—reprieves, commutations, and pardons" with the General Assembly's "authority to regulate the application process for only *one* type of clemency—pardons," and it concluded that "Section 11 could not be clearer in limiting the General Assembly's authority to regulate only pardons." *Maurer*, 71 Ohio St. 3d at 521 (emphasis in original) (also noting that Section 11 lists the three types of clemency together four times, and mentions pardons separately only once).

The Court observed that defining pardons to include commutations in Section 11 would be "nonsensical," and would "render[] the presence of the word 'commutations' useless." *Id.*; see also *East Ohio Gas Co. v. Pub. Util. Comm.* (1988), 39 Ohio St. 3d 295 (rejecting an interpretation that would render two terms in a statutory provision virtually synonymous).

Section 3(C) is analogous to the clemency provision in *Maurer*. The two provisions share an identical linguistic construction: "We authorize X and Y, subject to the following limitation on Y." Like the plaintiffs in *Maurer*, the Grocers maintain that the constitutional limits on "Y" also apply to "X." And for the same reasons the *Maurer* Court rejected the argument that "commutations are a subset of pardons," the Court now must reject the argument that, for purposes of Section 3(C), franchise taxes are a subset of excise taxes. Defining excise taxes to include franchise taxes in Section 3(C) would be nonsensical and would render the term "franchise taxes" meaningless, in violation of long-established canons of interpretation. Thus, "excise tax" and "franchise tax" must have independent meanings in Section 3(C).

Finally, the unremarkable observation that franchise taxes are a *subset* of excise taxes does not mean that the two terms are interchangeable, as not all excise taxes are franchise taxes. See, e.g., *Wesnovtek Corp. v. Wilkins,* 105 Ohio St. 3d 312, 2005-Ohio-1826, ¶ 2 ("The Ohio franchise tax is an excise tax"). Sales taxes are a subset of excise taxes, too, as are occupational taxes. *Ellwood Engineered Castings Co. v. Zaino,* 98 Ohio St. 3d 424, 2003-Ohio-1812, ¶ 26 ("The sales tax is an excise tax levied on each retail sale made in this state."); *Saviers v. Smith* (1920), 101 Ohio St. 132, 137-38 ("An excise tax has been defined to be a tax imposed on the performance of an act, or engaging in an occupation, or on the enjoyment of a privilege, and it is said in 26 Ruling Case Law, 34, that the word has come to have a broader meaning and includes every form of taxation not a burden laid directly on persons or property.").

Thus, Section 3(C) uses the term "excise tax" to exclude, not include, franchise taxes, because, as shown above, the term "franchise tax" is necessarily distinct from an "excise tax . . . upon the sale or purchase of food." No court (other than the Tenth District) has ever equated the terms "excise" and "franchise" as used in Article XII of the Ohio Constitution, and this Court should not do so now.

b. Sections 3(C) and 13 prohibit only transactional taxes, because they refer only to taxes "upon" food sales and purchases and do not limit taxes "measured by" food sales and purchases.

Even setting aside Section 3(C)'s contrasting use of the terms "excise and franchise" and "excise," Section 3(C)'s second clause and parallel language in Section 13 independently show that the constitutional prohibitions apply only to sales taxes. Section 3(C) prohibits excise taxes "levied or collected *upon the sale or purchase*" of certain food. Ohio Const. art. XII, § 3(C) (emphasis added). Similarly, Section 13 prohibits the General Assembly from levying or collecting any sales or other excise taxes "*levied*" (1) "*upon any wholesale sale or wholesale purchase*" of certain food, ingredients, or packaging; (2) "*upon any sale or purchase* of such items sold to or purchased by a manufacturer, processor, packager, distributor or reseller" of certain food or ingredients "for use in its trade or business"; or (3) on food packaging "*in any retail transaction.*" Ohio Const. art. XII, § 13 (emphasis added). "*Levied upon* the sale or purchase" means just that—it refers to a tax imposed on a particular *transaction*, which is a sales tax. In fact, it would be impossible to levy a franchise tax *upon a sale* because franchise taxes are not transactional. Neither provision, expressly or impliedly, prohibits a tax imposed in exchange for the privilege of operating a business in Ohio, i.e., a franchise tax, even if the tax is *measured by* gross receipts realized from the sale or purchase of food.

The distinction between a transactional tax levied "upon" a sale and a franchise tax "measured by" gross receipts realized from a sale was well recognized when Sections 3(C) and

13 were adopted. As explained more fully in Part A.2, franchise taxes had been a central part of Ohio's tax scheme for some time by 1936, when the electorate amended Section 3(C) to prohibit certain taxes on food sales. Moreover, the distinction between a tax "measured by" and a tax "upon" a transaction also had been subject to much litigation by that time. See *S. Gum Co. v. Laylin* (1902), 66 Ohio St. 578, 596 (distinguishing a tax paid "upon . . . property" and a tax "measured by the amount" of property, and finding no double taxation); *Western Union Telegraph Co. v. Mayer* (1876), 28 Ohio St. 521, 530-31 (states can both tax the property of corporate estates and exact a tax "proportioned . . . to the value of the privileges granted" to a corporation). By 1994, when Ohio's citizens amended the Ohio Constitution to add Section 13, an even larger body of jurisprudence confirmed this distinction. As this Court explained, "[t]he statutory Ohio franchise tax is . . . not a tax on income, sales or receipts. It is laid upon the privilege of doing business in Ohio . . . *measured by* the value of Ohio business done in proportion to the total business done." *Wheeling Steel Corp. v. Porterfield* (1970), 21 Ohio St. 2d 57, 60-61 (emphasis added); see also *Aluminum Co. of Am. v. Evatt* (1942), 140 Ohio St. 385, 407 ("[N]o tax is being laid *upon* sales" when a franchise tax is levied (emphasis added)); *East Ohio Gas Co v. Limbach* (1986), 26 Ohio St. 3d 63, 66-67 (per curiam) (even though annual gross receipts are used to measure a public utility's privilege of doing business in Ohio for purposes of a public utilities excise tax, "the tax is not imposed on gross receipts as they are received"); *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St. 3d 163, 167 (citing *East Ohio Gas*, 26 Ohio St. 3d at 67).

Given this contemporaneous understanding, as well as the principle that constitutional exceptions to the General Assembly's Section 3 tax authority are strictly construed, see *Keller*, 108 Ohio St. at syllabus ¶ 1, the prohibitions in Sections 3(C) and 13 each would have to include

the phrase "or measured by" or incorporate the term "franchise tax" to convey the intent to prohibit franchise taxes measured by food sales and purchases. If the drafters of these sections had intended the opposite result, "it would not have been difficult to find language which would express that purpose." *Lake Shore Elec. Ry. Co. v. Pub. Util. Comm.* (1926), 115 Ohio St. 311, 319. Further, if the word "franchise" merely replaces "excise" in the prohibition's text, the provision becomes absurd: It would make no sense to say that "no [franchise] tax shall be levied or collected upon the sale" of food, as franchise taxes at the time were not, and still are not, levied upon any sale. Had the drafters wished the text to achieve the Grocer's current goal, they would have used words to the effect that franchise taxes may not include sales of food as part of the measurement of the value of the privilege.

The Court has already refused to broaden Section 3(C)'s proscription, hewing to the provision's precise terms instead, in a case involving the "off the premises" clause. *Ilersich v. Schneider* (1964), 176 Ohio St. 255. In *Ilersich,* a drive-in ice cream business claimed that the term "premises" meant only the actual building where food was sold, so that customers eating in the business's adjacent parking lot were "off the premises" and were entitled to the tax exemption. *Id.* at 256. The Court rejected the argument, explaining that Section 3(C) barred taxes only on sales of food actually taken home or elsewhere, not sales of food consumed on property that is part of the immediate location where it was purchased. *Id.* at 257.

Similarly, the Franklin County Court of Common Pleas properly rejected a broad construction of Section 3(C)'s proscriptions in *Cameron Coca-Cola Bottling Co., supra.* Much like the Grocers do now, food wholesalers in that case argued that the court should broadly construe the phrase "levied or collected upon the sale or purchase of food for human consumption off the premises where sold" in Section 3(C) to prohibit both retail and wholesale

sales of food. *Id.* at 25. According to the wholesalers, the tax came within the spirit of Section 3(C)'s proscription because its impact would be passed on to retailers and ultimately consumers. But the court disagreed: "A reading of the plain language of the amendment dictates that not all sales of food are to be tax exempt. It is *a specific transaction between the retailer and its customer* that comes within the proscription of the constitutional provision." *Id.* at 26 (underlining in original, italics added). Taking into account Section 3(C)'s plain meaning and purpose, the court concluded that its proscription does not reach taxes imposed at the wholesale level:

> Although a retailer may ultimately be charged with the payment of the tax, it still remains a tax on the sale between the wholesaler and retailer. It is not a tax levied between the retailer and a consumer. At the wholesale level, there is no "human consumption off the premises where sold."

Id. at 26-27. Section 3(C)'s proscription was later extended to taxes on wholesale food sales only through the adoption of Section 13 in 1994.

Here, the Court should, as it did in *Ilersich* and as the trial court did in *Cameron Coca-Cola Bottling*, narrowly construe the proscriptions in Sections 3(C) and 13 and reject the Grocers' overly broad interpretation of these provisions. Given that neither Section 3(C)'s nor Section 13's language prohibits franchise taxes measured by food sales and purchases, the Court should strictly construe those prohibitions and refrain from speculating about whether they *should be* extended to franchise taxes.

2. The history of Sections 3(C) and 13 confirms that the proscriptions target only transactional taxes, not franchise taxes.

Even if the meaning of Sections 3(C) and 13 were not clear from the text alone, the history of these provisions—and of franchise and sales taxes in Ohio more generally—confirms that these sections prohibit the General Assembly from enacting one, and only one, type of tax: a sales tax on transactions involving the sale and purchase of food. Since Ohio first enacted a

general corporate franchise tax in 1902, the State has continuously assessed franchise taxes on grocers in the same manner as most other businesses—just as it does today through the CAT. Sections 3(C) and 13 neither prohibit nor intend to prohibit the General Assembly from requiring businesses in the food industry to pay their fair share of franchise taxes in exchange for the privilege of doing business in Ohio.

When courts construe a statute or constitutional provision, "the object of the people in adopting it should be given effect; the polestar in the construction of constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof." *Castleberry v. Evatt* (1946), 147 Ohio St. 30, syllabus ¶ 1; see also *State ex rel. Toledo Edison Co. v. Clyde*, 76 Ohio St. 3d 508, 513, 1996-Ohio-376 (same); see also *Jackson*, 2004-Ohio-3206 at ¶14 (rules of statutory construction generally apply to constitutional provisions). To determine intent, "[c]ourts review several factors . . . , including the circumstances surrounding the legislative enactment, the history of the statute, the spirit of the statute (the ultimate results intended by adherence to the statutory scheme), and the public policy that induced the statute's enactment." *Toledo Edison Co.*, 76 Ohio St. 3d at 513-514 (internal citations omitted); see also R.C. 1.49 (authorizing courts to consider the consequences of a particular construction, along with other factors, in evaluating an ambiguous statute's legislative intent).

The history of Sections 3(C) and 13 confirms what their text already makes clear: that the Ohio Constitution authorizes the General Assembly to impose a franchise tax measured by gross receipts generated partly by food sales. Sections 3(C) and 13 are best understood against the backdrop of how franchise and sales taxes evolved in Ohio. By the time the State amended its Constitution to prohibit excise taxes upon the sales and purchases of food, the State had relied on corporate franchise taxes as an integral part of its tax scheme for decades. Ohio imposed

franchise taxes on public utilities as early as the mid-nineteenth century, see *Western Union Telegraph*, 28 Ohio St. at 541; foreign insurance companies beginning in 1888, R.S. Chapter 2745, 85 Ohio Laws 183; and domestic insurance companies beginning in 1931, G.C. 5414-9 *et seq.*, 114 Ohio Laws 714, 753, *amended by* 115 Ohio Laws 548, 576-577 (1933). Ohio enacted a general corporate franchise tax for the first time in 1902, see 95 Ohio Laws 124, 124-128, *amended by* G.C. 5495 *et seq.*, 111 Ohio Laws 471, 471-475 (1925); see also *S. Gum Co.*, 66 Ohio St. at 593-94 (upholding the first general corporate franchise tax). Franchise taxes were so central to the State's tax scheme by 1912 that Article XII, Section 10 of the 1912 Ohio Constitution specifically authorized the General Assembly to pass laws for "excise and *franchise* taxes." Ohio Const. art. XII, § 10 (1912) (emphasis added) (later repealed and reenacted in Section 3(C)).

Ohio enacted a sales tax for the first time in 1934. G.C. 5546-1 *et seq.*, 115 Ohio Laws Pt. II 306 (1934); see *Castleberry*, 147 Ohio St. at 38-39. This tax, like other sales taxes—and unlike franchise taxes—was a *transactional* tax that applied uniformly to each covered transaction at the time the transaction occurred. The covered transactions initially included all sales of food, except produce sold by farmers, milk, and loaf bread. The State had levied a corporate franchise tax on grocers for more than thirty years, but this was the first time it taxed consumers for their food purchases. At the time, "[t]his country was still coming out of the Great Depression and the idea of a sales tax on consumers' groceries was repugnant to the electorate." *Cameron Coca-Cola Bottling Co., supra,* at 25-26. Ohio responded to the new tax by proposing a constitutional amendment by initiative and referendum. See Ohio Sec'y of State, Certified Ballot Language (Nov. 3, 1936) (copy certified Feb. 27, 2009) (Ex. 11, A-110).

The drafters and adopters of the 1936 amendment plainly intended to prohibit a *transactional* tax on certain food sales and purchases. Its proponents explained no fewer than four times in a five-paragraph argument to voters that the amendment would "repeal the *sales* tax on food." *Id.* (quoting argument of the Committee for the Amendment) (emphasis added). Likewise, the amendment's opponents understood that, if adopted, the amendment would "repeal" or "remove" "the *sales* tax on food," and they therefore urged voters to "vote 'no' on the proposal to exempt food for human consumption from the *sales* tax." *Id.* (quoting argument of the Committee Against the Amendment) (emphasis added). The opponents confirmed this by referring specifically to the recently enacted sales tax as "emergency legislation" that was then scheduled to expire in 1937. With this understanding, Ohio citizens adopted the amendment and prohibited the General Assembly from levying a sales tax on consumers buying groceries. As adopted, the amendment read: "On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold." Ohio Const. art. XII, § 12 (1936) (later repealed and reenacted in Section 3(C)).

In response to the enactment of Article XII, Section 12, the General Assembly amended Ohio's sales tax statute to comply with the new constitutional prohibition. See G.C. 5546-2, 116 Ohio Laws Pt. II, 323, 326. But no one ever proposed, and Ohio voters never considered, a constitutional amendment to restrict the levying of franchise taxes on grocers. The General Assembly did not amend the existing corporate franchise tax, see G.C. 5495 *et seq.*, 111 Ohio Laws 471, to exclude grocers from its scope. And no one filed a lawsuit challenging the constitutionality of the corporate franchise tax levied on grocers. In fact, even courts equated the amendment's prohibition of excise taxes with the sales tax on food. See, e.g., *Andrews v. Tax Comm'n* (9th Dist.), 1938 Ohio Misc. Lexis 896, *4-5 ("Before the adoption of said

constitutional amendment, the excise tax law, *or sales tax law*, in Ohio levied a tax upon the retail sale in general of tangible personal property, which included food. . . . The constitutional amendment rendered parts of the excise tax law inoperative." (emphasis added)), *aff'd,* 135 Ohio St. 374 (1939). Viewed together, the General Assembly's revision of the sales tax after Section 12's adoption and Ohio's failure to modify or challenge the franchise taxes levied on grocers indicate that Ohio's citizens and the General Assembly both understood that the new constitutional prohibitions on taxing food applied only to transactional taxes paid by consumers: "The historical basis of Art. XII, Sec. 3(C) clearly reveals the amendment was aimed at 'consumer' purchases. The purpose was to prohibit the levying of the new sales tax upon food purchased by the public at the grocery store." *Cameron Coca-Cola Bottling Co., supra*, at 25.

This understanding persisted even after Ohio's citizens approved several constitutional amendments in 1976, including one that merged the authorization of franchise and excise taxes with the prohibition of excise taxes upon sales of food—two provisions that previously were separate. The 1976 Ohio Constitution repealed former Article XII, Sections 10 and 12 and reenacted them in Article XII, Section 3, which combined former Sections 10 and 12 without making any substantive changes. See Ohio Sec'y of State, State Issue 8 Certified Ballot Language (June 8, 1976) (copy certified Feb. 27, 2009) ("Four sections of the Constitution dealing with the taxing power of the state are consolidated in a single section and extraneous language has been eliminated." (quoting "Explanation of Issue No. 8")). The sales tax statute continued to reflect the constitutional prohibition of taxing food transactions, see R.C. 5739.02(B)(2), and Ohio continued to levy a corporate franchise tax on food-related businesses, see R.C. 5733.01 *et seq.*, even though sales related to food transactions were used to calculate the

amount of corporate franchise tax owed by these businesses. This history confirms that the term "excise tax," as used in Section 3(C), refers only to transactional taxes, such as Ohio's sales tax.

Section 13's history similarly confirms that its prohibition of certain "sales or other excise tax[es]" on food applies only to transactional taxes. Ohio adopted Section 13 in response to litigation concerning a wholesale tax on beverages. In 1993, a court held that a newly enacted excise tax on wholesale beverage sales did not violate Section 3(C). *Cameron Coca-Cola Bottling, supra,* at 27; see R.C. 5753.01 *et seq.* (effective Feb. 1, 1993). In response, a constitutional amendment was proposed on the November 1994 ballot to extend Section 3(C)'s prohibition to excise taxes on the wholesale sale or purchase of food. Ohio Const. art. XII, § 13; Ohio Sec'y of State, State Issue 4 Certified Ballot Language (Nov. 8, 1994) (copy certified Feb. 27, 2009) (Ex. 12, Appx. at A-112) ("When the constitutionality of a new wholesale soft drink tax was challenged in 1992, the court ruling opened a gaping hole in Ohio's constitution. . . . A YES vote on Issue 4 will close this loophole, and restore Ohio's constitutional prohibition on taxing food." (quoting Argument for State Issue 4)). As submitted to voters, the ballot explained that "[t]he amendment would expand the current restrictions" of Section 3(C) in four ways, but would not modify Section 3(C). *Id.* After Section 13 was adopted and became effective, the General Assembly repealed the wholesale tax on beverages. See R.C. 5753.01 (repealed effective Jan. 1, 1999). The General Assembly did not modify Ohio's corporate franchise tax, however, and no one filed lawsuits challenging the application of the corporate franchise tax to businesses involved in the wholesale sale or purchase of food. As with Section 3(C), both as originally adopted and readopted, Ohio's citizens and the General Assembly understood Section 13's prohibition to apply only to transactional taxes—not non-transactional taxes like the CAT.

For more than a century, Ohio levied the corporate franchise tax on grocers and other businesses. Meanwhile, Ohioans twice voted to adopt constitutional language restricting the taxation of food sales and purchases, each time in direct response to a newly enacted sales tax. At no point did the drafters or adopters contemplate eliminating the General Assembly's authority to impose a franchise tax on businesses in the food industry in exchange for their privilege of doing business in Ohio, regardless of how the General Assembly chose to measure their tax liability. The Ohio Constitution continues to authorize the General Assembly to enact "excise and franchise taxes" and prohibits only transactional taxes on retail and wholesale food sales and purchases.

3. The Tenth District ignored the plain language of Sections 3(C) and 13 and never considered the constitutional history confirming that these provisions were intended to prohibit only transactional taxes on food sales.

The Tenth District disregarded the plain language of Sections 3(C) and 13, looking beyond the text of these provisions to determine their meaning. But even as the appeals court turned elsewhere for definitions of "excise" and "franchise," it failed to consider the overwhelming historical evidence confirming the plain meaning of Sections 3(C) and 13. Consequently, the court improperly concluded that these provisions prohibit the CAT's application to the Grocers.

Consistent with the analysis in Part A.1, the Tenth District recognized that Section 3(C) distinguishes the terms "excise tax" and "franchise tax." In fact, the appeals court initially seemed to agree that the prohibition on taxing food sales does not affect franchise taxes:

> From this it is gleaned the intent was not to bar all taxes from being imposed in relation to food transactions, as the exception in 3(C), Article XII does not include a prohibition of franchise taxes, but only a prohibition of excise taxes.

App. Op. at ¶ 19. However, the court was then led astray by the fact that courts have recognized that the term "excise tax" is used more broadly, *in other contexts*, to encompass franchise taxes. Relying on cases that refer to franchise taxes as excise taxes, the court stated,

> Thus, while it would appear the constitutional exceptions in Sections 3(C) and 13 of Article XII were not meant to apply to franchise taxes, judicial interpretation has clearly determined a franchise tax is a form of an excise tax. As appellants suggest, excise taxes on certain food sales are precisely what the Constitution prohibits.

See *id.* at ¶ 20. Thus, the Tenth District seems to have reasoned: (1) the constitutional bar applies to excise taxes, but not franchise taxes; (2) but franchise taxes are excise taxes; therefore, (3) franchise taxes are barred after all, despite point (1).

The Tenth District's reasoning was wrong in at least four ways, each rooted in the court's seeming equation of franchise and excise taxes and consequent disregard for Section 3(C)'s plain text. First, the court erred by ignoring its own acknowledgement that the contrasting use of "excise and franchise," followed by "excise" alone, means that "excise" here denotes those excise taxes that are *not* franchise taxes. Second, the court ignored the import of the clause limiting the excise taxes at issue to those "levied upon a sale." Third, the court failed to recognize that these problems are erased simply by recognizing that "excise tax" can be used, in different contexts, to refer to (1) all excise taxes, (2) the sales tax subset of excise taxes, *or* (3) the franchise tax subset of excise taxes. Fourth, the court did not consider the strongest evidence of constitutional intent—constitutional history—even after deciding that it needed to look beyond the four corners of the provisions to determine their meaning. Each of these errors demonstrates the Tenth District's disregard for its obligation to strictly construe these constitutional exceptions.

At most, the Tenth District's holding indicates a possible ambiguity in Sections 3(C) and 13. But, as the history of these provisions confirms, any potential ambiguity must be resolved in favor of interpreting the provision to give "excise tax" and "franchise tax" independent meaning. In addition, other interpretive tools—such as the intent of the voters in adopting the 1936 ban on taxing food sales—further confirm that this bar is aimed at *sales* taxes, not franchise taxes on

businesses. And again, the Tenth District's reading descends into absurdity even if the term "excise tax" is replaced with "franchise tax" in the provision: A "franchise tax" simply cannot be levied upon a "sale or purchase" of food. Further, if the prohibition against excise taxes on retail sales of food somehow does "apply" to franchise taxes categorically, such that it precludes receipts generated by sales of food from being included in a calculation formula for any franchise tax, then the previous corporate franchise tax was unconstitutional as well. It, too, included sales as part of the formula for assessing a business's liability. Thus, the Grocers cannot show that the bans on taxing food sales "apply" to all franchise taxes, so they cannot win on that basis.

B. The CAT is a franchise tax by its plain terms and by operation, and it does not become a transactional tax merely because it uses gross receipts as a measure of the privilege taxed.

As explained above, to prevail, the Grocers must prove one of two propositions—either that: (1) as the Tenth District implicitly reasoned, the food-tax ban applies to *all* franchise taxes; or (2) even if the food-tax prohibition does not apply to franchise taxes, the CAT is actually a sales tax, not a franchise tax, and it therefore is prohibited. Part A above explained why the first proposition fails. This Part explains why the second proposition fails as well.

Simply put, the CAT is a franchise tax. The difference between franchise taxes and transactional or sales taxes is well-established, and several of the CAT's operational features show that it does not apply to transactions the way a sales tax would. The fact that the CAT uses gross receipts to measure the privilege of doing business does not change the analysis. After all, every franchise tax must use something—whether sales, property, or any other factor—as a measuring stick, and the Court has held that such usage does not convert a franchise tax into a tax "upon" that measured element. The Tenth District's purported distinction of these cases is unpersuasive. Finally, the Grocers offer no workable standard to justify the result they seek, as

any approach that results in affirmance would be untenable and would threaten much of Ohio tax law.

1. A franchise tax fundamentally differs from a sales or transactional tax.

At the core of this case are the fundamental differences between taxes that fall within the family of "franchise taxes" and those that constitute "transactional" or sales taxes. States impose franchise taxes on persons and entities involved in commerce for the privilege of doing business within the State. The rationale is that the State bestows a special benefit on the taxpayer to conduct its business, and the business pays a tax in exchange for that benefit. *S. Gum Co.*, 66 Ohio St. at 594-598. The incidence of the tax, therefore, falls on the business. *Columbus & S. Ohio Elec. Co. v. Porterfield* (10th Dist. 1974), 41 Ohio App. 2d 191, 198. A taxing authority may use various factors (such as property, net worth, net income, sales, gross earnings, and gross receipts) to measure the value of the privilege, but the tax, itself, is on the privilege, not on the factors used as the measuring stick. *Mut. Holding Co. v. Limbach* (1994), 71 Ohio St. 3d 59, 60; *Bank One Dayton*, 50 Ohio St. 3d at 167; *East Ohio Gas*, 26 Ohio St. 3d at 67. Moreover, because States calculate franchise taxes based on the results of an entire period of doing business, a business's liability on the franchise tax is not fixed until the end of the reporting period. *East Ohio Gas*, 26 Ohio St. 3d at 67; *Bank One Dayton*, 50 Ohio St. 3d at 167. Given that the amount of tax owed is not fixed until the end of the period, the rate of taxation for franchise taxes may be adjusted at any point during that period without violating the Ohio Constitution's prohibition against retroactive laws. *East Ohio Gas*, 26 Ohio St. 3d at 67-68.

By contrast, a transactional tax, such as a sales tax, is imposed on the right to acquire and use tangible personal property, and applies to each transaction by which that right is exercised. *Celina Mut. Ins. Co. v. Bowers* (1965), 5 Ohio St. 2d 12, 16. The incidence of the tax is on the consumer, *Columbus & S. Ohio Elec. Co.*, 41 Ohio App. 2d at 198, and the tax liability is fixed

the moment the transaction occurs, *East Ohio Gas*, 26 Ohio St. 3d. at 66. Because transactional taxes apply at the time an underlying transaction takes place, the rate for such taxes cannot be changed retroactively. See *id.* at 63.

2. The CAT's character as a franchise tax is shown by both its plain terms and its operation, including the many features that link it to the old corporate franchise tax and differentiate it from sales taxes.

The CAT's plain language states that it is a tax on the privilege of doing business in the State—a franchise tax, rather than a transactional tax. As R.C. 5751.02 says, "there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state . . . . The tax imposed under this section is not a transactional tax." It "should be clear from the language of [the statute]" that this is nothing other than a franchise tax. *Aluminum Co. of Am.,* 140 Ohio St. at 394 (addressing similar language in the provisions of the corporate franchise tax, G.C. 5495, now R.C. 5733.01). The General Assembly structured the CAT so that its operation matches its label, and several features show that the CAT operates as a franchise tax, not a transactional tax.

a. The CAT's incidence on entities and its tiered structure reflect its character as a franchise tax on businesses, not a sales tax on transactions.

A transactional tax or sales tax is straightforward: Each retail sales transaction is taxed by applying the sales tax rate to the price of the items purchased. Typically, the only issues are whether the item being purchased is taxable or whether the consumer is entitled to an exemption. If the sale is taxable, the application of the sales tax is as simple as imposing, say, six cents on a one-dollar sale. The CAT, by contrast, has many features, such as its tiered structure, scope, and timing, that show how it differs greatly from the familiar sales tax concept of taxing each retail sales transaction. These differences all reflect that the CAT is a privilege tax imposed on an *entity* rather than on a sale itself.

First, the CAT uses a tax base that consists of far more than the income derived from the taxpayer's sales transactions. Contrary to the Tenth District's erroneous conclusion, App. Op. at ¶ 25, "gross receipts" is not limited to the taxpayer's income from sales of food, but instead includes, subject to certain enumerated exceptions, "the total amount realized by a person . . . that contributes to the production of gross income of the person." R.C. 5751.01(F). That includes sales of both food and non-food items, and it includes any non-sales income as well, such as from rebates and incentives. A sales tax, by contrast, is limited to sales. If the sale is that of a food item, the tax is on that food item and nothing else.

Second, the timing of imposing the CAT distinguishes it from sales taxes and shows its linkage to the old corporate franchise tax. Unlike a transactional tax, the CAT is not imposed or collected at the point of sale. The $150 fixed minimum tax is paid prospectively with the annual return from the prior year for the privilege year, and the rate component of the tax is not paid until the quarterly or calendar period has elapsed. R.C. 5751.051. By contrast, Ohio's sales tax shall be collected "with and at the same time as the price." R.C. 5739.03(A)(1).

The timing of the CAT's imposition, standing alone, is critical. The CAT is measured annually, not per transaction: It is imposed on the privilege of doing business for a calendar year, so it is measured by the value of that privilege (taxable gross receipts) over the year, not on each individual transaction. R.C. 5751.02; cf. R.C. 5733.02. This contrasts with the sales tax, which is "levied on each retail sale in the state." R.C. 5739.02. That difference in timing is not merely administrative, but also substantive. The amount owed under the CAT does not become fixed at the point of sale. Instead, it is fixed only at the end of the measurement period. R.C. 5751.051. The sales tax, by contrast, is fixed immediately at the time of sale. R.C. 5739.025. Consequently, sales taxes, by virtue of the constitutional limitation on retroactivity, are

irrevocably fixed at the moment of a sale; yesterday's sale cannot be subject to a higher tax today. But because the actual tax rate under the CAT does not become fixed until the end of the calendar quarter, the General Assembly can change the rate up until that last day of the calendar quarter, even if the gross receipts used as a measurement were generated during the quarter before a new rate was enacted. R.C. 5751.051(A)(4).

Third, in another example of continuity from the prior corporate franchise tax, the CAT excludes taxable gross receipts between members of a "consolidated elected taxpayer group," which consists of two or more commonly owned persons that elect to file and pay the CAT on a consolidated basis. R.C. 5751.011(C)(1)(a). The corporate franchise tax used a similar concept; it excluded various inter-corporate transfers in calculating a consolidated group's combined net income. R.C. 5733.052(D). The CAT exclusion, by its nature, could not apply to a transactional tax, because the group's tax liability depends upon the other group members' annual receipts, and that is inconsistent with calculating tax due on a transactional basis. See R.C. 5751.011(C)(1)(a).

Fourth, the CAT's identity as a franchise tax is further confirmed by its designation as parallel to, and mutually exclusive of, the industry-specific franchise taxes imposed on public utilities, R.C. 5727.24, R.C. 5727.30; financial institutions, R.C. 5733.06(D); and insurance companies, R.C. 5725.18, R.C. Chapter 5729. Entities paying these industry-specific franchise taxes are excluded from the CAT. R.C. 5751.01(E)(2) (public utilities); R.C. 5751.01(E)(3) (financial institutions that pay the general corporate franchise tax under R.C. 5733.06(D)); R.C. 5751.01(E)(9) (insurance companies).

Finally, as with the corporate franchise tax, a company that fails to comply with the CAT can face a quo warranto action under R.C. Chapter 2733 to revoke the privilege or franchise to

do business in the state. R.C. 5751.11. That possible liability fits logically with the CAT's nature as a franchise tax: If the tax is for the privilege of doing business, a party that does not pay should lose the privilege.

b. The CAT is offset by several credits, further confirming that it is a franchise tax on businesses, not on transactions.

The CAT's character as a franchise tax is also shown by the inclusion of many credits allowed to offset the tax, all of which were formerly allowed as credits or deductions against the corporate franchise tax—showing that in many respects it is the successor to that tax. See R.C. 5751.50, cf. R.C. 5733.061 (jobs creation and retention tax credits); R.C. 5751.51, cf. 5733.351 (credit for qualified research expenses); R.C. 5751.52. cf. 5733.352 (credit for qualified research and development loan payments); and R.C. 5751.53 (amortizable net operating losses). 5733.04(I) (credit against CAT for such losses). These offsets do not apply to the sales tax, and for good reason: A jobs creation tax credit is granted to a company that creates jobs, and it reduces that company's franchise tax liability for the privilege of doing business. But a sales tax is imposed on the sale of a product, so the fact that the company selling the product created a job does not align with any particular sale in a similar way.

Of these credits, the credit for unused franchise tax net operating loss deductions ("NOLs") best demonstrates the continuity between the corporate franchise tax and the CAT. R.C. 5751.53. Under the corporate franchise tax, these NOLs were carried over year-to-year as deductions. With the phase-in of the CAT, the General Assembly allowed taxpayers to apply unused NOLs from the corporate franchise tax as credits against the CAT in some cases. Further, NOLs by nature are uniquely franchise tax-type deductions, because they are based on the results of a business's operations over a full tax year. Such tax credits could not be applied to a transactional tax, because a *company* does not have sales tax liability to begin with. After all, it

is the *customers* who bear sales tax liability; the vendor simply acts as an agent of the State to collect the tax from its customers and remit it to the State.

3. The CAT does not become a transactional tax simply because it uses gross receipts to measure the value of the privilege to be taxed.

The Grocers cannot deny the many features that the CAT shares with the corporate franchise tax, and with franchise taxes generally. But the Tenth District agreed with the Grocers that one feature—the use of gross receipts as a measuring stick for the value of the privilege taxed—trumps all else and renders the CAT a sales tax. But the Grocers and the Tenth District are wrong. As explained below, the Court has repeatedly held that a tax imposed on the privilege of doing business may be measured by some underlying factor without amounting to a tax "upon" that factor.

a. The Court has explained repeatedly that a franchise tax's measurement may include a factor without amounting to a tax *upon* that factor.

The "measuring stick" or "yardstick" distinction has been a fundamental tenet of this Court's franchise tax jurisprudence for over a century. As the Court explained in *Aluminum Co.*, "[t]he employment of various factors in determining the part of the business of a corporation (whether domestic or foreign) done in Ohio is no indication that the subjects of such factors are being taxed. Instead, they are being used merely to compose a measuring stick." *Aluminum Co. of Am.*, 140 Ohio St. at 395; see also *Bank One Dayton*, 50 Ohio St. 3d at 167 (noting validity of "franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property"). Time and again, the Court has reaffirmed that measuring a franchise tax by some feature does not convert the tax into a tax "on" that feature. See *S. Gum Co.*, 66 Ohio St. at 596 (franchise tax measured by subscribed and issued outstanding capital stock does not make the tax one imposed on personal property); *Wheeling Steel Corp.*, 21 Ohio St. 2d at 60-61 ("The

statutory Ohio franchise tax . . . is purely a privilege tax and not a tax on income, sales or receipts"); *Mut. Holding Co.*, 71 Ohio St. 3d at 60 ("Measuring tax liability in terms of net worth does not convert a franchise tax into a property tax. R.C. 5725.18 is a franchise tax *measured by* net worth, *not* a tax *on* net worth." (citations omitted) (emphasis added)).

The Court's decision in *East Ohio Gas,* 26 Ohio St. 3d 63, offers perhaps the most thorough explanation of the yardstick principle. In that case, the issue was, as here, whether an annual privilege tax measured by a company's gross receipts amounted to a tax on the transactions that led to those receipts. Specifically, the tax at issue in *East Ohio Gas* was the public utilities excise tax, which was measured by the company's gross receipts for a 12-month period, or "tax year." The tax was imposed at the end of the tax year. In 1983, the General Assembly increased the tax rate, and it made the change effective 5/6ths of the way through the tax year. But because the tax was not imposed until the end of the year, the increased rate applied to *all* gross receipts for the year at issue, even though most of those receipts were based on sales generated before the rate change. The taxpayer, East Ohio Gas, claimed that this tax increase violated the constitutional bar against retroactive laws, based on the theory that that the tax liability was fixed and calculable as each sale was consummated, so that applying the new, higher tax rate to receipts based on past transactions was retroactive. See *id.* (citing Ohio Const. Art. II, § 28).

The Court rejected East Ohio Gas's argument, and in doing so, it firmly rejected the idea that measuring the privilege by gross receipts amounted to a transactional tax on the sales that led to the receipts. *Id.* at 66-67. First, the Court explained that the characterization was the heart of the issue: "The linchpin of appellant's argument is its claim that the excise tax on its gross receipts is a transactional tax comparable in nature to a sales tax, calculable with certainty as

each dollar is received. . . ." *Id.* at 66. Next, the Court soundly rejected that argument, explaining the distinction several times:

> Appellant mischaracterizes the nature of the tax imposed upon it pursuant to R.C. 5727.38. It is not a tax on daily transactions. Rather, R.C. 5727.38 stated in relevant part that this is an annual excise tax, calculated at the conclusion of the utility's tax year, based upon gross receipts from an annual period.
>
> * * *
>
> This Court has previously stated that the excise tax on public utilities is a tax on a privilege—the privilege of doing business in this state. The critical legal distinction which appellant ignores is that the tax is not imposed on gross receipts as they are received. Annual gross receipts are merely the measure of the tax on the privilege.

Id. at 66, 67 (internal citations omitted). Notably, the Court explained that this reasoning applied both to the so-called "excise tax" on public utilities, which was a tax on the privilege of doing business, and to the conceptually identical corporate franchise tax that applied to all other corporations (other than the insurance companies that paid that industry's specific excise/franchise tax): "Similarly, the annual franchise tax levied on corporations is also a tax on the privilege of doing business in this state. Both the excise tax on public utilities and the franchise tax on corporations are levied on the exercise of a privilege and not on income, sales, or receipts." *Id.* at 67 (internal citations omitted).

Finally, the Court noted that the analytical distinction was reinforced by the *timing* of the tax's imposition. The Court explained that "both taxes are based upon the results of an entire year of doing business and tax liability is not fixed until the end of that annual period, rather than fixed at a given moment in time prior to the end of that period as appellant contends." *Id.* Consequently, the Court rejected East Ohio Gas's ultimate retroactivity challenge, and it did so based solely on this distinction between taxes on each transaction and a privilege tax on the annual gross receipts generated by the transactions.

The Court used the identical distinction in *Bank One Dayton,* 50 Ohio St. 3d 163, in which the issue was not one of timing, but one similar to the issue here regarding nontaxable food sales—namely, including non-taxable government bonds as a basis for measuring corporate franchise tax. The taxpayer challenged the inclusion of nontaxable federal bonds as a basis for measuring its net worth for calculating its corporate franchise tax liability. Because federal law prevented the State from directly taxing the bonds, the taxpayer argued that the State could not do the same thing indirectly by imposing a corporate franchise tax based on the bonds' value. *Id.* at 166.

The Court, in rejecting the taxpayers' arguments in *Bank One Dayton,* reiterated the principle of *East Ohio Gas*—namely, that including a tax-exempt item as a measure of corporate franchise tax liability is simply not the same as taxing the underlying item. See *Bank One Dayton,* 50 Ohio St. 3d at 167 (citing *East Ohio Gas,* 26 Ohio St. 3d. at 67); see also *Fifth Third Union Trust Co. v. Peck* (1954), 161 Ohio St. 169, 172 (allowing inclusion of tax-exempt federal securities in calculating net worth for franchise tax purposes, because "tax levied . . . is a franchise tax based on the value of the capital stock and is not a tax on the securities as such"). Notably, by relying on *East Ohio Gas* in resolving *Bank One Dayton,* the Court demonstrated that its precedent in *characterizing* such taxes controls later cases that turn on the same issues of characterization and operation. That remains true regardless of whether the cases arise in contexts as disparate as retroactivity clause challenges, as in *East Ohio Gas,* challenges under the federal constitution's Borrowing and Supremacy Clauses, as in *Bank One Dayton,* or challenges based on the prohibitions against taxing food sales, as here.

These principles have been repeatedly applied, without deviation or exception, by this Court, the U.S. Supreme Court, and Ohio's appeals courts. See *Cincinnati, Milford & Loveland*

Traction Co. v. State (1916), 94 Ohio St. 24, 27 (noting that tax measured by value of property "is valid and constitutional and is not a tax upon property, but a tax on privilege, on immunity, on special favor."); *Werner Mach. Co. v. Div. of Taxation* (1956), 350 U.S. 492, 494 (noting that Court had "consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property"); *Educ. Films Corp. of Am. v. Ward* (1931), 282 U.S. 379, 391 ("[T]here is a logical and practical distinction between a tax laid directly upon all of any class of government instrumentalities, which the Constitution impliedly forbids, and a tax such as the present, which can in no case have any incidence, unless the taxpayer enjoys a privilege which is a proper object of taxation"); *LSDHC Corp. v. Zaino,* 98 Ohio St. 3d 450, 2003-Ohio-1911, ¶ 25; *Columbus & S. Ohio Elec.*, 41 Ohio App. 2d 191.

b. The Court has applied the yardstick distinction when gross receipts were the sole basis for measurement and also when those receipts were derived from sales.

As explained above, the Court has applied the yardstick distinction as a general principle, and it has applied it where, as in *Bank One*, an item that could not be itself taxed was included in a bundle of items measured for calculating a privilege tax. The Court has not limited this rule to cases in which a challenged item was included in a multifactor formula for calculating net income, net worth, or any other concept used to measure the value of a privilege. To the contrary, the Court has repeatedly applied the yardstick distinction when the sole basis for measuring value under a privilege tax was an entity's gross receipts, and it has done so when sales were a source of receipts. For example, in *East Ohio Gas,* discussed above, gross receipts were the sole basis for measuring the privilege under the franchise tax at issue, namely, the public utilities excise tax.

Similarly, gross receipts were the sole basis of measurement under the privilege tax at issue in *Western Union*—and, notably, the argument there also centered on the claim that such a gross receipts approach meant that the franchise tax at issue was converted into a sales tax. See *Western Union Telegraph*, 28 Ohio St. at 532. Specifically, a New York telegraph company raised a Commerce Clause challenge to the constitutionality of Ohio's use of gross receipts to measure its public utilities franchise tax liability. No one doubted that, under the then-applicable standards, a sales tax on the items that generated the gross receipts—namely, the messages delivered—would have violated the federal Commerce Clause, Section 8, Article I of the United States Constitution, as applied to interstate messages. Thus, Western Union argued, as the Grocers do here, that a tax measured by gross receipts, when those receipts were generated by transactions immune from sales tax, was invalid because the tax was essentially a sales tax on the underlying item. The Court disagreed, explaining that "a tax on the *gross receipts* for transportation was not a tax on *articles* of commerce, but upon the *fruits* of commerce after they have reached the treasury of the company." *Id.* at 531 (emphasis in original). Thus, the Court concluded, because the tax "does not impose a tax on the messages, but on the gross receipts of a previous period of time," it was a valid tax on the privilege of doing business, not an invalid sales tax on the underlying item—even though the aggregate sales of that item constituted the company's aggregate gross receipts. *Id.* at 532.

Likewise, several other cases concerned privilege taxes that used gross receipts as the sole basis for measuring the value of the privilege, and in no case did that sole-basis approach convert a privilege tax into a sales tax or anything else. See, e.g., *State ex rel. Cleveland v. Kosydar* (1973), 36 Ohio St. 2d 183 (rejecting assertion that taxes paid by public utilities on gross receipts amounted to an income tax; thus, so constitutional provision that applied to income taxes did not

apply); *Express Co. v. State* (1896), 55 Ohio St. 69, syllabus ¶ 1 (rejecting argument that a franchise tax was invalid because it was based on gross receipts and did not factor net earnings or losses, profits, or capital into the calculation). And, as *State ex rel. New England Mut. Life Ins. Co. v. Reinmund* (1887), 45 Ohio St. 214, noted, the excise tax imposed on foreign insurance companies for the privilege of doing business is based solely on an insurer's gross premiums.

Further, while it is the General Assembly's choice whether to measure a privilege's value by gross receipts or net income or some other approach, the Court has described the Assembly's use of gross receipts as "wise." In *Cincinnati, Milford & Loveland Traction Co.*, 94 Ohio St. 24, a utility argued that its payments to a second utility should be subtracted from the first company's gross receipts, because the second utility included the payments in *its* gross receipts. Otherwise, it argued that double taxation occurred. In rejecting that argument, the Court noted that basing franchise tax liability on gross receipts, rather than net earnings, better reflected the idea behind a franchise tax—measuring the business done in the State. The Court explained that the State's purpose "evidently was to assess with reference to the amount of business done by such company, and it concluded, *wisely no doubt,* that as an evidence of the amount of business done it would base the assessment on the 'gross earnings' of the company." *Id.* at 31 (emphasis added); see also *Fifth Third Union Trust Co.*, 161 Ohio St. at 174-75 ("The exclusion of a major portion of the assets of one corporation, in determining the value of its franchise, because of the [tax-exempt] character of some of its investments, whereas all the assets of another corporation are included because it has no such investments, would not be fair or just.").

The United States Supreme Court likewise has recognized gross receipts as a valid means of calculating franchise taxes, noting that a State may choose whether to charge a flat sum, or a levy against gross receipts, or net earnings or profits. See *Home Insurance Co. v. New York*

(1890), 134 U.S. 594, 600 (State "*may require, as a condition of the grant of the franchise, and also of its continued exercise, that the corporation pay* a specific sum to the State each year, or month, or *a specific portion of its gross receipts,* or of the profits of its business, or a sum to be ascertained in any convenient mode which it may prescribe.") (emphasis added); see also *Reading R.R. Co. v. Pennsylvania* (1873), 82 U.S. 284 (using same distinction to reject challenge to franchise tax imposed on railroads that was measured by gross receipts).

Not only has the Court approved the use of gross receipts as a measuring stick, but it has specifically done so when the receipts being measured were generated by an entity's sales. For example, in *East Ohio Gas,* the franchise tax was levied on a public utility's gross receipts for the year, and those receipts were primarily, if not exclusively, derived from each utility's *sales* of energy to its customers. Still, the Court held that the tax was not "upon" the underlying sales. *East Ohio Gas,* 26 Ohio St. 3d. at 66-67). The same was true in *Western Union,* where the telegraph company's gross receipts were measured solely by its sales of telegrams. *Western Union Telegraph,* 28 Ohio St. at 532; see also *Columbus & S. Ohio Elec*, 41 Ohio App. 2d at 198 (rejecting claim that including city's energy purchases in measuring gross receipts amounted to forbidden sales tax on such purchases).

In sum, a century's worth of this Court's cases uniformly demonstrates that the CAT is not converted into a tax *on* food merely because it includes receipts generated from food sales as part of its measurement of gross receipts.

4. The Tenth District erred both in its misunderstanding of how the CAT operates and in its misreading of the Court's precedents.

Even though the CAT operates as a franchise tax, and even though the Court has repeatedly explained the difference between taxing an item and including the item as part of a measurement formula, the Tenth District went in another direction. It asserted that the CAT operates just like

a sales tax, App. Op at ¶ 21, and it asserted that this Court's holdings were distinguishable, *id.* at ¶ 25. The court was wrong on both scores.

First, in asserting that "a transactional tax is precisely what the CAT becomes," *id.* at ¶ 21, the court overlooked the operational features that show how the CAT operates as a franchise tax. It acknowledged the tiered structure and the flat-rate parts of the CAT, see *id.* at ¶ 8, but it arbitrarily excluded those features when it concluded later that the CAT "is measured *solely* by gross receipts," *id.* at ¶ 21. It never addressed the many credits and other indicia, such as the consolidated group filing, that prevent the CAT from operating "as" a sales tax. These features show that the CAT does not operate merely by charging a percentage on all taxable gross receipts, so the Tenth District's contrary statement was wrong.

Further, because the appeals court held the CAT unconstitutional only as applied to the Grocers' food sales, and because that alleged unconstitutionality was tied to the court's view that the tax's *operational character* triggered that result, the appeals court's view is implicitly premised on the improbable notion that the CAT's *character* slaloms back and forth between being a franchise tax and a sales tax at different points in its operation. That is, under the appeals court's view, the CAT apparently is a true franchise tax for the first million dollars' worth of receipts, but converts to a sales tax if taxable gross receipts exceed $1 million. However, if the taxpayer is a consolidated elected taxpayer group, the CAT would have to revert to being an entity-based franchise tax for the purpose excluding receipts between members of the group. Separately, the CAT would also need to revert to franchise status to apply credits. After all, a grocer could still wish to claim its credits against it its somehow-segregated receipts generated by non-food sales. In other words, the Tenth District's view is not only wrong, but it is incapable of logical application going forward if this Court mistakenly adopts it.

Second, the Tenth District erred in purporting to distinguish the Court's extensive case law adopting and applying the yardstick concept. The appeals court acknowledged that this Court and the U.S. Supreme Court had repeatedly endorsed this distinction, see *id.* at ¶ 25, but the Tenth District purported to distinguish those cases as follows:

> [W]hile in these cases it was deemed permissible to include certain tax exempt properties and incomes when determining an entity's tax liability, it is important to note that *the tax exempt property or income was not the only measure of tax liability since the tax liability was based on an entity's net worth.* Here, the sole factor being used to determine tax liability is gross receipts, which is simply a group of individual sales or transactions. *A tax exempt transaction is not just a factor being considered to determine tax liability, rather before us, a tax exempt transaction is the only factor being used to determine tax liability.* Though the United States Supreme Court has upheld franchise taxes "measured by a yardstick" which includes tax-exempt income or property, in the case sub judice, the "yardstick" is comprised solely of transactions that include food sales that are constitutionally prohibited from being taxed.

Id. at ¶ 25 (emphases added). The Tenth District's primary purported distinction was that the CAT uses the allegedly forbidden item as the *sole* measurement, as opposed to using it as one among many factors. In addition, the court's reference to measuring "net worth" in precedent suggests that the court perceived a difference in using net worth, rather than gross receipts, as the yardstick that includes some allegedly non-taxable item in the yardstick's measurement.

But the appeals court's distinctions were wrong, for the Court has applied the yardstick distinctions in cases involving only gross receipts. See, e.g., *East Ohio Gas,* 26 Ohio St. 3d. at 66-67. *Western Union Telegraph,* 28 Ohio St. at 530-31. In fact, four Ohio franchise taxes share that methodology. The public utilities excise tax, R.C. Chapter 5727, uses gross receipts to measure the value of the franchise, while the domestic insurance franchise tax, R.C. 5725.18 *et seq.*, and the foreign insurance company franchise tax, R.C. Chapter 5729, use gross premium payments as a yardstick.

Further, the Tenth District lost sight of the fundamental point that any franchise tax must use *something* to measure the value of the privilege; otherwise the State would be forced to

charge a flat tax for all corporations, regardless of size, shape, and means. And if the State must use some measure of the value of a company's right to do business, it is hard to criticize the use of a business's taxable gross receipts as a fair and accurate measure of the value of that privilege. Indeed, while the General Assembly was certainly justified in calculating the corporate franchise tax based on net worth or net income, and in looking to a company's payroll and property as part of the formula, it is hard to deny that raw commercial activity is in many ways a *better* measure of the value of the right to do business in a given year.

5. The result that the Grocers seek cannot be squared with any workable legal principle, as any rule supporting affirmance would wreak havoc on Ohio tax law.

Finally, the Court should reject the Grocers' claim because judgment in their favor would require the Court to adopt an untenable legal principle and throw Ohio's tax jurisprudence and administration into doubt. Each possible path to a Grocers' victory is unworkable.

First, the Court should not adopt a rule that forbids *any* inclusion, in a franchise tax formula, of gross receipts generated by sales of food. That approach would force the Court to revisit *East Ohio Gas, Bank One Dayton,* and the entire body of law applying the yardstick principle. After all, if this principle does not apply to *this* franchise tax, it is hard to see what principle would distinguish it from the other franchise taxes that measure some item that may not be directly taxed.

Moreover, if a franchise tax may never include receipts derived from food sales, then the prior corporate franchise tax—which the incorporated Grocers paid for almost a century without challenge—was unconstitutional all along, and such a rule would mean that the General Assembly could not impose any new franchise tax on the Grocers that includes any sales or receipts element. The Grocers implicitly suggested such a "no inclusion at all" rule, as they argued below that the CAT is rendered a sales tax because "[f]or every one dollar in sales, a

corresponding tax is owed." See Reply Brief of Appellants Ohio Grocers Assoc., et al., *Ohio Grocers Assoc. v. Wilkins,* No. 07APE-10-081 (10th Dist. Jan. 22, 2008) at 7. The Grocers mistakenly insisted that this feature distinguishes the CAT from the corporate franchise tax: "[i]n stark contrast to the corporate franchise tax, the 'measure' by which the CAT is owed is a one-to-one correlation to sales, including food sales." *Id.* But this argument is wrong, first, because the CAT does not operate in such a "one-to-one" way, with every increase in sales leading to a corresponding tax increase, as the tiers and credits ensure that the CAT is not "one-to-one." More important, if the "one-to-one" concept condemns the CAT despite other features, merely because each extra dollar in sales triggers a proportional increase in tax when all else is held equal, then that principle would indisputably ensnare the corporate franchise tax as well.

The corporate franchise tax, like the CAT, incorporated sales as a factor in the tax equation. The corporate franchise tax used (and still uses, for some businesses) this formula:

Net Worth Tax Base

Ohio Taxable Value	=	Net Value of Stock	X	[(Property factor X .20) + (Payroll factor X .20) + **(Sales Factor X .60)**]

Net Income Tax Base

Ohio Taxable Income	=	**Business Income Apportioned to Ohio**	+	Nonbusiness Income Allocated to Ohio	–	Ohio Net Operating Loss Carry Forward Deduction
Net Income Apportionment Formula:						
Ohio Apportioned Net Income	=	Apportionable Income	X	[(Property factor X .20) + (Payroll factor X .20) + **(Sales Factor X .60)**]		

As the bolded elements show, sales were not only an element of the earlier formula, but they were 60% of the three-factor calculation that was then multiplied by the other elements. So an increase in sales in Ohio, all else equal, led to a tax increase by virtue of the apportionment formula. Moreover, under the Net Income approach, when sales generated income to the taxpayer, they also contributed to "Business Income Apportioned to Ohio."

If the Grocers' reasoning prevails, the State would not only be prevented from including receipts generated by food sales in applying the CAT to food sellers, but it might be unable to enact any new franchise tax that, like the corporate franchise tax, had a sales component that resulted in higher taxes from increased sales. Notably, the food industry challenged various aspects of their tax assessments under the corporate franchise tax, yet no case suggested that food sellers were exempt from the corporate franchise tax or were entitled to exclude their food sales from their net income or their apportionment calculation. See *Lancaster Colony Corp. v. Limbach* (1988), 37 Ohio St. 3d 198; *Pancake House, Inc. v. Lindley* (1980), 61 Ohio St. 2d 151; *Armour & Co. v. Kosydar* (1976), 46 Ohio St. 2d 450; *Kroger Co. v. Bowers* (1965), 3 Ohio St. 2d 76; *American Automatic Vending Corp. v. Porterfield* (1965), 20 Ohio St. 2d 149.

Finally, if the Grocers instead urge that the CAT is entirely a sales tax, that rule, too, creates problems, because calling the CAT a sales tax would draw into question the application of *Quill v. North Dakota* (1992), 504 U.S. 298. *Quill* held that, under the dormant Commerce Clause, a State cannot impose the obligation to collect a sales tax on a company that does not have a sufficient "physical presence" in the state. Thus, recasting the CAT as a sales tax might bar the State from levying it against those who do business here but have no physical presence, such as online sellers. Indeed, just after the Tenth District's decision, an out-of-state business brought a *Quill*-based challenge to another key provision of the CAT. *Overstock.com v. Levin*

(Franklin Cty Com. Pl. No. 08CVH11-16412) (challenging "economic presence" standard for imposing CAT liability set forth in R.C. 5751.01(H) and (I) and arguing that *Quill*'s "physical presence" test applies). Similarly, the plaintiffs in another case claim that the CAT is invalid because it operates as a transactional tax on the sale of motor fuel used for propelling vehicles on public highways in violation of Article XII, Section 5a of the Ohio Constitution. *Beaver Excavating Co. v. Levin* (Franklin County Com. Pl. Case No. 08CVH03-3921).

In sum, ruling in the Grocers' favor would disrupt the State tax system, require the Court to rewrite its entire tax jurisprudence, and disturb long-settled principles about how taxation works in Ohio. The Court should reject that invitation and should allow the State to ensure that the Grocers, along with other businesses in Ohio, pay their fair share.

CONCLUSION

For the reasons above, the Court should reverse the appeals court's decision and hold that the common pleas court properly granted summary judgment to the Tax Commissioner, because applying the CAT to grocers or any food sellers does not violate Article XII, Sections 3(C) and 13 of the Ohio Constitution.

Respectfully submitted,

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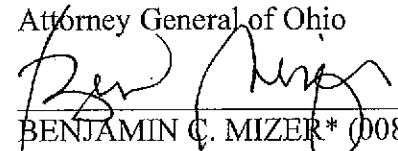

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CERTIFICATE OF SERVICE

I certify that a copy of the Merit Brief of Defendant-Appellant Richard A. Levin, Ohio Tax Commissioner, was served by e-mail and by U.S. mail this 6th day of April 2009, upon the following counsel:

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I also sent courtesy copies to counsel of record for all known amici curiae on the 6th day of April, 2009.

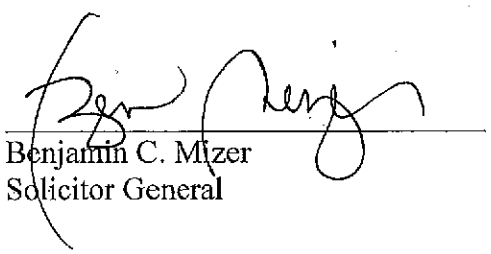

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EXHIBIT 1

In the

Supreme Court of Ohio

OHIO GROCERS ASSOCIATION, et al.,	:	Case No. 08-2018
Plaintiffs-Appellees,	:	On Appeal from the Franklin County Court of Appeals, Tenth Appellate District
v.	:	
WILLIAM W. WILKINS [RICHARD A. LEVIN], in his official capacity as Ohio Tax Commissioner,	:	Court of Appeals Case No. 07AP-813
Defendant-Appellant.	:	

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

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FILED
OCT 17 2008
CLERK OF COURT
SUPREME COURT OF OHIO

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

Defendant-Appellant Richard A. Levin, Successor to William W. Wilkins, Ohio Tax Commissioner, gives notice of its claimed appeal of right and discretionary appeal to this Court, pursuant to Ohio Supreme Court Rules II(A)(2) and (3), from a Judgment Entry of the Tenth District Court of Appeals, journalized in Case No. 07AP-813, *Ohio Grocers Association v. William W. Wilkins [Richard A. Levin], in his official capacity as Ohio Tax Commissioner.* That Judgment Entry was stamped "Filed" on September 2, 2008. The Judgment Entry and Opinion are attached to the Defendant-Appellant's Memorandum in Support of Jurisdiction. Reasons for this claimed appeal of right and discretionary appeal, including the great public and general interest involved in this case, are fully set forth in the accompanying Memorandum in Support of Jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Notice of Appeal of Defendant-Appellant Richard A. Levin, Successor to William W. Wilkins, Ohio Tax Commissioner was served by U.S. mail this 17th day of October 2008, upon the following counsel:

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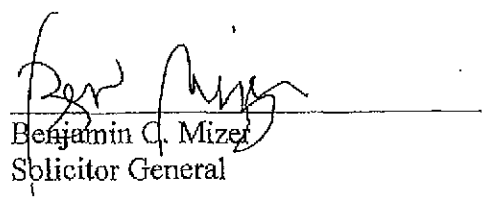

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EXHIBIT 2

20546 - T62

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
2008 SEP -2 PM 12: 55
CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Grocers Association et al.,	:	
Plaintiffs-Appellants,	:	No. 07AP-813 (C.P.C. No. 06CVH-2278)
v.	:	(REGULAR CALENDAR)
William W. Wilkins, in his official capacity as Ohio Tax Commissioner,	:	
Defendant-Appellee.	:	

JUDGMENT ENTRY

For the reasons stated in the opinion of this court rendered herein on September 2, 2008, appellants' two assignments of error are sustained, and it is the judgment and order of this court that the judgment of the Franklin County Court of Common Pleas is reversed, and this cause is remanded to that court for further proceedings in accordance with law consistent with said opinion. Costs shall be assessed against appellee.

McGRATH, P.J., BROWN, J. and TYACK, J.

By _____
Judge Patrick M. McGrath, P.J.

EXHIBIT 3

20546 - S99

FILED
COURT OF APPEALS
FRANKLIN CO. OHIO
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CLERK OF COURTS

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Ohio Grocers Association et al.,	:	
Plaintiffs-Appellants,	:	No. 07AP-813 (C.P.C. No. 06CVH-2278)
v.	:	(REGULAR CALENDAR)
William W. Wilkins, In his official capacity as Ohio Tax Commissioner,	:	
	:	
Defendant-Appellee.	:	

O P I N I O N

Rendered on September 2, 2008

Chester, Willcox & Saxbe LLP, Charles R. Saxbe, Donald C. Brey and *Gerhardt A. Gosnell II*, for appellants.

Nancy H. Rogers, Attorney General, *Lawrence D. Pratt, Christine T. Mesirow, Alan Schwepe* and *Sophia Hussain*, for appellee.

APPEAL from the Franklin County Court of Common Pleas.

McGRATH, P.J.

{¶1} Plaintiffs-appellants, Ohio Grocer's Association, Carfagna's Incorporated, CFZ Supermarkets, Inc., Reading Food Services, Inc., and The Sanson Company (collectively "appellants"), appeal from the judgment of the Franklin County Court of Common Pleas denying their motion for summary judgment, and granting summary

judgment in favor of defendant-appellee, William W. Wilkins, in his official capacity as Ohio Tax Commissioner ("appellee").

{¶2} Appellants filed their complaint for declaratory judgment and injunctive relief on February 17, 2006, alleging Ohio's commercial activity tax ("CAT"), codified in R.C. Chapter 5751, effective June 30, 2005, is unconstitutional. Specifically, it is appellants' position that the CAT's provision that imposes a percent tax on annual gross receipts greater than $1 million violates the Ohio Constitution when it is applied to gross receipts derived from the wholesale sale of food and from the retail sale of food for human consumption off the premises where sold.

{¶3} Appellants filed a motion for summary judgment on September 15, 2006. On December 5, 2006, appellee filed a memorandum in opposition and cross-motion for summary judgment. Appellants filed a memorandum in opposition and corresponding reply briefs were filed by each party. On August 24, 2007, the trial court issued a decision denying appellants' motion for summary judgment and granting appellee's cross-motion for summary judgment. This appeal followed, and appellants bring two assignments of error for our review:

> I. THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT RICHARD LEVIN, IN HIS OFFICIAL CAPACITY.
>
> II. THE TRIAL COURT ERRED IN DENYING SUMMARY JUDGMENT TO PLAINTIFFS.

{¶4} This matter was decided in the trial court by summary judgment, which under Civ.R. 56(C) may be granted only when there remains no genuine issue of material fact, the moving party is entitled to judgment as a matter of law, and reasonable minds

can come to but one conclusion, that conclusion being adverse to the party opposing the motion. *Tokles & Son, Inc. v. Midwestern Indemn. Co.* (1992), 65 Ohio St.3d 621, 629, citing *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64. Additionally, a moving party cannot discharge its burden under Civ.R. 56 simply by making conclusory assertions that the nonmoving party has no evidence to prove its case. *Dresher v. Burt* (1996), 75 Ohio St.3d 280, 293. Rather, the moving party must point to some evidence that affirmatively demonstrates that the nonmoving party has no evidence to support his or her claims. Id.

{¶5} An appellate court's review of summary judgment is de novo. *Koos v. Cent. Ohio Cellular, Inc.* (1994), 94 Ohio App.3d 579, 588; *Patsy Bard v. Society Nat. Bank, nka KeyBank* (Sept. 10, 1998), Franklin App. No. 97APE11-1497. Thus, we conduct an independent review of the record and stand in the shoes of the trial court. *Jones v. Shelly Co.* (1995), 108 Ohio App.3d 440, 445. As such, we must affirm the trial court's judgment if any of the grounds raised by the movant at the trial court are found to support it, even if the trial court failed to consider those grounds. See *Dresher*, supra; *Coventry Twp. v. Ecker* (1995), 101 Ohio App.3d 38, 41-42.

{¶6} In 2005, the Ohio legislature enacted a series of tax revisions. The component of those revisions at issue here is the new CAT, as codified in R.C. Chapter 5751, effective June 30, 2005. According to appellee, the CAT is designed to replace other business taxes, many of which are being phased out over various time frames.

{¶7} R.C. 5751.02 provides:

> (A) For the purpose of funding the needs of this state and its local governments beginning with the tax period that commences July 1, 2005, and continuing for every tax period

> thereafter, there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state. The tax imposed under this section is not a transactional tax and is not subject to Public Law No. 86-272, 73 Stat. 555. The tax imposed under this section is in addition to any other taxes or fees imposed under the Revised Code. The tax levied under this section is imposed on the person receiving the gross receipts and is not a tax imposed directly on a purchaser. The tax imposed by this section is an annual privilege tax for the calendar year that, in the case of calendar year taxpayers, is the annual tax period and, in the case of calendar quarter taxpayers, contains all quarterly tax periods in the calendar year. A taxpayer is subject to the annual privilege tax for doing business during any portion of such calendar year.
>
> (B) The tax imposed by this section is a tax on the taxpayer and shall not be billed or invoiced to another person. Even if the tax or any portion thereof is billed or invoiced and separately stated, such amounts remain part of the price for purposes of the sales and use taxes levied under Chapters 5739. and 5741. of the Revised Code. Nothing in division (B) of this section prohibits a person from including in the price charged for a good or service an amount sufficient to recover the tax imposed by this section.

{¶8} The CAT excludes persons having taxable gross receipts during a calendar year of less than $150,000, and other enumerated entities. The CAT is imposed at a flat rate of $150 for the first $1 million of annual taxable gross receipts (above $150,000), plus, when fully phased in, at the rate of two and sixth tenth mills (0.26 percent) per dollar of taxable gross receipts above $1 million. R.C. 5751.03. "Taxable gross receipts" are defined as gross receipts sitused in Ohio, which includes gross receipts from sales of tangible personal property, e.g., goods, received in this state by a purchaser. R.C.

5751.01(G) and 5751.033(E). "Gross receipts" means "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration." R.C. 5751.01(F).

{¶9} It is the portion of the CAT applied to gross receipts from the sale of food to which appellants take exception. Appellants contend this portion of the CAT runs afoul of two Ohio Constitutional provisions, namely, Section 3, Article XII, and Section 13, Article XII.

{¶10} Section 3, Article XII of the Ohio Constitution, as re-enacted June 8, 1976, provides in pertinent part:

> Laws may be passed providing for:
>
> * * *
>
> (C) Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

{¶11} Section 13, Article XII of the Ohio Constitution, adopted November 8, 1994, provides:

> No sales or other excise taxes shall be levied or collected (1) upon any wholesale sale or wholesale purchase of food for human consumption, its ingredients or its packaging; (2) upon any sale or purchase of such items sold to or purchased by a manufacturer, processor, packager, distributor or reseller of food for human consumption, or its ingredients, for use in its trade or business; or (3) in any retail transaction, on any packaging that contains food for human consumption on or off the premises where sold. For purposes of this section, food

> for human consumption shall include non-alcoholic beverages. This section shall not affect the extent to which the levy or collection of sales or other excise taxes on the retail sale or retail purchase of food for human consumption is permitted or prohibited by Section 3(C) of this Article.

{¶12} According to appellants, they and all Ohio retail grocers and Ohio food wholesalers must pay a 0.26 percent CAT on all receipts over $1 million annually, including those receipts received from the sale of food for human consumption. Because the CAT uses gross receipts from food sales to determine the tax owed, appellants contend this is equivalent to a sales or transactional tax on the sale or purchase of food that is expressly prohibited by the above outlined Ohio Constitutional provisions.

{¶13} To the contrary, appellee contends this is a franchise tax imposed on the privilege of doing business in Ohio, and is not a tax imposed on individual sales. Though the amount of tax owed is measured by gross receipts, appellee argues such does not convert the franchise tax into a transactional one, and thereby implicate the constitutional provisions referred to by appellants.

{¶14} The trial court concluded the CAT is a franchise tax, which is a type of excise tax, which is imposed on the privilege of doing business in Ohio, but is not an excise tax levied or collected upon the sale or purchase of food that has constitutional implications. Though measured by taxable gross receipts, which include receipts from the sale or purchase of food, the trial court held the CAT is not a transactional or sales tax prohibited by Sections 3 and 13, Article XII of the Ohio Constitution.

{¶15} "A court's power to invalidate a statute 'is a power to be exercised only with great caution and in the clearest of cases.' Laws are entitled to a 'strong presumption of constitutionality,' and the party challenging the constitutionality of a law 'bears the burden

of proving that the law is unconstitutional beyond a reasonable doubt.' " *Columbia Gas Trans. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, at ¶41. *Buckley v. Wilkins*, 105 Ohio St.3d 350, 2005-Ohio-2166, ¶18, citing *Yajnik v. Akron Dept. of Health, Hous. Div.*, 101 Ohio St.3d 106, 2004-Ohio-357. Further, "on review of statutory acts, a court is bound to give a constitutional rather than unconstitutional construction if one is reasonably available." *United Air Lines, Inc. v. Porterfield* (1971), 28 Ohio St.2d 97, 100.

{¶16} It is undisputed that the statute expressly delineates that the CAT is a tax imposed "for the privilege of doing business in this state[,]" and that the CAT "is not a transactional tax." R.C. 5751.02(A). Regardless, however, of the descriptive vernacular used by the Ohio legislature, appellants contend that to find the true nature of a tax, we must look behind its label, and look instead at its operation. In support of this contention, appellants cite to a litany of cases. See, e.g., *Bank One Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, 166, citing *Educational Films Corp. of America v. Ward* (1931), 282 U.S. 379, 387 (stating "the nature of a tax must be determined by its operation, rather than by its particular descriptive language"); *Porterfield*, quoting *American Oil Co. v. Neill* (1965), 380 U.S. 451, 455 (stating "[w]hen passing on the constitutionality of a state taxing scheme it is firmly established that this court concerns itself with the practical operation of the tax, that is substance rather than form").

{¶17} Further, appellants contend the Supreme Court of Ohio has repeatedly held that a tax levied upon a business' gross receipts is an "excise tax." *State ex rel. Cleveland v. Kosydar* (1973), 36 Ohio St.2d 183, 184; *E. Ohio Gas Co. v. Limbach* (1986), 26 Ohio St.3d 63, 66-67. Because both Sections 3(C) and 13 of Article XII of the Ohio Constitution prohibit "excise taxes" from being imposed on certain food sales,

appellants suggest the CAT when applied to gross receipts that include food sales is clearly unconstitutional.

{¶18} To the contrary, appellee argues the CAT is a franchise tax as it is imposed for the privilege of doing business in Ohio, regardless of whether one looks at the CAT's description or its operation. According to appellee, what the Ohio Constitution prohibits are excise taxes levied on the sale of food in certain situations, and does not prohibit a tax, no matter what it is termed, from being imposed on the privilege of doing business within this state. We agree, however, with appellants' and the trial court's assessment that the Supreme Court has repeatedly recognized that a franchise tax is a form of an excise tax. See, e.g., *Wesnovtek Corp. v. Wilkins*, 105 Ohio St.3d 312, 313, 2005-Ohio-1826 (the Ohio franchise tax is an excise tax for the privilege of doing business in this state); *Keycorp v. Tracy* (1999), 87 Ohio St.3d 238, 240 (a franchise tax is an excise tax); *Hoover Universal, Inc. v. Limbach* (1991), 61 Ohio St.3d 563, 568 (the franchise tax, an excise tax, can be measured on net income received in a taxable year). Moreover, as defined by the Supreme Court of Ohio in *Saviers v. Smith* (1920), 101 Ohio St. 132, "[a]n excise tax is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege * * *." Id. at paragraph four of the syllabus.

{¶19} Section 3(C) of Article XII of the Ohio Constitution provides, that laws may be passed providing for "excise and franchise taxes * * *, except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold." From this it is claimed the intent was not to bar all taxes from being imposed in relation to food transactions, as the exception in 3(C), Article XII does not include a prohibition of franchise taxes, but only a prohibition of excise taxes.

{¶20} Thus, while it would appear the constitutional exceptions in Sections 3(C) and 13 of Article XII were not meant to apply to franchise taxes, judicial interpretation has clearly determined a franchise tax is a form of an excise tax. As appellants suggest, excise taxes on certain food sales are precisely what the Constitution prohibits.

{¶21} Even setting nomenclature aside and focusing on the operation of the CAT, we reach the same conclusion. Though appellee suggests the CAT is a franchise tax and is not equivalent to a sales or transactional tax, by its very operation when applied to gross receipts derived from the sales of food, a transactional tax is precisely what the CAT becomes. This is so because the tax is measured *solely* by gross receipts and is based on aggregate sales, including those from the sales of food. Because the CAT is not based on each transaction or each individual sale, appellee contends the CAT is constitutional. However, though not based on individual sales at the time they are made, the CAT is merely based on the aggregate of all sales within a specified time frame. If the legislature is prohibited from collecting a tax on the individual sale, it logically follows the legislature would be prohibited from collecting a tax on the aggregate of those same sales.

{¶22} We are cognizant of the Supreme Court of Ohio's decision in *Mutual Holding Co. v. Limbach* (1994), 71 Ohio St.3d 59, wherein the court noted the following:

> A franchise tax, such as that imposed by R.C. 5725.18, is a tax on the privilege of doing business in Ohio. It is not a tax on the property of the paying entity. *Bank One, Dayton, N.A. v. Limbach* (1990), 50 Ohio St.3d 163, 553 N.E.2d 624; *Celina Mut. Ins. Co. v. Bowers (1965)*, 5 Ohio St.2d 12, 34 O.O.2d 7, 213 N.E.2d 175. For the privilege of operating a domestic insurance company, Ohio imposes a tax that may be measured either in terms of net worth or premium value. R.C. 5725.18. Measuring tax liability in terms of net worth

> does not convert a franchise tax into a property tax. See *Internatl. Harvester Co. v. Evatt* (1945), 146 Ohio St. 58, 31 O.O. 546, 64 N.E.2d 53. R.C. 5725.18 is a franchise tax measured by net worth, not a tax on net worth.

Id. at 60.

{¶23} Similarly, in *Bank One Dayton*, the appellants argued the corporate franchise tax was actually a property tax, while the appellee argued it was a tax *measured* by the value of federal obligations, and not levied on the assets themselves. In ruling in favor of the appellee, the court noted the annual franchise tax was levied on the privilege of doing business in the state and not on income, sales or receipts. Id. at 167.

{¶24} Also, in *Bank One Dayton*, the court cited to *Werner Mach. Co. v. Dir. of Div. of Taxation* (1956), 350 U.S. 492, 76 S.Ct. 534, wherein the United States Supreme Court approved a tax scheme which included the value of federal bonds in corporation net worth to determine New Jersey's franchise tax. The court in *Werner* upheld the New Jersey Supreme Court's holding that the tax was a franchise tax and not a tax imposed directly on property, even though that property was used to determine the corporation's net worth. The United States Supreme Court stated, it had "consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even *though a part of the economic impact of the tax may be said to bear indirectly upon such* income or property." Id. quoting *Werner* at 494.

{¶25} However, while in these cases it was deemed permissible to include certain tax exempt properties and incomes when determining an entity's tax liability, it is important to note that the tax exempt property or income was not the only measure of tax liability since the tax liability was based on an entity's net worth. Here, the sole factor

being used to determine tax liability is gross receipts, which is simply a group of individual sales or transactions. A tax exempt transaction is not just a factor being considered to determine tax liability, rather before us, a tax exempt transaction is the *only* factor being used to determine tax liability. Though the United States Supreme Court has upheld franchise taxes "measured by a yardstick" which includes tax-exempt income or property, in the case sub judice, the "yardstick" is comprised solely of transactions that include food sales that are constitutionally prohibited from being taxed.

{¶26} Though the CAT purports not to be a transactional tax, in its operation when applied to gross receipts, a transactional tax is in essence what it becomes. We are aware of one Ohio district that has reached a similar conclusion. In *Mosser Const., Inc. v. City of Toledo*, Lucas App. No. L-07-1060, 2007-Ohio-4910, the construction company brought suit against the city for payment, pursuant to the parties' contract, for a tax imposed on the company under R.C. 5751.02. The city argued the CAT was an overhead cost that it was not responsible for because it is a tax levied on the privilege of doing business in Ohio and is not a transactional tax, and it is not similar to a sales, consumer or use tax. The company argued that despite purporting not to be a transactional tax, the CAT functions as an excise tax on gross receipts. The Sixth District Court of Appeals held the parties' contract provided for a shift of the tax burden to the city in the event of unforeseen changes in the law "if the law was similar to a sales, consumer, or use tax." Id. at ¶36. "Since the amount of tax owed is tied to the amount of a business's gross receipts, the tax is similar to a sale or consumer tax and not an overhead tax." Id. While admittedly *Mosser* was not presented with the precise issue that is before us, it is important to note that when looking at the CAT's function, the Sixth

District also found that despite its language to the contrary, the CAT, when applied to gross receipts is a transactional tax.

{¶27} For these reasons, we conclude the CAT when applied to gross receipts from the wholesale sale of food and from the retail sale of food for human consumption off premises where sold, operates as, and is, an excise tax levied or collected upon the sale or purchase of food, which is prohibited by Sections 3 and 13 of Article XII of the Ohio Constitution. Accordingly, we sustain appellants' two assignments of error.

{¶28} For the foregoing reasons, appellants' two assignments of error are sustained, the judgment of the Franklin County Court of Common Pleas is hereby reversed, and this matter is remanded to that court for further proceedings consistent with law and this opinion.

Judgment reversed and cause remanded.

BROWN and TYACK, JJ., concur.

EXHIBIT 4

IN THE COURT OF COMMON PLEAS, FRANKLIN COUNTY, OHIO
CIVIL DIVISION

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FILED
COMMON PLEAS COURT
FRANKLIN CO. OHIO
2007 AUG 24 PM 2: 12
CLERK OF COURTS

OHIO GROCERS ASSOCIATION, ET AL.

Plaintiffs.

Case No 06CVH02-2278

vs

JUDGE BESSEY

WILLIAM WILKINS, IN HIS OFFICIAL CAPACITY AS OHIO TAX COMMISSIONER.

Defendant

DECISION DENYING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT FILED SEPTEMBER 15, 2006 AND DECISION GRANTING DEFENDANT'S CROSS-MOTION FOR SUMMARY JUDGMENT, FILED DECEMBER 15, 2006

These matters are before the Court upon the Motion for Summary Judgment filed by Plaintiffs, Ohio Grocers Association, Carfagna's Incorporated, dba Carfagna's Specialty Foods, CIZ Supermarkets, Inc., dba Union Square Sparkle, Reading Food Services Inc., dba Reading IGA, and The Sanson Company (hereinafter "Plaintiffs"), on September 15, 2006 On December 15, 2006, Defendant, William Wilkins, in his official capacity as Ohio Tax Commissioner (hereinafter "Defendant"), filed a Memorandum Contra Plaintiff's Motion for Summary Judgment, as well as a Cross-Motion for Summary Judgment On January 5, 2007, Plaintiffs filed their Combined Reply Memorandum in Support of Plaintiffs' Motion for Summary Judgment and Memorandum in Opposition to Defendant's Motion for Summary Judgment On January 31, 2007, Defendant filed its Reply Memorandum to Plaintiffs' Memorandum Opposing Defendant's Motion for Summary Judgment

I. Background

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This case concerns whether the Commercial Activity Tax (hereinafter "CAT") is constitutionally valid Plaintiffs contend that this Court should declare as a matter of law that the provisions of the CAT, that impose a percent tax on annual gross receipts greater than $1 million violates the Ohio Constitution when applied to gross receipts derived from the wholesale sale of food and from the retail sale of food for human consumption off the premises where sold However, Defendant contends that because neither Section 3(C), Article XII of the Constitution, nor Section 13, Article XII of the Constitution, expressly or by implication prohibit the imposition of a tax on the privilege of doing business in Ohio, the Court should hold that the CAT is constitutionally valid

Section 3, Article XII of the Constitution, as reenacted, states in pertinent part, as follows

> Laws may be passed providing for
> * * *
> (C) Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas, and other minerals, except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold

In addition, Section 13, Article XII of the Constitution, states in pertinent part as follows

> No sales or other excise taxes shall be levied or collected (1) upon any wholesale sale or wholesale purchase of food for human consumption, its ingredients or its packaging; (2) upon any sale or purchase of such items sold to or purchased by a manufacturer, processor, packager, distributor or reseller of food for human consumption, or its ingredients, for use in its trade or business, or (3) in any retail transaction, on any packaging that contains food for human consumption on or off the premises where sold

The CAT imposes a tax on each person with annual "taxable gross receipts" in excess of $150,000 R C 5751 02, R C 5751 03, R C 5751 333 and R C 5751 01(E)(1) "Taxable gross receipts" are defined as "gross receipts" sitused in Ohio, which includes gross receipts from sales of tangible personal property (e g goods) received in this state by a purchaser R C 5751 01(G) and R C 5751 033(E) "Gross receipts" means "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contribute to the production of income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration " R C 5751 01(F) The CAT is imposed at a flat rate of $150 for the first $1 million of annual "taxable gross receipts" plus, when fully phased in, at the rate of two and sixth mills (0 26 percent) per dollar of taxable gross receipts above $1 million In short, the CAT imposes a gross receipts tax on annual gross receipts greater than $1 million on a percent basis As Plaintiffs contend, it is this aspect of the CAT, when applied to receipts from the sale of food, which is at issue in this case

II. Standard of Review

When deciding the parties' Motions for Summary Judgment, the Court must first examine the standard under which summary judgments are properly granted

A motion for summary judgment is properly granted in favor of the moving party, if the court, upon viewing the evidence in a light most favorable to the party against whom the motion is made, determines that 1) there are no genuine issues as to any material fact, 2) the movant is entitled to a judgment as a matter of law, and, 3) the evidence is such that reasonable minds can come to but one conclusion and that conclusion is adverse to the opposing party See Civ R 56(C), *State ex rel Howard v*

Ferreri (1994), 70 Ohio St 3d 587, 589, *Miller v Bike Athletic Co* (1995), 80 Ohio St 3d 607, 617

A party seeking summary judgment, on the grounds that the nonmoving party cannot prove its case, bears the initial burden of 1) informing the trial court of the basis for the motion, and 2) identifying those portions of the record which demonstrate the absence of a genuine issue of material fact on the essential element(s) of the nonmoving party's claims See *Vahila v Hall* (1997), 77 Ohio St 3d 421, 429, citing, *Dresher v Burt* (1996), 75 Ohio St 3d 280, 293, 662 N E 2d 264, *Mitseff v Wheeler* (1988), 38 Ohio St 3d 112, 115 "The moving party cannot discharge its initial burden under Civ R 56 simply by making a conclusory assertion that the nonmoving party has no evidence to prove its case Rather, the moving party must be able to specifically point to some evidence of the type listed in Civ R 56(C) which affirmatively demonstrates that the nonmoving party has no evidence to support the nonmoving party's claims" *Dresher*, at 288-289 If the moving party fails to satisfy this initial burden, the motion for summary judgment must be denied See *Kulch v Structural Fibers, Inc* (1997), 78 Ohio St 3d 134, 147, *Dresher*

If the moving party satisfies its initial burden, "the nonmoving party then has a reciprocal burden outlined in Civ R 56(E) to set forth specific facts showing that there is a genuine issue for trial and, if the nonmovant does not so respond, summary judgment, if appropriate, shall be entered against the nonmoving party" *Dresher*, at 288-289, followed by *Conway v Calbert* (C A 10 1997), 119 Ohio App 3d 288, 291, 695 N E 2d 271, 272-273 Thus, "[a] motion for summary judgment forces the non-moving party to produce evidence on issues for which that party bears the burden of production at trial"

Wade-Hairston v Franklin Cty Bd of Mental Retardation and Developmental Disabilities (Dec 17, 1998), Franklin App No 98AP-456, unreported, citing, *Wing v Anchor Media, Ltd of Texas* (1991), 59 Ohio St 3d 108, 111, see, also, *Dresher*, at 288-289, *Carter v Consol Rail Corp* (C A 10 1998), 126 Ohio App 3d 177, 181, citing, *Stewart v B F Goodrich Co* (1993), 89 Ohio App 3d 35, 623 N E 2d 591, *Cullen v Ohio Dept of Rehab & Corr* (C A 10 1998), 125 Ohio App 3d 758, 764, citing, *Stewart* "The non-movant must also present specific facts and may not merely rely upon the pleadings or on unsupported allegations" *Wade-Hairston*, citing, *Shaw v J Pollock & Co* (1992), 82 Ohio App 3d 656, 612 N E 2d 1295 Moreover, "[w]hen a party moves for summary judgment supported by evidentiary material of a type and character set forth in Civ R 56[(C)], the opposing party has a duty to submit materials permitted by Civ R 56(C) to show that there is a genuine issue for trial" *Wade-Hairston*, citing, *Harless v Willis Day Warehousing Co* (1978), 54 Ohio St 2d 64, 375 N E 2d 46

III. Discussion

A. Is the CAT an excise tax or franchise tax?

Plaintiffs argue that the CAT is an excise tax "An excise is a tax imposed on the performance of an act, the engaging in an occupation or the enjoyment of a privilege" *Saviers v Smith* (1920) 101 Ohio St 132, syllabus at ¶4 Ohio Revised Code 5751 02(A) specifically states that "there is hereby levied a commercial activity tax on each person with taxable gross receipts *for the privilege of doing business in this state*" [Emphasis provided] As such, Plaintiffs contend that by its own terms, the CAT purports to be a tax on a privilege, and therefore must be an excise tax The Court agrees

In contrast, Defendant contends that because the CAT is imposed on the privilege of conducting business in the State of Ohio, it is a franchise tax, *not* an excise tax However, the Court finds that Ohio Supreme Court has repeatedly recognized that a franchise tax is a form of an excise tax As Plaintiffs argue, the Ohio Supreme Court has long held that "[a]n excise tax is a tax assessed for some special privilege or immunity granted to some artificial or natural person, based upon the grant of such privilege or immunity In the case of a corporation it is sometimes spoken of as a franchise tax" *Cincinnati, Milford & Loveland Traction Co v State* (1916), 94 Ohio St 24, 27 See also, *Litton Industrial Products, Inc v Limbach* (1991), 58 Ohio St 3d 169, 170 ("The franchise tax, an excise tax, taxes corporations for the privilege of doing business in Ohio in corporate form"), *Hoover Universal, Inc v Limbach* (1991), 61 Ohio St 3d 563, 568 ("The franchise tax, an excise tax, can be measured on net income received in a taxable year"), *Keycorp v Tracy* (1999), 87 Ohio St 3d 238, 240 ("Franchise tax is an excise tax paid by domestic and foreign for profit corporations for the privilege of doing business within the state"), *Wesnovtek Corp v Wilkins*, 105 Ohio St 3d 312, 313, 2005-Ohio-1826, ¶ 2 ("The Ohio franchise tax is an excise tax levied upon corporations for the privilege of doing business in the state, owning or using a part or all of its capital or property in this state, or holding a certificate of compliance authorizing it to do business in this state")

Therefore, based on the foregoing, the Court finds that the CAT is a franchise tax, which is a type of excise tax, which is imposed on the privilege of doing businesses in Ohio However, even though the Court finds that the CAT is both a franchise tax and an excise tax, the Court further finds that the constitutional exceptions asserted by Plaintiffs

are not applicable More specifically, the Court finds as stated above, that the CAT is an excise tax on the privilege of doing business in the state of Ohio, and is *not* an excise tax that is "levied or collected upon the sale or purchase of food" Although the CAT is measured by the taxpayer's taxable gross receipts, the Court finds that this does not convert the CAT into a transactional tax on the privilege of purchasing or selling food As Defendant argues, in *Mutual Holding Co v Limbach* (1994), 71 Ohio St 3d 59, the Court defined a franchise tax, and held that the method of measuring the amount of the tax does not establish the nature of the tax The Court specifically stated

> A franchise tax, such as that imposed by R C 5725 18, is a tax on the privilege of doing business in Ohio (Emphasis supplied) It is not a tax on the property of the paying entity *Bank One, Dayton, N A v Limbach* (1990), 50 Ohio St 3d 163, 553 N E 2d 624, *Celina, supra* For the privilege of operating a domestic insurance company, Ohio imposes a tax that may be measured either in terms of net worth or premium value R C 5725 18 Measuring tax liability in terms of net worth does not convert a franchise tax into a property tax Emphasis supplied)See *Internatl Harvester Co v Evatt* (1945), 146 Ohio St 58, 31 O O 546, 64 N E 2d 53 R C 5725 18 is a franchise tax measured by net worth, not a tax on net worth [Emphasis provided]

Mutual Holding Co , 71 Ohio St 3d at 60

Moreover, and again as Defendant argues, the Ohio Supreme Court has determined that an excise imposed on the privilege of doing business is *not* a tax imposed on an underlying component of such business In *Bank One Dayton, N A v Limbach* (1990), 50 Ohio St 3d 163, the Ohio Supreme Court specifically held

> [T]his court has previously discussed the nature and operation of the Ohio corporate franchise tax, stating as follows
>
> "Similarly, the annual franchise tax levied on corporations is also a tax on the privilege of doing business in this state R C 5733 01(A), *Woodland Gardens Apartments v Porterfield*

> (1968), 16 Ohio St 2d 56 Both the excise tax on public utilities and the franchise tax on corporations are levied on the exercise of a privilege and not on income, sales or receipts Further, both taxes are based upon the results of an entire year of doing business and tax liability is not fixed until the end of that annual period * * * " *East Ohio Gas Co v Limbach* (1986), 26 Ohio St 3d 63, 67, 26 OBR 54, 57, 498 N E 2d 453, 456

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Bank One Dayton, N A , 50 Ohio St 3d at 167

In addition, the Court in *Bank One Dayton, N A* , went on to approvingly cite to the United States Supreme Court decision in *Werner Machine Co v Dir Of Div of Taxation* (1956), 350 U S 492, when it stated

> In *Werner Machine Co v Dir Of Div of Taxation* (1956), 350 U S 492, the Supreme Court approved a tax scheme which included the value of federal bonds in a corporation's net worth to determine New Jersey's franchise tax Therein, the high court accepted the state supreme court's conclusion that the tax was not imposed directly on property, but was indeed a bona fide franchise tax Furthermore, the United States Supreme Court stated that it had "* * * consistently upheld franchise taxes measured by a yardstick which includes tax-exempt income or property, even though a part of the economic impact of the tax may be said to bear indirectly upon such income or property * * *" (Emphasis supplied) *Id* at 494

Bank One Dayton, N A , 50 Ohio St 3d at 167

Similarly, in the case at hand, the Court finds that although the CAT is measured by a yardstick which includes taxable gross receipts from the sale or purchase of food for human consumption, and the CAT may be said to indirectly bear an economic impact on the retail and wholesale sale of food for human consumption, this does not cause the CAT to violate the Constitution Stated another way, the Court finds that although the CAT is measured by a taxpayer's taxable gross receipts for the calendar quarter or year, which may include receipts from purchases or sales of food for human consumption, it is not a transactional tax on the purchase or sale of tangible personal property, including food for

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human consumption, and therefore does not violate the above cited sections of the Constitution

B. **Is the CAT any different from a traditional sales tax?**

Plaintiffs contend that expert testimony establishes that under well-established economic analysis, the CAT is no different from, and will have the same economic effect as a traditional sales tax. More specifically, Plaintiffs contend that the economic incidence for the CAT, which refers to the analysis of who actually bears the burden of the tax, regardless of who is legally responsible for paying the tax, is no different from a traditional sales tax simply because it is collected from the seller and the latter is collected from the consumer As such, Plaintiffs contend that by operation and effect, the CAT is no different from a sales tax, and when applied to the gross receipts received from the sales of food violates the Constitution

However, the Court finds, as Defendant argues, that the authority to impose a tax is not limited by the possibility that the cost of the tax may be shifted to others, particularly customers In *Columbus & Southern Ohio Electric Co v Porterfield* (1974), 41 Ohio App 2d 191, the Tenth District Court of Appeals discussed the issue of the "incidence" of a public utility tax and stated

> Clearly, the Ohio sales tax is a tax on a consumer of goods * * * Interestingly, the amount of sales tax is clearly identified in any transaction because the invoice covering a sale of goods shows a cost of those goods to the consumer to which is added, separately noted, and calculated a sales tax at the basic rate of 4% It is a tax which the consumer pays, there is the "incidence "
>
> An examination of the stipulations in this case reveals no recital as to a method of billing It must be assumed that the invoice sent to the City by the Company shows an amount of energy consumed multiplied by a rate, arrived at by contract, or established with approval of the Public Utilities Commission of

> Ohio, or both There is no distinguishable tax imposed upon, or added to that amount The excise tax device provides as a base upon which the tax is calculated "the gross receipts of such company on its intrastate business " (R C 5727 38) In contrast to the sales tax, the tax does not relate to any single consumer of electrical energy It is an excise tax upon a particular corporation for the privilege of carrying on that business
>
> * * * The facts as stipulated, as well as the operational requirement of the excise tax here imposed, require the conclusion that the "incidence" of the tax rests upon the Company and the City does not "pay" the tax

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Columbus & Southern Ohio Electric Co , 41 Ohio App 2d at 198

Similarly, in the case at hand, the Court finds that in contrast to the sales tax, the CAT is calculated on the gross receipts of the business and does not relate to any single consumer or purchaser of food The Court further finds that the CAT is imposed directly on the business for the privilege of doing business in Ohio, and therefore the "incidence" of the tax rests upon the business not the consumer While the tax may ultimately be passed on to the consumers in the form of higher prices, it cannot be directly billed to and paid by the purchaser As such, the Court finds that the CAT is significantly different from a sales tax If the Court were to hold otherwise, the legislature would be unable to impose an excise tax on any aspect of a business that was in the supply chain for any food This would further be in conflict with the decisions cited by Defendant, which hold that the indirect effect of an excise tax on the privilege of doing business in Ohio does not invalidate the tax See, *Southern Gum v Laylin* (1902), 66 Ohio St 578, *Zielonka v Carrel* (1919), 99 Ohio St 220, and *Savier v Smith* (1920), 101 Ohio St 132

In addition, the Court finds that unlike a sales tax, the very terms of the CAT tie the obligation to pay the CAT to a time or date, not a specific transaction or sale As Defendant argues, it is not possible for a business to compute the tax it owes under the

CAT until the applicable time period, either a quarter or a year, expires and the gross receipts for that time period are totaled Furthermore, gross receipts are much broader than sales receipts, because a business' gross receipts may include other sources of revenue from the sale of services or goods other than food As such, the Court agrees that the CAT is simply not tied to a transaction, and therefore distinctly different from a sales tax

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Therefore, based on the foregoing, the Court agrees that there are both theoretical and practical differences between a tax on sales and a gross receipts tax, which are economically significant, and which cause the CAT to be substantively different from a traditional sales tax

IV. Conclusion

Based on the foregoing, the Court finds that the CAT is an excise tax on the privilege of doing business in the state of Ohio, and is *not* an excise tax that is "levied or collected upon the sale or purchase of food" Although the CAT is measured by the taxpayer's taxable gross receipts, which includes gross receipts derived from the wholesale sale of food and from the retail sale of food for human consumption off the premises where sold, the Court finds that the CAT is still substantively different from a transactional or sales tax, and thus is not expressly or impliedly prohibited by either Section 3(C), Article XII of the Constitution, or Section 13, Article XII of the Constitution Therefore, the Court finds the CAT to be constitutionally valid, and accordingly hereby **DENIES** Plaintiffs' Motion for Summary Judgment, and **GRANTS** Defendant's Motion for Summary Judgment

Counsel for Defendant shall submit the appropriate Judgment Entry pursuant to Loc Rs 25 01 and 25 02

IT IS SO ORDERED.

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JOHN P. BESSEY, JUDGE

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Counsel for Defendant, William Wilkins, in his official capacity as Ohio Tax Commissioner

Any attorney or party pro se whose e-mail address is noted above has received this document electronically The original will be filed within 24 hours of the time noted on the e-mail transmittal message

EXHIBIT 5

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 4, 2009 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 4, 2009 ***

CONSTITUTION OF THE STATE OF OHIO
ARTICLE XII. FINANCE AND TAXATION

Go to the Ohio Code Archive Directory

Oh. Const. Art. XII, § 3 (2009)

§ 3. Imposition of taxes

Laws may be passed providing for:

(A) The taxation of decedents' estates or of the right to receive or succeed to such estates, and the rates of such taxation may be uniform or may be graduated based on the value of the estate, inheritance, or succession. Such tax may also be levied at different rates upon collateral and direct inheritances, and a portion of each estate may be exempt from such taxation as provided by law.

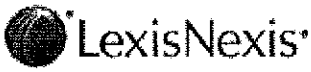
(B) The taxation of incomes, and the rates of such taxation may be either uniform or graduated, and may be applied to such incomes and with such exemptions as may be provided by law.

(C) Excise and franchise taxes and for the imposition of taxes upon the production of coal, oil, gas, and other minerals; except that no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

HISTORY:

(Re-enacted June 8, 1976, HJR No.15.)

EXHIBIT 6



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ARTICLE XII. FINANCE AND TAXATION

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Oh. Const. Art. XII, § 13 (2009)

§ 13. Tax on non-alcoholic beverages

No sales or other excise taxes shall be levied or collected (1) upon any wholesale sale or wholesale purchase of food for human consumption, its ingredients or its packaging; (2) upon any sale or purchase of such items sold to or purchased by a manufacturer, processor, packager, distributor or reseller of food for human consumption, or its ingredients, for use in its trade or business; or (3) in any retail transaction, on any packaging that contains food for human consumption on or off the premises where sold. For purposes of this section, food for human consumption shall include non-alcoholic beverages. This section shall not affect the extent to which the levy or collection of sales or other excise taxes on the retail sale or retail purchase of food for human consumption is permitted or prohibited by Section 3(C) of this Article.

(Adopted November 8, 1994)

EXHIBIT 7

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TITLE 57. TAXATION
CHAPTER 5733. CORPORATION FRANCHISE TAX

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ORC Ann. 5733.04 (2009)

§ 5733.04. Definitions

As used in this chapter:

(A) "Issued and outstanding shares of stock" applies to nonprofit corporations, as provided in *section 5733.01 of the Revised Code*, and includes, but is not limited to, membership certificates and other instruments evidencing ownership of an interest in such nonprofit corporations, and with respect to a financial institution that does not have capital stock, "issued and outstanding shares of stock" includes, but is not limited to, ownership interests of depositors in the capital employed in such an institution.

(B) "Taxpayer" means a corporation subject to the tax imposed by *section 5733.06 of the Revised Code*.

(C) "Resident" means a corporation organized under the laws of this state.

(D) "Commercial domicile" means the principal place from which the trade or business of the taxpayer is directed or managed.

(E) "Taxable year" means the period prescribed by division (A) of *section 5733.031 [5733.03.1] of the Revised Code* upon the net income of which the value of the taxpayer's issued and outstanding shares of stock is determined under division (B) of *section 5733.05 of the Revised Code* or the period prescribed by division (A) of *section 5733.031 [5733.03.1] of the Revised Code* that immediately precedes the date as of which the total value of the corporation is determined under division (A) or (C) of *section 5733.05 of the Revised Code*.

(F) "Tax year" means the calendar year in and for which the tax imposed by *section 5733.06 of the Revised Code* is required to be paid.

(G) "Internal Revenue Code" means the "Internal Revenue Code of 1986," *100 Stat. 2085, 26 U.S.C.A. 1*, as amended.

(H) "Federal income tax" means the income tax imposed by the Internal Revenue Code.

(I) Except as provided in *section 5733.058 [5733.05.8] of the Revised Code*, "net income" means the taxpayer's taxable income before operating loss deduction and special deductions, as required to be reported for the taxpayer's taxable year under the Internal Revenue Code, subject to the following adjustments:

(1) (a) Deduct any net operating loss incurred in any taxable years ending in 1971 or thereafter, but exclusive of any net operating loss incurred in taxable years ending prior to January 1, 1971. This deduction shall not be allowed in any tax year commencing before December 31, 1973, but shall be carried over and allowed in tax years commencing after December 31, 1973, until fully utilized in the next succeeding taxable year or years in which the taxpayer has net income, but in no case for more than the designated carryover period as described in division (I)(1)(b) of this section. The amount of such net operating loss, as determined under the allocation and apportionment provisions of section 5733.051 [5733.05.1] and division (B) of *section 5733.05 of the Revised Code* for the year in which the net operating loss occurs, shall be deducted from net income, as determined under the allocation and apportionment provisions of section 5733.051 [5733.05.1] and division (B) of *section 5733.05 of the Revised Code*, to the extent necessary to reduce net income to zero with the remaining unused portion of the deduction, if any, carried forward to the remaining years of the designated carryover period as described in division (I)(1)(b) of this section, or until fully utilized, whichever occurs first.

(b) For losses incurred in taxable years ending on or before December 31, 1981, the designated carryover period shall be the five consecutive taxable years after the taxable year in which the net operating loss occurred. For losses incurred in taxable years ending on or after January 1, 1982, and beginning before August 6, 1997, the designated carryover period shall be the fifteen consecutive taxable years after the taxable year in which the net operating loss occurs. For losses incurred in taxable years beginning on or after August 6, 1997, the designated carryover period shall be the twenty consecutive taxable years after the taxable year in which the net operating loss occurs.

(c) The tax commissioner may require a taxpayer to furnish any information necessary to support a claim for deduction under division (I)(1)(a) of this section and no deduction shall be allowed unless the information is furnished.

(2) Deduct any amount included in net income by application of *section 78* or *951 of the Internal Revenue Code*, amounts received for royalties, technical or other services derived from sources outside the United States, and dividends received from a subsidiary, associate, or affiliated corporation that neither transacts any substantial portion of its business nor regularly maintains any substantial portion of its assets within the United States. For purposes of determining net foreign source income deductible under division (I)(2) of this section, the amount of gross income from all such sources other than dividend income and income derived by application of *section 78* or *951 of the Internal Revenue Code* shall be reduced by:

(a) The amount of any reimbursed expenses for personal services performed by employees of the taxpayer for the subsidiary, associate, or affiliated corporation;

(b) Ten per cent of the amount of royalty income and technical assistance fees;

(c) Fifteen per cent of the amount of all other income.

The amounts described in divisions (I)(2)(a) to (c) of this section are deemed to be the expenses attributable to the production of deductible foreign source income unless the taxpayer shows, by clear and convincing evidence, less actual expenses, or the tax commissioner shows, by clear and convincing evidence, more actual expenses.

(3) Add any loss or deduct any gain resulting from the sale, exchange, or other disposition of a capital asset, or an asset described in *section 1231 of the Internal Revenue Code*, to the extent that such loss or gain occurred prior to the first taxable year on which the tax provided for in *section 5733.06 of the Revised Code* is computed on the corporation's net income. For purposes of division (I)(3) of this section, the amount of the prior loss or gain shall be measured by the difference between the original cost or other basis of the asset and the fair market value as of the beginning of the first taxable year on which the tax provided for in *section 5733.06 of the Revised Code* is computed on the corporation's net income. At the option of the taxpayer, the amount of the prior loss or gain may be a percentage of the gain or loss, which percentage shall be determined by multiplying the gain or loss by a fraction, the numerator of which is the number of months from the acquisition of the asset to the beginning of the first taxable year on which the fee provided in *section 5733.06 of the Revised Code* is computed on the corporation's net income, and the denominator of which is the number of months from the acquisition of the asset to the sale, exchange, or other disposition of the asset. The adjustments described in this division do not apply to any gain or loss where the gain or loss is recognized by a qualifying taxpayer, as defined in *section 5733.0510 [5733.05.10] of the Revised Code*, with respect to a qualifying taxable event, as defined in that section.

(4) Deduct the dividend received deduction provided by *section 243 of the Internal Revenue Code.*

(5) Deduct any interest or interest equivalent on public obligations and purchase obligations to the extent included in federal taxable income. As used in divisions (I)(5) and (6) of this section, "public obligations," "purchase obligations," and "interest or interest equivalent" have the same meanings as in *section 5709.76 of the Revised Code.*

(6) Add any loss or deduct any gain resulting from the sale, exchange, or other disposition of public obligations to the extent included in federal taxable income.

(7) To the extent not otherwise allowed, deduct any dividends or distributions received by a taxpayer from a public utility, excluding an electric company and a combined company, and, for tax years 2005 and thereafter, a telephone company, if the taxpayer owns at least eighty per cent of the issued and outstanding common stock of the public utility. As used in division (I)(7) of this section, "public utility" means a public utility as defined in Chapter 5727. of the Revised Code, whether or not the public utility is doing business in the state.

(8) To the extent not otherwise allowed, deduct any dividends received by a taxpayer from an insurance company, if the taxpayer owns at least eighty per cent of the issued and outstanding common stock of the insurance company. As used in division (I)(8) of this section, "insurance company" means an insurance company that is taxable under Chapter 5725. or 5729. of the Revised Code.

(9) Deduct expenditures for modifying existing buildings or structures to meet American national standards institute standard A-117.1-1961 (R-1971), as amended; provided, that no deduction shall be allowed to the extent that such deduction is not permitted under federal law or under rules of the tax commissioner. Those deductions as are allowed may be taken over a period of five years. The tax commissioner shall adopt rules under Chapter 119. of the Revised Code establishing reasonable limitations on the extent that expenditures for modifying existing buildings or structures are attributable to the purpose of making the buildings or structures accessible to and usable by physically handicapped persons.

(10) Deduct the amount of wages and salaries, if any, not otherwise allowable as a deduction but that would have been allowable as a deduction in computing federal taxable income before operating loss deduction and special deductions for the taxable year, had the targeted jobs credit allowed and determined under *sections 38, 51,* and *52 of the Internal Revenue Code* not been in effect.

(11) Deduct net interest income on obligations of the United States and its territories and possessions or of any authority, commission, or instrumentality of the United States to the extent the laws of the United States prohibit inclusion of the net interest for purposes of determining the value of the taxpayer's issued and outstanding shares of stock under division (B) of *section 5733.05 of the Revised Code.* As used in division (I)(11) of this section, "net interest" means interest net of any expenses taken on the federal income tax return that would not have been allowed under *section 265 of the Internal Revenue Code* if the interest were exempt from federal income tax.

(12) (a) Except as set forth in division (I)(12)(d) of this section, to the extent not included in computing the taxpayer's federal taxable income before operating loss deduction and special deductions, add gains and deduct losses from direct or indirect sales, exchanges, or other dispositions, made by a related entity who is not a taxpayer, of the taxpayer's indirect, beneficial, or constructive investment in the stock or debt of another entity, unless the gain or loss has been included in computing the federal taxable income before operating loss deduction and special deductions of another taxpayer with a more closely related investment in the stock or debt of the other entity. The amount of gain added or loss deducted shall not exceed the product obtained by multiplying such gain or loss by the taxpayer's proportionate share, directly, indirectly, beneficially, or constructively, of the outstanding stock of the related entity immediately prior to the direct or indirect sale, exchange, or other disposition.

(b) Except as set forth in division (I)(12)(e) of this section, to the extent not included in computing the taxpayer's federal taxable income before operating loss deduction and special deductions, add gains and deduct losses from direct or indirect sales, exchanges, or other dispositions made by a related entity who is not a taxpayer, of intangible property other than stock, securities, and debt, if such property was owned, or used in whole or in part, at any time prior to or at the time of the sale, exchange, or disposition by either the taxpayer or by a related entity that was a taxpayer at any time during the related entity's ownership or use of such property, unless the gain or loss has been included in computing the federal taxable income before operating loss deduction and special deductions of another taxpayer with a more closely related ownership or use of such intangible property. The amount of gain added or loss deducted shall not exceed the product obtained by multiplying such gain or loss by the taxpayer's proportionate share, directly, indirectly, beneficially, or constructively, of the outstanding stock of the related entity immediately prior to the direct or indirect sale, exchange, or other disposition.

(c) As used in division (I)(12) of this section, "related entity" means those entities described in divisions (I)(12)(c)(i) to (iii) of this section:

(i) An individual stockholder, or a member of the stockholder's family enumerated in *section 318 of the Internal Revenue Code*, if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty per cent of the value of the taxpayer's outstanding stock;

(ii) A stockholder, or a stockholder's partnership, estate, trust, or corporation, if the stockholder and the stockholder's partnerships, estates, trusts, and corporations own directly, indirectly, beneficially, or constructively, in the aggregate, at least fifty per cent of the value of the taxpayer's outstanding stock;

(iii) A corporation, or a party related to the corporation in a manner that would require an attribution of stock from the corporation to the party or from the party to the corporation under division (I)(12)(c) (iv) of this section, if the taxpayer owns, directly, indirectly, beneficially, or constructively, at least fifty per cent of the value of the corporation's outstanding stock.

(iv) The attribution rules of *section 318 of the Internal Revenue Code* apply for purposes of determining whether the ownership requirements in divisions (I)(12)(c)(i) to (iii) of this section have been met.

(d) For purposes of the adjustments required by division (I)(12)(a) of this section, the term "investment in the stock or debt of another entity" means only those investments where the taxpayer and the taxpayer's related entities directly, indirectly, beneficially, or constructively own, in the aggregate, at any time during the twenty-four month period commencing one year prior to the direct or indirect sale, exchange, or other disposition of such investment at least fifty per cent or more of the value of either the outstanding stock or such debt of such other entity.

(e) For purposes of the adjustments required by division (I)(12)(b) of this section, the term "related entity" excludes all of the following:

(i) Foreign corporations as defined in *section 7701 of the Internal Revenue Code*;

(ii) Foreign partnerships as defined in *section 7701 of the Internal Revenue Code*;

(iii) Corporations, partnerships, estates, and trusts created or organized in or under the laws of the Commonwealth of Puerto Rico or any possession of the United States;

(iv) Foreign estates and foreign trusts as defined in *section 7701 of the Internal Revenue Code.*

The exclusions described in divisions (I)(12)(e)(i) to (iv) of this section do not apply if the corporation, partnership, estate, or trust is described in any one of divisions (C)(1) to (5) of *section 5733.042 [5733.04.2] of the Revised Code.*

(f) Nothing in division (I)(12) of this section shall require or permit a taxpayer to add any gains or deduct any losses described in divisions (I)(12)(f)(i) and (ii) of this section:

(i) Gains or losses recognized for federal income tax purposes by an individual, estate, or trust without regard to the attribution rules described in division (I)(12)(c) of this section;

(ii) A related entity's gains or losses described in division (I)(12)(b) of this section if the taxpayer's ownership of or use of such intangible property was limited to a period not exceeding nine months and was attributable to a transaction or a series of transactions executed in accordance with the election or elections made by the taxpayer or a related entity pursuant to *section 338 of the Internal Revenue Code.*

(13) Any adjustment required by *section 5733.042 [5733.04.2] of the Revised Code.*

(14) Add any amount claimed as a credit under *section 5733.0611 [5733.06.11] of the Revised Code* to the extent that such amount satisfies either of the following:

(a) It was deducted or excluded from the computation of the corporation's taxable income before operating loss deduction and special deductions as required to be reported for the corporation's taxable year under the Internal Revenue Code;

(b) It resulted in a reduction of the corporation's taxable income before operating loss deduction and special deductions as required to be reported for any of the corporation's taxable years under the Internal Revenue Code.

(15) Deduct the amount contributed by the taxpayer to an individual development account program established by a county department of job and family services pursuant to *sections 329.11* to *329.14 of the Revised Code* for the purpose of matching funds deposited by program participants. On request of the tax commissioner, the taxpayer shall provide any information that, in the tax commissioner's opinion, is necessary to establish the amount deducted under division (I)(15) of this section.

(16) Any adjustment required by *section 5733.0510 [5733.05.10]* or *5733.0511 [5733.05.11] of the Revised Code.*

(17) (a) (i) Add five-sixths of the amount of depreciation expense allowed under subsection (k) of *section 168 of the Internal Revenue Code*, including a person's proportionate or distributive share of the amount of depreciation expense allowed by that subsection to any pass-through entity in which the person has direct or indirect ownership.

(ii) Add five-sixths of the amount of qualifying section 179 depreciation expense, including a person's proportionate or distributive share of the amount of qualifying section 179 depreciation expense allowed to any pass-through entity in which the person has a direct or indirect ownership. For the purposes of this division, "qualifying section 179 depreciation expense" means the difference between (I) the amount of depreciation expense directly or indirectly allowed to the taxpayer under *section 179 of the Internal Revenue Code*, and (II) the amount of depreciation expense directly or indirectly allowed to the taxpayer under *section 179 of the Internal Revenue Code* as that section existed on December 31, 2002.

The tax commissioner, under procedures established by the commissioner, may waive the add-backs related to a pass-through entity if the person owns, directly or indirectly, less than five per cent of the pass-through entity.

(b) Nothing in division (I)(17) of this section shall be construed to adjust or modify the adjusted basis of any asset.

(c) To the extent the add-back is attributable to property generating income or loss allocable under *section 5733.051 [5733.05.1] of the Revised Code*, the add-back shall be allocated to the same location as the income or loss generated by that property. Otherwise, the add-back shall be apportioned, subject to division (B)(2)(d) of *section 5733.05 of the Revised Code.*

(18) (a) If a person is required to make the add-back under division (I)(17)(a) of this section for a tax year, the person shall deduct one-fifth of the amount added back for each of the succeeding five tax years.

(b) If the amount deducted under division (I)(18)(a) of this section is attributable to an add-back allocated under division (I)(17)(c) of this section, the amount deducted shall be allocated to the same location. Otherwise, the amount shall be apportioned using the apportionment factors for the taxable year in which the deduction is taken, subject to division (B)(2)(d) of *section 5733.05 of the Revised Code.*

(J) Except as otherwise expressly provided or clearly appearing from the context, any term used in this chapter has the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes. Any reference in this chapter to the Internal Revenue Code includes other laws of the United States relating to federal income taxes.

(K) "Financial institution" has the meaning given by *section 5725.01 of the Revised Code* but does not include a production credit association as described in *85 Stat. 597, 12 U.S.C.A. 2091.*

(L) (1) A "qualifying holding company" is any corporation satisfying all of the following requirements:

(a) Subject to divisions (L)(2) and (3) of this section, the net book value of the corporation's intangible assets is greater than or equal to ninety per cent of the net book value of all of its assets and at least fifty per cent of the net book value of all of its assets represents direct or indirect investments in the equity of, loans and advances to, and accounts receivable due from related members;

(b) At least ninety per cent of the corporation's gross income for the taxable year is attributable to the following:

(i) The maintenance, management, ownership, acquisition, use, and disposition of its intangible property, its aircraft the use of which is not subject to regulation under 14 C.F.R. part 121 or part 135, and any real property described in division (L)(2)(c) of this section;

(ii) The collection and distribution of income from such property.

(c) The corporation is not a financial institution on the last day of the taxable year ending prior to the first day of the tax year;

(d) The corporation's related members make a good faith and reasonable effort to make timely and fully the adjustments required by division (C)(2) of *section 5733.05 of the Revised Code* and to pay timely and fully all uncontested taxes, interest, penalties, and other fees and charges imposed under this chapter;

(e) Subject to division (L)(4) of this section, the corporation elects to be treated as a qualifying holding company for the tax year.

A corporation otherwise satisfying divisions (L)(1)(a) to (e) of this section that does not elect to be a qualifying holding company is not a qualifying holding company for the purposes of this chapter.

(2) (a) (i) For purposes of making the ninety per cent computation under division (L)(1)(a) of this section, the net book value of the corporation's assets shall not include the net book value of aircraft or real property described in division (L)(1)(b)(i) of this section.

(ii) For purposes of making the fifty per cent computation under division (L)(1)(a) of this section, the net book value of assets shall include the net book value of aircraft or real property described in division (L)(1)(b)(i) of this section.

(b) (i) As used in division (L) of this section, "intangible asset" includes, but is not limited to, the corporation's direct interest in each pass-through entity only if at all times during the corporation's taxable year ending prior to the first day of the tax year the corporation's and the corporation's related members' combined direct and indirect interests in the capital or profits of such pass-through entity do not exceed fifty per cent. If the corporation's interest in the pass-through entity is an intangible asset for that taxable year, then the distributive share of any income from the pass-through entity shall be income from an intangible asset for that taxable year.

(ii) If a corporation's and the corporation's related members' combined direct and indirect interests in the capital or profits of a pass-through entity exceed fifty per cent at any time during the corporation's taxable year ending prior to the first day of the tax year, "intangible asset" does not include the corporation's direct interest in the pass-through entity, and the corporation shall include in its assets its proportionate share of the assets of any such pass-through entity and shall include in its gross income its distributive share of the gross income of such pass-through entity in the same form as was earned by the pass-through entity.

(iii) A pass-through entity's direct or indirect proportionate share of any other pass-through entity's assets shall be included for the purpose of computing the corporation's proportionate share of the pass-through entity's assets under division (L)(2)(b)(ii) of this section, and such pass-through entity's distributive share of any other pass-through entity's gross income shall be included for purposes of computing the corporation's distributive share of the pass-through entity's gross income under division (L)(2)(b)(ii) of this section.

(c) For the purposes of divisions (L)(1)(b)(i), (1)(b)(ii), (2)(a)(i), and (2)(a)(ii) of this section, real property is described in division (L)(2)(c) of this section only if all of the following conditions are present at all times during the taxable year ending prior to the first day of the tax year:

(i) The real property serves as the headquarters of the corporation's trade or business, or is the place from which the corporation's trade or business is principally managed or directed;

(ii) Not more than ten per cent of the value of the real property and not more than ten per cent of the square footage of the building or buildings that are part of the real property is used, made available, or occupied for the purpose of providing, acquiring, transferring, selling, or disposing of tangible property or services in the normal course of business to persons other than related members, the corporation's employees and their families, and such related members' employees and their families.

(d) As used in division (L) of this section, "related member" has the same meaning as in division (A)(6) of *section 5733.042 [5733.04.2] of the Revised Code* without regard to division (B) of that section.

(3) The percentages described in division (L)(1)(a) of this section shall be equal to the quarterly average of those percentages as calculated during the corporation's taxable year ending prior to the first day of the tax year.

(4) With respect to the election described in division (L)(1)(e) of this section:

(a) The election need not accompany a timely filed report;

(b) The election need not accompany the report; rather, the election may accompany a subsequently filed but timely application for refund and timely amended report, or a subsequently filed but timely petition for reassessment;

(c) The election is not irrevocable;

(d) The election applies only to the tax year specified by the corporation;

(e) The corporation's related members comply with division (L)(1)(d) of this section.

Nothing in division (L)(4) of this section shall be construed to extend any statute of limitations set forth in this chapter.

(M) "Qualifying controlled group" means two or more corporations that satisfy the ownership and control requirements of division (A) of *section 5733.052 [5733.05.2] of the Revised Code.*

(N) "Limited liability company" means any limited liability company formed under Chapter 1705. of the Revised Code or under the laws of any other state.

(O) "Pass-through entity" means a corporation that has made an election under subchapter S of Chapter 1 of Subtitle A of the Internal Revenue Code for its taxable year under that code, or a partnership, limited liability company, or any other person, other than an individual, trust, or estate, if the partnership, limited liability company, or other person is not classified for federal income tax purposes as an association taxed as a corporation.

(P) "Electric company," "combined company," and "telephone company" have the same meanings as in *section 5727.01 of the Revised Code.*

(Q) "Business income" means income arising from transactions, activities, and sources in the regular course of a trade or business and includes income from real property, tangible personal property, and intangible personal property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation. "Business income" includes income, including gain or loss, from a partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill.

(R) "Nonbusiness income" means all income other than business income.

HISTORY:

GC § 5498-1; 122 v 161, § 2; Bureau of Code Revision, 10-1-53; 134 v H 475 (Eff 12-20-71); 135 v H 95 (Eff 7-20-73); 135 v S 277 (Eff 2-5-74); 136 v H 1 (Eff 6-13-75); 136 v S 162 (Eff 7-23-76); 138 v H 653 (Eff 5-29-80); 139 v H 694 (Eff 11-15-81); 140 v H 291 (Eff 7-1-83); 140 v H 250 (Eff 7-30-84); 141 v H 1053 (Eff 12-19-86); 141 v H 428 (Eff 12-23-86); 142 v H 171 (Eff 7-1-87); 142 v S 386 (Eff 3-29-88); 143 v H 111 (Eff 7-1-89); 144 v H 298 (Eff 7-26-91); 147 v H 215 (Eff 9-29-97); 147 v H 408 (Eff 10-1-97); 147 v H 770 (Eff 9-16-98); 148 v S 3 (Eff 7-6-99); 148 v H 471 (Eff 7-1-2000); 149 v S 261 (Eff 6-5-2002); 149 v S 200. Eff 9-6-2002; 150 v H 95, § 1, eff. 6-26-03; 150 v H 362, § 1, eff. 12-30-04.

NOTES:

Section Notes

The provisions of § 5 of H.B. 362 (150 v --) read as follows:

SECTION 5. (A) Except as provided in division (B) of this section, the amendment by this act of *sections 5733.04* and *5747.01 of the Revised Code*, which updates references to federal income tax laws and thereby incorporates recent changes to those laws, first applies to taxable years ending on or after the effective date of those sections, as amended by this act.

(B) A taxpayer may irrevocably elect to apply *section 5733.04* or *5747.01 of the Revised Code*, as amended by this act, to the taxpayer's taxable year ending in 2004. The filing of a return or report by the taxpayer for that taxable year

that incorporates the amendments to those sections by this act without adjustments to reverse the effects of those amendments constitutes the making of an irrevocable election under this section.

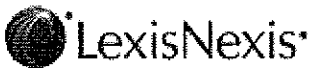
The effective date is set by section 6 of H.B. 362 (150 v --).

The provisions of § 236 of H.B. 95 (150 v --) read as follows:

SECTION 236. *Section 5733.04 of the Revised Code* is presented in this act as a composite of the section as amended by both Sub. S.B. 200 and Am. Sub. S.B. 261 of the 124th General Assembly. The General Assembly, applying the principle stated in division (B) of section 152 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the composite is the resulting version of the section in effect prior to the effective date of the section as presented in this act.

See provisions, §§ 3, 4 of SB 261 (149 v --) following *RC § 5743.02*.

EXHIBIT 8



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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 4, 2009 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 4, 2009 ***

TITLE 57. TAXATION
CHAPTER 5733. CORPORATION FRANCHISE TAX

Go to the Ohio Code Archive Directory

ORC Ann. 5733.061 (2009)

§ 5733.061. Credit for investment in property used in refining or manufacturing

A credit shall be allowed against the tax imposed by *section 5733.06 of the Revised Code* for each taxable year. The credit shall be claimed in the order required under *section 5733.98 of the Revised Code.* The credit shall equal the lesser of the amount of tax due under that section after allowing for any other credits that precede the credit under this section in that order or the difference between:

(A) The tangible personal property taxes timely paid in the taxable year that were charged against engines, machinery, tools, and implements owned by the taxpayer, listed for taxation in this state under *section 5711.16 of the Revised Code* as used or designed to be used in refining or manufacturing, and acquired on or after January 1, 1978; minus

(B) The taxes that would have been charged against such property and paid during such year had it been listed and assessed for taxation at a percentage of its true value for the year it was required to be listed, determined as follows:

(1) For 1984 through 1988, twenty per cent;

(2) For 1989, twenty-one per cent;

(3) For 1990, twenty-two per cent;

(4) For 1991, twenty-three per cent;

(5) For 1992, twenty-four per cent;

(6) For 1993 and thereafter, twenty-five per cent.

The tax commissioner may require a taxpayer to furnish any information necessary to support a claim for credit under this section, and no credit shall be allowed unless such information is provided.

No credit shall be allowed against any taxes paid on property previously required to be listed for taxation in this state by a person other than the taxpayer.

If the sum of the credits to which the taxpayer would otherwise be entitled under this section in any tax year is greater than the tax due under *section 5733.06 of the Revised Code* for that year after allowing for any other credits that precede the credit under this section in the order required under *section 5733.98 of the Revised Code*, such excess shall

be allowed as a credit in each of the ensuing three tax years that the taxpayer owns the property, but the amount of any excess credit allowed in any such year shall be deducted from the balance carried forward to the ensuing tax year.

(C) A refundable credit, computed under division (D) of this section, is hereby provided for tax year 1994 if all of the following conditions are met:

(1) In a taxable year ending prior to July 1, 1989, the taxpayer acquired property by transfer from a transferor as defined in division (A) of *section 5733.053 [5733.05.3] of the Revised Code*;

(2) Such property acquired from the taxpayer's transferor does not qualify for the credit provided by this section for one or more of the tax years 1989, 1990, 1991, 1992, or 1993 solely because the property previously was required to be listed for taxation in this state by a person other than the taxpayer;

(3) If *section 5733.053 [5733.05.3] of the Revised Code* had been in effect by the end of the taxable year in which the transfer occurred, division (E)(1) of *section 5733.053 [5733.05.3] of the Revised Code* would have allowed the taxpayer the credit provided by this section for the property acquired from the taxpayer's transferor for one or more of the tax years 1989, 1990, 1991, 1992, or 1993.

(D) The credit provided by division (C) of this section shall equal the difference between the following quantities:

(1) The lesser of the tax imposed or the tax paid for each of the tax years 1989, 1990, 1991, 1992, and 1993;

(2) The tax that would have been due for each of such years if both of the following apply:

(a) Division (E)(1) of *section 5733.053 [5733.05.3] of the Revised Code* had been in effect prior to the end of the taxable year in which the transfer occurred;

(b) Divisions (C) and (D) of *section 5733.053 [5733.05.3] of the Revised Code* had been in effect prior to the end of the taxable year in which the transfer occurred.

Division (D)(2)(b) of this section applies only if the amount described in divisions (C) and (D)(1) of *section 5733.053 [5733.05.3] of the Revised Code* for the taxable year ending in 1988 was greater than zero.

In no event shall the credit provided by division (C) of this section be less than zero. If the credit is affected by an adjustment to a report for a prior tax year, or by a report or an adjustment to a report for a subsequent tax year, the taxpayer shall file an amended annual corporation report in the manner prescribed by division (D) of *section 5733.067 [5733.06.7] of the Revised Code.*

HISTORY:

137 v H 828 (Eff 3-10-78); 140 v H 291 (Eff 7-1-83); 144 v S 32 (Eff 7-1-92); 144 v S 361 (Eff 1-13-93); 145 v S 269 (Eff 7-22-94); 145 v H 715 (Eff 7-22-94); 147 v H 215. Eff 6-30-97.

NOTES:

Section Notes

See provisions, § 210 of HB 215 (147 v --), as amended by § 4 of HB 770 (147 v --), following *RC § 5733.02.*

EXHIBIT 9

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 4, 2009 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2009 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 4, 2009 ***

TITLE 57. TAXATION
CHAPTER 5733. CORPORATION FRANCHISE TAX

Go to the Ohio Code Archive Directory

ORC Ann. 5733.352 (2009)

§ 5733.352. Credit for borrower's qualified research and development loan payments

(A) As used in this section:

(1) "Borrower" means any person that receives a loan from the director of development under *section 166.21 of the Revised Code*, regardless of whether the borrower is subject to the taxes imposed by *sections 5733.06, 5733.065 [5733.06.5]*, and *5733.066 [5733.06.6] of the Revised Code.*

(2) "Related member" has the same meaning as in *section 5733.042 [5733.04.2] of the Revised Code.*

(3) "Qualified research and development loan payments" has the same meaning as in division (D) of *section 166.21 of the Revised Code.*

(B) Beginning with tax year 2004, and in the case of a corporation subject to division (G)(2) of *section 5733.01 of the Revised Code* ending with tax year 2008, a nonrefundable credit is allowed against the taxes imposed by *sections 5733.06, 5733.065 [5733.06.5]*, and *5733.066 [5733.06.6] of the Revised Code* equal to a borrower's qualified research and development loan payments made during the calendar year immediately preceding the tax year for which the credit is claimed. The amount of the credit for a tax year shall not exceed one hundred fifty thousand dollars. No taxpayer is entitled to claim a credit under this section unless it has obtained a certificate issued by the director of development under division (D) of *section 166.21 of the Revised Code* and submits a copy of the certificate with its report for the taxable year. Failure to submit a copy of the certificate with the report does not invalidate a claim for a credit if the taxpayer submits a copy of the certificate within sixty days after the tax commissioner requests it. The credit shall be claimed in the order required under *section 5733.98 of the Revised Code.* The credit, to the extent it exceeds the taxpayer's tax liability for the tax year after allowance for any other credits that precede the credit under this section in that order, shall be carried forward to the next succeeding tax year or years until fully used. A corporation subject to division (G)(2) of *section 5733.01 of the Revised Code* may carry forward any credit not fully utilized by tax year 2008 and apply it against the tax levied by Chapter 5751. of the Revised Code to the extent allowed under *section 5751.52 of the Revised Code.*

(C) A borrower entitled to a credit under this section may assign the credit, or a portion thereof, to any of the following:

(1) A related member of that borrower;

(2) The owner or lessee of the eligible research and development project;

(3) A related member of the owner or lessee of the eligible research and development project.

A borrower making an assignment under this division shall provide written notice of the assignment to the tax commissioner and the director of development, in such form as the tax commissioner prescribes, before the credit that was assigned is used. The assignor may not claim the credit to the extent it was assigned to an assignee. The assignee may claim the credit only to the extent the assignor has not claimed it.

(D) If any taxpayer is a partner in a partnership or a member in a limited liability company treated as a partnership for federal income tax purposes, the taxpayer shall be allowed the taxpayer's distributive or proportionate share of the credit available through the partnership or limited liability company.

(E) The aggregate credit against the taxes imposed by *sections 5733.06, 5733.065 [5733.06.5], 5733.066 [5733.06.6]*, and *5747.02 of the Revised Code* that may be claimed under this section and *section 5747.331 [5747.33.1] of the Revised Code* by a borrower as a result of qualified research and development loan payments attributable during a calendar year to any one loan shall not exceed one hundred fifty thousand dollars.

HISTORY:

150 v H 1, § 1, eff. 7-9-03; 151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06.

NOTES:

Section Notes

The effective date is set by § 818.03 of 151 v H 530.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 530, effective March 30, 2006, in (B), added "and submits a copy of the certificate with its report for the taxable year" to the end of the third sentence, and inserted the fourth sentence.

151 v H 66, effective June 30, 2005, in (B), substituted "with tax year 2004, and in the case of a corporation subject to division (G)(2) of *section 5733.01 of the Revised Code* ending with tax year 2008" for "in tax year 2004", and added the last sentence.

EXHIBIT 10

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 12, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 19, 2008 ***

TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

Go to the Ohio Code Archive Directory

ORC Ann. 5751.01 (2008)

§ 5751.01. Definitions

As used in this chapter:

(A) "Person" means, but is not limited to, individuals, combinations of individuals of any form, receivers, assignees, trustees in bankruptcy, firms, companies, joint-stock companies, business trusts, estates, partnerships, limited liability partnerships, limited liability companies, associations, joint ventures, clubs, societies, for-profit corporations, S corporations, qualified subchapter S subsidiaries, qualified subchapter S trusts, trusts, entities that are disregarded for federal income tax purposes, and any other entities. "Person" does not include nonprofit organizations or the state, its agencies, its instrumentalities, and its political subdivisions.

(B) "Consolidated elected taxpayer" means a group of two or more persons treated as a single taxpayer for purposes of this chapter as the result of an election made under *section 5751.011 [5751.01.1] of the Revised Code.*

(C) "Combined taxpayer" means a group of two or more persons treated as a single taxpayer for purposes of this chapter under *section 5751.012 [5751.01.2] of the Revised Code.*

(D) "Taxpayer" means any person, or any group of persons in the case of a consolidated elected taxpayer or combined taxpayer treated as one taxpayer, required to register or pay tax under this chapter. "Taxpayer" does not include excluded persons.

(E) "Excluded person" means any of the following:

(1) Any person with not more than one hundred fifty thousand dollars of taxable gross receipts during the calendar year. Division (E)(1) of this section does not apply to a person that is a member of a group that is a consolidated elected taxpayer or a combined taxpayer;

(2) A public utility that paid the excise tax imposed by *section 5727.24* or *5727.30 of the Revised Code* based on one or more measurement periods that include the entire tax period under this chapter, except that a public utility that is a combined company is a taxpayer with regard to the following gross receipts:

(a) Taxable gross receipts directly attributed to a public utility activity, but not directly attributed to an activity that is subject to the excise tax imposed by *section 5727.24* or *5727.30 of the Revised Code;*

(b) Taxable gross receipts that cannot be directly attributed to any activity, multiplied by a fraction whose numerator is the taxable gross receipts described in division (E)(2)(a) of this section and whose denominator is the total taxable gross receipts that can be directly attributed to any activity;

(c) Except for any differences resulting from the use of an accrual basis method of accounting for purposes of determining gross receipts under this chapter and the use of the cash basis method of accounting for purposes of determining gross receipts under *section 5727.24 of the Revised Code*, the gross receipts directly attributed to the activity of a natural gas company shall be determined in a manner consistent with division (D) of *section 5727.03 of the Revised Code.*

As used in division (E)(2) of this section, "combined company" and "public utility" have the same meanings as in *section 5727.01 of the Revised Code.*

(3) A financial institution, as defined in *section 5725.01 of the Revised Code*, that paid the corporation franchise tax charged by division (D) of *section 5733.06 of the Revised Code* based on one or more taxable years that include the entire tax period under this chapter;

(4) A dealer in intangibles, as defined in *section 5725.01 of the Revised Code*, that paid the dealer in intangibles tax levied by division (D) of *section 5707.03 of the Revised Code* based on one or more measurement periods that include the entire tax period under this chapter;

(5) A financial holding company as defined in the "Bank Holding Company Act," *12 U.S.C. 1841*(p);

(6) A bank holding company as defined in the "Bank Holding Company Act," *12 U.S.C. 1841*(a);

(7) A savings and loan holding company as defined in the "Home Owners Loan Act," *12 U.S.C. 1467a*(a)(1)(D) that is engaging only in activities or investments permissible for a financial holding company under *12 U.S.C. 1843*(k);

(8) A person directly or indirectly owned by one or more financial institutions, financial holding companies, bank holding companies, or savings and loan holding companies described in division (E)(3), (5), (6), or (7) of this section that is engaged in activities permissible for a financial holding company under *12 U.S.C. 1843*(k), except that any such person held pursuant to merchant banking authority under *12 U.S.C. 1843*(k)(4)(H) or *12 U.S.C. 1843*(k)(4)(I) is not an excluded person, or a person directly or indirectly owned by one or more insurance companies described in division (E)(9) of this section that is authorized to do the business of insurance in this state.

For the purposes of division (E)(8) of this section, a person owns another person under the following circumstances:

(a) In the case of corporations issuing capital stock, one corporation owns another corporation if it owns fifty per cent or more of the other corporation's capital stock with current voting rights;

(b) In the case of a limited liability company, one person owns the company if that person's membership interest, as defined in *section 1705.01 of the Revised Code*, is fifty per cent or more of the combined membership interests of all persons owning such interests in the company;

(c) In the case of a partnership, trust, or other unincorporated business organization other than a limited liability company, one person owns the organization if, under the articles of organization or other instrument governing the affairs of the organization, that person has a beneficial interest in the organization's profits, surpluses, losses, or distributions of fifty per cent or more of the combined beneficial interests of all persons having such an interest in the organization;

(d) In the case of multiple ownership, the ownership interests of more than one person may be aggregated to meet the fifty per cent ownership tests in this division only when each such owner is described in division (E)(3), (5), (6), or (7) of this section and is engaged in activities permissible for a financial holding company under *12 U.S.C. 1843*(k) or is a person directly or indirectly owned by one or more insurance companies described in division (E)(9) of this section that is authorized to do the business of insurance in this state.

(9) A domestic insurance company or foreign insurance company, as defined in *section 5725.01 of the Revised Code*, that paid the insurance company premiums tax imposed by section 5725.18 or Chapter 5729. of the Revised Code based on one or more measurement periods that include the entire tax period under this chapter;

(10) A person that solely facilitates or services one or more securitizations or similar transactions for any person described in division (E)(3), (5), (6), (7), (8), or (9) of this section. For purposes of this division, "securitization" means transferring one or more assets to one or more persons and then issuing securities backed by the right to receive payment from the asset or assets so transferred.

(11) Except as otherwise provided in this division, a pre-income tax trust as defined in division (FF)(4) of *section 5747.01 of the Revised Code* and any pass-through entity of which such pre-income tax trust owns or controls, directly, indirectly, or constructively through related interests, more than five per cent of the ownership or equity interests. If the pre-income tax trust has made a qualifying pre-income tax trust election under division (FF)(3) of *section 5747.01 of the Revised Code*, then the trust and the pass-through entities of which it owns or controls, directly, indirectly, or constructively through related interests, more than five per cent of the ownership or equity interests, shall not be excluded persons for purposes of the tax imposed under *section 5751.02 of the Revised Code*.

(F) Except as otherwise provided in divisions (F)(2), (3), and (4), of this section, "gross receipts" means the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration.

(1) The following are examples of gross receipts:

(a) Amounts realized from the sale, exchange, or other disposition of the taxpayer's property to or with another;

(b) Amounts realized from the taxpayer's performance of services for another;

(c) Amounts realized from another's use or possession of the taxpayer's property or capital;

(d) Any combination of the foregoing amounts.

(2) "Gross receipts" excludes the following amounts:

(a) Interest income except interest on credit sales;

(b) Dividends and distributions from corporations, and distributive or proportionate shares of receipts and income from a pass-through entity as defined under *section 5733.04 of the Revised Code*;

(c) Receipts from the sale, exchange, or other disposition of an asset described in *section 1221* or *1231 of the Internal Revenue Code*, without regard to the length of time the person held the asset. Notwithstanding *section 1221 of the Internal Revenue Code*, receipts from hedging transactions also are excluded to the extent the transactions are entered into primarily to protect a financial position, such as managing the risk of exposure to (i) foreign currency fluctuations that affect assets, liabilities, profits, losses, equity, or investments in foreign operations; (ii) interest rate fluctuations; or (iii) commodity price fluctuations. As used in division (F)(2)(c) of this section, "hedging transaction" has the same meaning as used in *section 1221 of the Internal Revenue Code* and also includes transactions accorded hedge accounting treatment under statement of financial accounting standards number 133 of the financial accounting standards board. For the purposes of division (F)(2)(c) of this section, the actual transfer of title of real or tangible personal property to another entity is not a hedging transaction.

(d) Proceeds received attributable to the repayment, maturity, or redemption of the principal of a loan, bond, mutual fund, certificate of deposit, or marketable instrument;

(e) The principal amount received under a repurchase agreement or on account of any transaction properly characterized as a loan to the person;

(f) Contributions received by a trust, plan, or other arrangement, any of which is described in *section 501(a) of the Internal Revenue Code*, or to which Title 26, Subtitle A, Chapter 1, Subchapter (D) of the Internal Revenue Code applies;

(g) Compensation, whether current or deferred, and whether in cash or in kind, received or to be received by an employee, former employee, or the employee's legal successor for services rendered to or for an employer, including reimbursements received by or for an individual for medical or education expenses, health insurance premiums, or employee expenses, or on account of a dependent care spending account, legal services plan, any cafeteria plan described in *section 125 of the Internal Revenue Code*, or any similar employee reimbursement;

(h) Proceeds received from the issuance of the taxpayer's own stock, options, warrants, puts, or calls, or from the sale of the taxpayer's treasury stock;

(i) Proceeds received on the account of payments from life insurance policies;

(j) Gifts or charitable contributions received, membership dues received, and payments received for educational courses, meetings, meals, or similar payments to a trade, professional, or other similar association; fundraising receipts received by any person when any excess receipts are donated or used exclusively for charitable purposes; and proceeds received by a nonprofit organization including proceeds realized with regard to its unrelated business taxable income;

(k) Damages received as the result of litigation in excess of amounts that, if received without litigation, would be gross receipts;

(l) Property, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other remuneration;

(m) Tax refunds, other tax benefit recoveries, and reimbursements for the tax imposed under this chapter made by entities that are part of the same combined taxpayer or consolidated elected taxpayer group, and reimbursements made by entities that are not members of a combined taxpayer or consolidated elected taxpayer group that are required to be made for economic parity among multiple owners of an entity whose tax obligation under this chapter is required to be reported and paid entirely by one owner, pursuant to the requirements of *sections 5751.011 [5751.01.1]* and *5751.012 [5751.01.2] of the Revised Code*;

(n) Pension reversions;

(o) Contributions to capital;

(p) Sales or use taxes collected as a vendor or an out-of-state seller on behalf of the taxing jurisdiction from a consumer or other taxes the taxpayer is required by law to collect directly from a purchaser and remit to a local, state, or federal tax authority;

(q) In the case of receipts from the sale of cigarettes or tobacco products by a wholesale dealer, retail dealer, distributor, manufacturer, or seller, all as defined in *section 5743.01 of the Revised Code*, an amount equal to the federal and state excise taxes paid by any person on or for such cigarettes or tobacco products under subtitle E of the Internal Revenue Code or Chapter 5743. of the Revised Code;

(r) In the case of receipts from the sale of motor fuel by a licensed motor fuel dealer, licensed retail dealer, or licensed permissive motor fuel dealer, all as defined in *section 5735.01 of the Revised Code*, an amount equal to federal and state excise taxes paid by any person on such motor fuel under *section 4081 of the Internal Revenue Code* or Chapter 5735. of the Revised Code;

(s) In the case of receipts from the sale of beer or intoxicating liquor, as defined in *section 4301.01 of the Revised Code*, by a person holding a permit issued under Chapter 4301. or 4303. of the Revised Code, an amount equal to federal and state excise taxes paid by any person on or for such beer or intoxicating liquor under subtitle E of the Internal Revenue Code or Chapter 4301. or 4305. of the Revised Code;

(t) Receipts realized by a new motor vehicle dealer or used motor vehicle dealer, as defined in *section 4517.01 of the Revised Code*, from the sale or other transfer of a motor vehicle, as defined in that section, to another motor vehicle dealer for the purpose of resale by the transferee motor vehicle dealer, but only if the sale or other transfer was based upon the transferee's need to meet a specific customer's preference for a motor vehicle;

(u) Receipts from a financial institution described in division (E)(3) of this section for services provided to the financial institution in connection with the issuance, processing, servicing, and management of loans or credit accounts, if such financial institution and the recipient of such receipts have at least fifty per cent of their ownership interests owned or controlled, directly or constructively through related interests, by common owners;

(v) Receipts realized from administering anti-neoplastic drugs and other cancer chemotherapy, biologicals, therapeutic agents, and supportive drugs in a physician's office to patients with cancer;

(w) Funds received or used by a mortgage broker that is not a dealer in intangibles, other than fees or other consideration, pursuant to a table-funding mortgage loan or warehouse-lending mortgage loan. Terms used in division (F)(2)(w) of this section have the same meanings as in *section 1322.01 of the Revised Code*, except "mortgage broker" means a person assisting a buyer in obtaining a mortgage loan for a fee or other consideration paid by the buyer or a lender, or a person engaged in table-funding or warehouse-lending mortgage loans that are first lien mortgage loans.

(x) Property, money, and other amounts received by a professional employer organization, as defined in *section 4125.01 of the Revised Code*, from a client employer, as defined in that section, in excess of the administrative fee charged by the professional employer organization to the client employer;

(y) In the case of amounts retained as commissions by a permit holder under Chapter 3769. of the Revised Code, an amount equal to the amounts specified under that chapter that must be paid to or collected by the tax commissioner as a tax and the amounts specified under that chapter to be used as purse money;

(z) Qualifying distribution center receipts.

(i) For purposes of division (F)(2)(z) of this section:

(I) "Qualifying distribution center receipts" means receipts of a supplier from qualified property that is delivered to a qualified distribution center, multiplied by a quantity that equals one minus the Ohio delivery percentage.

(II) "Qualified property" means tangible personal property delivered to a qualified distribution center that is shipped to that qualified distribution center solely for further shipping by the qualified distribution center to another location in this state or elsewhere. "Further shipping" includes storing and repackaging such property into smaller or larger bundles, so long as such property is not subject to further manufacturing or processing.

(III) "Qualified distribution center" means a warehouse or other similar facility in this state that, for the qualifying year, is operated by a person that is not part of a combined taxpayer group and that has a qualifying certificate. However, all warehouses or other similar facilities that are operated by persons in the same taxpayer group and that are located within one mile of each other shall be treated as one qualified distribution center.

(IV) "Qualifying year" means the calendar year to which the qualifying certificate applies.

(V) "Qualifying period" means the period of the first day of July of the second year preceding the qualifying year through the thirtieth day of June of the year preceding the qualifying year.

(VI) "Qualifying certificate" means an annual application approved by the tax commissioner from an operator of a distribution center that has filed an application as prescribed by the commissioner and paid the annual fee for the qualifying certificate on or before the first day of September prior to the qualifying year or forty-five days after the opening of the distribution center, whichever is later. The application and annual fee shall be filed and paid for each qualified distribution center.

The applicant must substantiate to the commissioner's satisfaction that, for the qualifying period, all persons operating the distribution center have more than fifty per cent of the cost of the qualified property shipped to a location such that it would be sitused outside this state under the provisions of division (E) of *section 5751.033 [5751.03.3] of the Revised Code*. The applicant must also substantiate that the distribution center cumulatively had costs from its suppliers equal to or exceeding five hundred million dollars during the qualifying period. (For purposes of division (F)(2)(z)(i)(VI) of this section, "supplier" excludes any person that is part of the consolidated elected taxpayer group, if applicable, of the operator of the qualified distribution center.) The commissioner may require the applicant to have an independent certified public accountant certify that the calculation of the minimum thresholds required for a qualified distribution center by the operator of a distribution center has been made in accordance with generally accepted accounting principles. The commissioner shall issue or deny the issuance of a certificate within sixty days after the receipt of the application. A denial is subject to appeal under *section 5717.02 of the Revised Code*. If the operator files a timely appeal under *section 5717.02 of the Revised Code*, the operator shall be granted a qualifying certificate, provided that the operator is liable for any tax, interest, or penalty upon amounts claimed as qualifying distribution center receipts, other than those receipts exempt under division (C)(1) of *section 5751.011 [5751.01.1] of the Revised Code*, that would have otherwise not been owed by its suppliers if the qualifying certificate was valid.

(VII) "Ohio delivery percentage" means the proportion of the total property delivered to a destination inside Ohio from the qualified distribution center during the qualifying period compared with total deliveries from such distribution center everywhere during the qualifying period.

(ii) If the distribution center is new and was not open for the entire qualifying period, the operator of the distribution center may request that the commissioner grant a qualifying certificate. If the certificate is granted and it is later determined that more than fifty per cent of the qualified property during that year was not shipped to a location such that it would be sitused outside of this state under the provisions of division (E) of *section 5751.033 [5751.03.3] of the Revised Code* or if it is later determined that the person that operates the distribution center had average monthly

costs from its suppliers of less than forty million dollars during that year, then the operator of the distribution center shall be liable for any tax, interest, or penalty upon amounts claimed as qualifying distribution center receipts, other than those receipts exempt under division (C)(1) of *section 5751.011 [5751.01.1] of the Revised Code,* that would have not otherwise been owed by its suppliers during the qualifying year if the qualifying certificate was valid. (For purposes of division (F)(2)(z)(ii) of this section, "supplier" excludes any person that is part of the consolidated elected taxpayer group, if applicable, of the operator of the qualified distribution center.)

(iii) When filing an application for a qualifying certificate under division (F)(2)(z)(i)(VI) of this section, the operator of a qualified distribution center also shall provide documentation, as the commissioner requires, for the commissioner to ascertain the Ohio delivery percentage. The commissioner, upon issuing the qualifying certificate, also shall certify the Ohio delivery percentage. The operator of the qualified distribution center may appeal the commissioner's certification of the Ohio delivery percentage in the same manner as an appeal is taken from the denial of a qualifying certificate under division (F)(2)(z)(i)(VI) of this section.

Within thirty days after all appeals have been exhausted, the operator of the qualified distribution center shall notify the affected suppliers of qualified property that such suppliers are required to file, within sixty days after receiving notice from the operator of the qualified distribution center, amended reports for the impacted calendar quarter or quarters or calendar year, whichever the case may be. Any additional tax liability or tax overpayment shall be subject to interest but shall not be subject to the imposition of any penalty so long as the amended returns are timely filed. The supplier of tangible personal property delivered to the qualified distribution center shall include in its report of taxable gross receipts the receipts from the total sales of property delivered to the qualified distribution center for the calendar quarter or calendar year, whichever the case may be, multiplied by the Ohio delivery percentage for the qualifying year. Nothing in division (F)(2)(z)(iii) of this section shall be construed as imposing liability on the operator of a qualified distribution center for the tax imposed by this chapter arising from any change to the Ohio delivery percentage.

(iv) In the case where the distribution center is new and not open for the entire qualifying period, the operator shall make a good faith estimate of an Ohio delivery percentage for use by suppliers in their reports of taxable gross receipts for the remainder of the qualifying period. The operator of the facility shall disclose to the suppliers that such Ohio delivery percentage is an estimate and is subject to recalculation. By the due date of the next application for a qualifying certificate, the operator shall determine the actual Ohio delivery percentage for the estimated qualifying period and proceed as provided in division (F)(2)(z)(iii) of this section with respect to the calculation and recalculation of the Ohio delivery percentage. The supplier is required to file, within sixty days after receiving notice from the operator of the qualified distribution center, amended reports for the impacted calendar quarter or quarters or calendar year, whichever the case may be. Any additional tax liability or tax overpayment shall be subject to interest but shall not be subject to the imposition of any penalty so long as the amended returns are timely filed.

(v) Qualifying certificates and Ohio delivery percentages issued by the commissioner shall be open to public inspection and shall be timely published by the commissioner. A supplier relying in good faith on a certificate issued under this division shall not be subject to tax on the qualifying distribution center receipts under division (F)(2)(z) of this section. A person receiving a qualifying certificate is responsible for paying the tax, interest, and penalty upon amounts claimed as qualifying distribution center receipts that would not otherwise have been owed by the supplier if the qualifying certificate were available when it is later determined that the qualifying certificate should not have been issued because the statutory requirements were in fact not met.

(vi) The annual fee for a qualifying certificate shall be one hundred thousand dollars for each qualified distribution center. If a qualifying certificate is not issued, the annual fee is subject to refund after the exhaustion of all appeals provided for in division (F)(2)(z)(i)(VI) of this section. The fee imposed under this division may be assessed in the same manner as the tax imposed under this chapter. The first one hundred thousand dollars of the annual application fees collected each calendar year shall be credited to the commercial activity tax administrative fund. The remainder of the annual application fees collected shall be distributed in the same manner required under *section 5751.20 of the Revised Code.*

(vii) The tax commissioner may require that adequate security be posted by the operator of the distribution center on appeal when the commissioner disagrees that the applicant has met the minimum thresholds for a qualified distribution center as set forth in divisions (F)(2)(z)(i)(VI) and (F)(2)(z)(ii) of this section.

(aa) Any receipts for which the tax imposed by this chapter is prohibited by the Constitution or laws of the United States or the Constitution of Ohio.

(3) In the case of a taxpayer when acting as a real estate broker, "gross receipts" includes only the portion of any fee for the service of a real estate broker, or service of a real estate salesperson associated with that broker, that is retained by the broker and not paid to an associated real estate salesperson or another real estate broker. For the purposes of this division, "real estate broker" and "real estate salesperson" have the same meanings as in *section 4735.01 of the Revised Code.*

(4) A taxpayer's method of accounting for gross receipts for a tax period shall be the same as the taxpayer's method of accounting for federal income tax purposes for the taxpayer's federal taxable year that includes the tax period. If a taxpayer's method of accounting for federal income tax purposes changes, its method of accounting for gross receipts under this chapter shall be changed accordingly.

In calculating gross receipts, the following shall be deducted to the extent included as a gross receipt in the current tax period or reported as taxable gross receipts in a prior tax period:

(a) Cash discounts allowed and taken;

(b) Returns and allowances;

(c) Bad debts. For the purposes of this division, "bad debts" mean any debts that have become worthless or uncollectible between the preceding and current quarterly tax payment periods, have been uncollected for at least six months, and may be claimed as a deduction under *section 166 of the Internal Revenue Code* and the regulations adopted pursuant thereto, or that could be claimed as such if the taxpayer kept its accounts on the accrual basis. "Bad debts" does not include uncollectible amounts on property that remains in the possession of the taxpayer until the full purchase price is paid, expenses in attempting to collect any account receivable or for any portion of the debt recovered, and repossessed property;

(d) Any amount realized from the sale of an account receivable but only to the extent the receipts from the underlying transaction giving rise to the account receivable were included in the gross receipts of the taxpayer.

(G) "Taxable gross receipts" means gross receipts sitused to this state under *section 5751.033 [5751.03.3] of the Revised Code.*

(H) A person has "substantial nexus with this state" if any of the following applies. The person:

(1) Owns or uses a part or all of its capital in this state;

(2) Holds a certificate of compliance with the laws of this state authorizing the person to do business in this state;

(3) Has bright-line presence in this state;

(4) Otherwise has nexus with this state to an extent that the person can be required to remit the tax imposed under this chapter under the Constitution of the United States.

(I) A person has "bright-line presence" in this state for a reporting period and for the remaining portion of the calendar year if any of the following applies. The person:

(1) Has at any time during the calendar year property in this state with an aggregate value of at least fifty thousand dollars. For the purpose of division (I)(1) of this section, owned property is valued at original cost and rented property is valued at eight times the net annual rental charge.

(2) Has during the calendar year payroll in this state of at least fifty thousand dollars. Payroll in this state includes all of the following:

(a) Any amount subject to withholding by the person under *section 5747.06 of the Revised Code*;

(b) Any other amount the person pays as compensation to an individual under the supervision or control of the person for work done in this state; and

(c) Any amount the person pays for services performed in this state on its behalf by another.

(3) Has during the calendar year taxable gross receipts of at least five hundred thousand dollars.

(4) Has at any time during the calendar year within this state at least twenty-five per cent of the person's total property, total payroll, or total gross receipts.

(5) Is domiciled in this state as an individual or for corporate, commercial, or other business purposes.

(J) "Tangible personal property" has the same meaning as in *section 5739.01 of the Revised Code.*

(K) "Internal Revenue Code" means the Internal Revenue Code of 1986, *100 Stat. 2085, 26 U.S.C. 1,* as amended. Any term used in this chapter that is not otherwise defined has the same meaning as when used in a comparable context in the laws of the United States relating to federal income taxes unless a different meaning is clearly required. Any reference in this chapter to the Internal Revenue Code includes other laws of the United States relating to federal income taxes.

(L) "Calendar quarter" means a three-month period ending on the thirty-first day of March, the thirtieth day of June, the thirtieth day of September, or the thirty-first day of December.

(M) "Tax period" means the calendar quarter or calendar year on the basis of which a taxpayer is required to pay the tax imposed under this chapter.

(N) "Calendar year taxpayer" means a taxpayer for which the tax period is a calendar year.

(O) "Calendar quarter taxpayer" means a taxpayer for which the tax period is a calendar quarter.

(P) "Agent" means a person authorized by another person to act on its behalf to undertake a transaction for the other, including any of the following:

(1) A person receiving a fee to sell financial instruments;

(2) A person retaining only a commission from a transaction with the other proceeds from the transaction being remitted to another person;

(3) A person issuing licenses and permits under *section 1533.13 of the Revised Code*;

(4) A lottery sales agent holding a valid license issued under *section 3770.05 of the Revised Code*;

(5) A person acting as an agent of the division of liquor control under *section 4301.17 of the Revised Code.*

(Q) "Received" includes amounts accrued under the accrual method of accounting.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06; 151 v H 699, § 101.01, eff. 3-29-07.

NOTES:

Section Notes

The effective date is set by § 612.03 of 151 v H 699.

The provisions of § 757.24 of 151 v H 530 read as follows:

SECTION 757.24. (A) As used in this section, "qualifying year" and "qualifying certificate" have the same meanings as in division (F)(2)(z)(ii) of *section 5751.01 of the Revised Code.*

(B) An application for a qualifying certificate for qualifying year 2007 shall be filed on or before September 1, 2006, in accordance with the procedures prescribed in division (F)(2)(z)(i)(VI) of *section 5751.01 of the Revised Code.*

The provisions of § 821.06.03 of 151 v H 530 read as follows:

SECTION 821.06.03. (A) Except as otherwise provided in division (B) of this section, the amendments by this act to *section 5751.01 of the Revised Code*, provide for or are essential to implementation of a tax levy. Therefore, under *Ohio Constitution, Article II, Section 1d*, the amendments are not subject to the referendum and go into immediate effect when this act becomes law.

(B) The amendment of this act adding division (F)(2)(z) to *section 5751.01 of the Revised Code* is subject to the referendum. Therefore, under *Ohio Constitution, Article II, Section 1c* and *section 1.471 of the Revised Code*, the amendment takes effect January 1, 2007. If, however, a referendum petition is filed against the amendment, the amend-

ment, unless rejected at the referendum, goes into effect at the earliest time permitted by law that is on or after the effective date specified in this division.

The provisions of § 831.06 of 151 v H 530 read as follows:

SECTION 831.06. The amendments by this act of the first paragraph of division (F) of section 5751.01, of division (F)(2)(w) of section 5751.01, of the first paragraph of section 5751.032, and of divisions (A)(7) and (A)(8)(c) of *section 5751.032 of the Revised Code* are nonsubstantive corrections of errors in Chapter 5751. of the Revised Code.

The effective date of § 831.06 of 151 v H 530 is set by § 818.03 of 151 v H 530.

The provisions of § 557.09.06 of 151 v H 66 read as follows:

SECTION 557.09.06. (A) Notwithstanding any provision of Chapter 5751. of the Revised Code as enacted by this act, "gross receipts," as defined in *section 5751.01 of the Revised Code*, excludes all of the following receipts if they are received prior to July 1, 2007:

(1) Receipts from the sale of fuel by a refinery to a terminal that is intended to be used as motor fuel;

(2) Receipts from the sale of motor fuel from a terminal to a motor fuel dealer, excluding motor fuel that is not subject to taxation under Chapter 5735. of the Revised Code;

(3) Receipts from the sale of motor fuel upon which the tax under Chapter 5735. of the Revised Code has been imposed.

For the purposes of this division, "motor fuel," "motor fuel dealer, and "terminal" have the same meanings as used in *section 5735.01 of the Revised Code.*

(B) For the purposes of division (A) of this section, the imposition of tax on motor fuel for the illegal use of that fuel shall not be considered motor fuel subject to the tax under Chapter 5735. of the Revised Code.

(C) The Tax Commissioner may promulgate rules to administer this section, including prescribing the method to determine which fuel is intended to be used as motor fuel.

Between July 1, 2005, and March 1, 2007, the Tax Commissioner shall accept recommendations and comments on the taxation of receipts from the sale or other transfer of motor fuel under Chapter 5751. of the Revised Code, including from persons required to report and pay the tax under Chapter 5735. of the Revised Code, and shall prepare a report summarizing those recommendations and comments and presenting any recommendations of the Tax Commissioner. The Tax Commissioner and shall submit the report to the President of the Senate, the Speaker of the House of Representatives, and the leader of the minority caucus in each house on or before March 1, 2007.

The provisions of § 557.09 of 151 v H 66 read as follows:

SECTION 557.09. (A) This section applies only to the semiannual period from July 1, 2005, to December 31, 2005.

Notwithstanding any provision of Chapter 5751. of the Revised Code as enacted by this act, for purposes of making the first payment of the tax imposed under that chapter, a tax return for both calendar year and calendar quarter taxpayers for that semiannual period shall be filed not later than February 10, 2006. The tax imposed by this section is a semiannual privilege tax measured for the semiannual period commencing July 1, 2005, that is the six-month tax period during which the tax is measured on receipts during that period. The semiannual tax payment for all taxpayers for that semiannual period shall be seventy-five dollars for the first five hundred thousand dollars in taxable gross receipts during that semiannual period. In addition, a tax is imposed on all taxable gross receipts for that semiannual period in excess of five hundred thousand dollars. Such tax shall equal the product of six-tenths of one mill per dollar (the result of rounding twenty-three per cent of two and six-tenths mills) times the remaining amount of taxable gross receipts after subtracting five hundred thousand dollars in taxable gross receipts.

(B) Only persons excluded pursuant to divisions (E)(2) to (10) of *section 5751.01 of the Revised Code*, as enacted by this act, and persons with less than one hundred fifty thousand dollars in taxable gross receipts during calendar year 2005 are not subject to this section.

(C) The tax commissioner shall take the necessary steps to implement this section and use money in the commercial tax administrative fund to promote awareness of the tax imposed under this section and under Chapter 5751. of the Revised Code as enacted by this act by means of advertising and other reasonable means.

The provisions of § 557.09.09 of 151 v H 66 read as follows:

SECTION 557.09.09. Notwithstanding any provision of Chapter 5751. of the Revised Code as enacted by this act, for purposes of Chapter 5751. of the Revised Code, "gross receipts" excludes amounts received from the sale of tangible personal property that is delivered into or shipped from a qualified foreign trade zone area that includes a qualified intermodal facility.

As used in this section:

(A) "Qualified foreign trade zone area" means a warehouse or other place of delivery or shipment that is:

(1) Located within one mile of the nearest boundary of an international airport; and

(2) Located, in whole or in part, within a foreign trade zone as defined in division (A) (2) of *section 5709.44 of the Revised Code.*

(B) "Qualified intermodal facility" means a transshipment station that is capable of receiving and shipping freight through rail transportation, highway transportation, and air transportation. A transshipment station is "capable of receiving and shipping freight" after the commencement of the construction of each of the rail, highway, and air transportation components of the facility.

Not analogous to former RC § 5751.01 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 699, effective March 29, 2007, added the last three sentences of (F)(2)(c); and made minor stylistic changes.

151 v H 530, effective March 30, 2006, except the amendment adding (F)(2)(z), effective January 1, 2007, added (E)(11); added the language beginning "and reimbursements" to the end of (F)(2)(m); added the language beginning "or other taxes" to the end of (F)(2)(p); inserted (F)(2)(z) and redesignated former (F)(2)(z) as (aa); added the language beginning "to the extent" to the second paragraph of (F)(4); in (F)(4)(C), deleted "from receipts upon which the tax imposed by this chapter was paid in a prior quarterly tax payment period" from the end of the first sentence; in (I)(3), deleted "in this state" following "gross receipts"; in (I)(4), substituted "gross receipts" for "sales"; and corrected internal references and made minor stylistic changes.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 12, 2008 ***
*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***
*** OPINIONS OF ATTORNEY GENERAL CURRENT THROUGH MARCH 19, 2008 ***

TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.011 (2008)

§ 5751.011. Election to be consolidated elected taxpayer

(A) A group of two or more persons may elect to be a consolidated elected taxpayer for the purposes of this chapter if the group satisfies all of the following requirements:

(1) The group elects to include all persons, including persons enumerated in divisions (E)(2) to (10) of *section 5751.01 of the Revised Code*, having at least eighty per cent, or having at least fifty per cent, of the value of their ownership interests owned or controlled, directly or constructively through related interests, by common owners during all or any portion of the tax period, together with the common owners. At the election of the group, all entities that are not incorporated or formed under the laws of a state or of the United States and that meet the elected ownership test shall either be included in the group or all shall be excluded from the group. The group shall notify the tax commissioner of the foregoing elections before the due date of the return in which the election is to become effective. If fifty per cent of the value of a person's ownership interests is owned or controlled by each of two consolidated elected taxpayer groups formed under the fifty per cent ownership or control test, that person is a member of each group for the purposes of this section, and each group shall include in the group's taxable gross receipts fifty per cent of that person's taxable gross receipts. Otherwise, all of that person's taxable gross receipts shall be included in the taxable gross receipts of the consolidated elected taxpayer group of which the person is a member. In no event shall the ownership or control of fifty per cent of the value of a person's ownership interests by two otherwise unrelated groups form the basis for consolidating the groups into a single consolidated elected taxpayer group or permit any exclusion under division (C) of this section of taxable gross receipts between members of the two groups. Division (A)(3) of this section applies with respect to the elections described in this division.

(2) The group makes the election to be treated as a consolidated elected taxpayer in the manner prescribed under division (D) of this section.

(3) Subject to review and audit by the tax commissioner, the group agrees that all of the following apply:

(a) The group shall file reports as a single taxpayer for at least the next eight calendar quarters following the election so long as at least two or more of the members of the group meet the requirements of division (A)(1) of this section.

(b) Before the expiration of the eighth such calendar quarter, the group shall notify the commissioner if it elects to cancel its designation as a consolidated elected taxpayer. If the group does not so notify the tax commissioner, the election remains in effect for another eight calendar quarters.

(c) If, at any time during any of those eight calendar quarters following the election, a former member of the group no longer meets the requirements under division (A)(1) of this section, that member shall report and pay the tax imposed under this chapter separately, as a member of a combined taxpayer, or, if the former member satisfies such requirements with respect to another consolidated elected group, as a member of that consolidated elected group.

(d) The group agrees to the application of division (B) of this section.

(B) A group of persons making the election under this section shall report and pay tax on all of the group's taxable gross receipts even if substantial nexus with this state does not exist for one or more persons in the group.

(C) (1) (a) Members of a consolidated elected taxpayer group shall exclude gross receipts among persons included in the consolidated elected taxpayer group.

(b) Subject to divisions (C)(1)(c) and (C)(2) of this section, nothing in this section shall have the effect of requiring a consolidated elected taxpayer group to include gross receipts received by a person enumerated in divisions (E)(2) to (10) of *section 5751.01 of the Revised Code* if that person is a member of the group pursuant to the elections made by the group under division (A)(1) of this section.

(c) (i) As used in division (C)(1)(c) of this section, "dealer transfer" means a transfer of property that satisfies both of the following: (I) the property is directly transferred by any means from one member of the group to another member of the group that is a dealer in intangibles but is not a qualifying dealer as defined in *section 5725.24 of the Revised Code*; and (II) the property is subsequently delivered by the dealer in intangibles to a person that is not a member of the group.

(ii) In the event of a dealer transfer, a consolidated elected taxpayer group shall not exclude, under division (C) of this section, gross receipts from the transfer described in division (C)(1)(c)(i)(I) of this section.

(2) Gross receipts related to the sale or transmission of electricity through the use of an intermediary regional transmission organization approved by the federal energy regulatory commission shall be excluded from taxable gross receipts under division (C)(1) of this section if all other requirements of that division are met, even if the receipts are from and to the same member of the group.

(D) To make the election to be a consolidated elected taxpayer, a group of persons shall notify the tax commissioner of the election in the manner prescribed by the commissioner and pay the commissioner a registration fee equal to the lesser of two hundred dollars or twenty dollars for each person in the group. No additional fee shall be imposed for the addition of new members to the group once the group has remitted a fee in the amount of two hundred dollars. The election shall be made and the fee paid before the later of the beginning of the first calendar quarter to which the election applies or November 15, 2005. The fee shall be collected and used in the same manner as provided in *section 5751.04 of the Revised Code*.

The election shall be made on a form prescribed by the tax commissioner for that purpose and shall be signed by one or more individuals with authority, separately or together, to make a binding election on behalf of all persons in the group.

Any person acquired or formed after the filing of the registration shall be included in the group if the person meets the requirements of division (A)(1) of this section, and the group shall notify the tax commissioner of any additions to the group with the next tax return it files with the commissioner.

(E) Each member of a consolidated elected taxpayer is jointly and severally liable for the tax imposed by this chapter and any penalties or interest thereon. The tax commissioner may require one person in the group to be the taxpayer for purposes of registration and remittance of the tax, but all members of the group are subject to assessment under *section 5751.09 of the Revised Code*.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06; 151 v H 699, § 101.01, eff. 3-29-07.

NOTES:

Section Notes

The effective date is set by § 612.03 of 151 v H 699.

The effective date is set by § 818.03 of 151 v H 530.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 699, effective March 29, 2007, rewrote (C)(1).

151 v H 530, effective March 30, 2006, rewrote the section.

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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.012 (2008)

§ 5751.012. Combined taxpayer group

(A) All persons, other than persons enumerated in divisions (E)(2) to (10) of *section 5751.01 of the Revised Code*, having more than fifty per cent of the value of their ownership interest owned or controlled, directly or constructively through related interests, by common owners during all or any portion of the tax period, together with the common owners, shall be members of a combined taxpayer if those persons are not members of a consolidated elected taxpayer pursuant to an election under *section 5751.011 [5751.01.1] of the Revised Code.*

(B) A combined taxpayer shall register, file returns, and pay taxes under this chapter as a single taxpayer.

(C) A combined taxpayer shall neither exclude taxable gross receipts between its members nor from others that are not members.

(D) A combined taxpayer shall pay to the tax commissioner a registration fee equal to the lesser of two hundred dollars or twenty dollars for each person in the group. No additional fee shall be imposed for the addition of new members to the group once the group has remitted a fee in the amount of two hundred dollars. The fee shall be timely paid before the later of the beginning of the first calendar quarter or November 15, 2005. The fee shall be collected and used in the same manner as provided in *section 5751.04 of the Revised Code.*

Any person acquired or formed after the filing of the registration shall be included in the group if the person meets the requirements of division (A) of this section, and the group must notify the tax commissioner of any additions with the next quarterly tax return it files with the commissioner.

(E) Each member of a combined taxpayer is jointly and severally liable for the tax imposed by this chapter and any penalties or interest thereon. The tax commissioner may require one person in the group to be the taxpayer for purposes of registration and remittance of the tax, but all members of the group are subject to assessment under *section 5751.09 of the Revised Code.*

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.013 (2008)

§ 5751.013. Property transferred into Ohio within one year after receipt out of Ohio

(A) Except as provided in division (B) of this section:

(1) A person shall include as taxable gross receipts the value of property the person transfers into this state for the person's own use within one year after the person receives the property outside this state; and

(2) In the case of an elected consolidated taxpayer or a combined taxpayer, the taxpayer shall include as taxable gross receipts the value of property that any of the taxpayer's members transferred into this state for the use of any of the taxpayer's members within one year after the taxpayer receives the property outside this state.

(B) Property brought into this state within one year after it is received outside this state by a person or group described in division (A)(1) or (2) of this section shall not be included as taxable gross receipts as required under those divisions if the tax commissioner ascertains that the property's receipt outside this state by the person or group followed by its transfer into this state within one year was not intended in whole or in part to avoid in whole or in part the tax imposed under this chapter.

(C) The tax commissioner may adopt rules necessary to administer this section.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.02 (2008)

§ 5751.02. Commercial activity tax levied on persons with taxable gross receipts; restrictions on billing or invoicing tax to another person

(A) For the purpose of funding the needs of this state and its local governments beginning with the tax period that commences July 1, 2005, and continuing for every tax period thereafter, there is hereby levied a commercial activity tax on each person with taxable gross receipts for the privilege of doing business in this state. For the purposes of this chapter, "doing business" means engaging in any activity, whether legal or illegal, that is conducted for, or results in, gain, profit, or income, at any time during the calendar year. Persons on which the commercial activity tax is levied include, but are not limited to, persons with substantial nexus with this state. The tax imposed under this section is not a transactional tax and is not subject to Public Law No. 86-272, *73 Stat. 555.* The tax imposed under this section is in addition to any other taxes or fees imposed under the Revised Code. The tax levied under this section is imposed on the person receiving the gross receipts and is not a tax imposed directly on a purchaser. The tax imposed by this section is an annual privilege tax for the calendar year that, in the case of calendar year taxpayers, is the annual tax period and, in the case of calendar quarter taxpayers, contains all quarterly tax periods in the calendar year. A taxpayer is subject to the annual privilege tax for doing business during any portion of such calendar year.

(B) The tax imposed by this section is a tax on the taxpayer and shall not be billed or invoiced to another person. Even if the tax or any portion thereof is billed or invoiced and separately stated, such amounts remain part of the price for purposes of the sales and use taxes levied under Chapters 5739. and 5741. of the Revised Code. Nothing in division (B) of this section prohibits a person from including in the price charged for a good or service an amount sufficient to recover the tax imposed by this section.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

See provisions of § 557.09 of 151 v H 66 following *RC § 5751.01.*

Not analogous to former RC § 5751.02 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

The enactment of (B) by 151 v H 66 was disapproved in part by the Governor.

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*** CURRENT THROUGH LEGISLATION PASSED BY THE 127TH OHIO GENERAL ASSEMBLY AND FILED WITH THE SECRETARY OF STATE THROUGH MARCH 12, 2008 ***
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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.03 (2008)

§ 5751.03. Computation of tax; credit if funds transferred to commercial activity tax refund fund

(A) Except as provided in divisions (B) and (D) of this section and in *sections 5751.031 [5751.03.1]* and *5751.032 [5751.03.2] of the Revised Code*, the tax levied under this section for each tax period shall be the product of two and six-tenths mills per dollar times the remainder of the taxpayer's taxable gross receipts for the tax period after subtracting the exclusion amount provided for in division (C) of this section.

(B) Notwithstanding division (C) of this section, the tax on the first one million dollars in taxable gross receipts each calendar year shall be one hundred fifty dollars. For calendar year 2006, the tax imposed under this division shall be paid not later than May 10, 2006, by both calendar year taxpayers and calendar quarter taxpayers. For calendar year 2007 and thereafter, the tax imposed under this division shall be paid with the fourth-quarter tax return or annual tax return for the prior calendar year by both calendar year taxpayers and calendar quarter taxpayers.

(C) (1) Each calendar quarter taxpayer may exclude the first two hundred fifty thousand dollars of taxable gross receipts for a calendar quarter and may carry forward and apply any unused exclusion amount to the three subsequent calendar quarters. Each calendar year taxpayer may exclude the first one million dollars of taxable gross receipts for a calendar year.

(2) A taxpayer switching from a calendar year tax period to a calendar quarter tax period may, for the first quarter of the change, apply the prior calendar quarter exclusion amounts to the first calendar quarter return the taxpayer files that calendar year. The tax rate shall be based on the rate imposed that calendar quarter when the taxpayer switches from a calendar year to a calendar quarter tax period.

(D) There is hereby allowed a credit against the tax imposed under this chapter for each of the following calendar years if a transfer was made in the preceding calendar year from the general revenue fund to the commercial activity tax refund fund under division (D) of *section 5751.032 [5751.03.2] of the Revised Code*: calendar years 2008, 2010, and 2012. The credit is allowed for taxpayers that paid in full the tax imposed under this chapter for the calendar year in which the transfer was made. The amount of a taxpayer's credit equals the amount computed under division (D) of *section 5751.032 [5751.03.2] of the Revised Code.*

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

Not analogous to former RC § 5751.03 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.031 (2008)

§ 5751.031. Computation of tax imposed per calendar quarter

This section applies only to calendar quarter taxpayers. The tax imposed per calendar quarter under division (A) of *section 5751.03 of the Revised Code* shall be computed as follows:

(A) From January 1, 2006, to March 31, 2006, by multiplying the tax otherwise due under that division by twenty-three per cent;

(B) From April 1, 2006, to March 31, 2007, by multiplying the tax otherwise due under that division by forty per cent;

(C) From April 1, 2007, to March 31, 2008, by multiplying the tax otherwise due under that division by sixty per cent;

(D) From April 1, 2008, to March 31, 2009, by multiplying the tax otherwise due under that division by eighty per cent;

(E) After March 31, 2009, one hundred per cent of the tax due under that division.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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TITLE 57. TAXATION
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ORC Ann. 5751.032 (2008)

§ 5751.032. Computation of tax collected during test period; rate adjustments; biennial legislative review

(A) As used in this section:

(1) "CAT" refers to the tax levied by this chapter.

(2) "CAT collected" means, with regard to a CAT test period, the net amount of CAT, exclusive of registration fees, received in the period after subtracting any CAT refunded in the period.

(3) "First CAT test period" means the twenty-four month period beginning July 1, 2005, and ending June 30, 2007.

(4) "Second CAT test period" means the twelve-month period beginning July 1, 2008, and ending June 30, 2009.

(5) "Third CAT test period" means the twelve-month period beginning July 1, 2010, and ending June 30, 2011.

(B) Not later than the last day of September immediately following the end of each CAT test period, the tax commissioner shall compute the amount of CAT collected during that test period. If the amount is greater than one hundred ten per cent of the prescribed CAT collections for that period, the commissioner shall proceed as provided in divisions (C) and (D) of this section. For the purposes of division (B) of this section, the prescribed CAT collections for the CAT test periods are as follows:

(1) For the first CAT test period, eight hundred fifteen million dollars;

(2) For the second CAT test period, one billion one hundred ninety million dollars less any amount credited to the commercial activity tax refund fund with regard to the first CAT test period;

(3) For the third CAT test period, one billion six hundred ten million dollars less any amount credited to the commercial activity tax refund fund with regard to the second CAT test period.

(C) (1) If the amount of CAT collected during a CAT test period exceeds one hundred ten per cent of the prescribed CAT collections for that test period, the tax commissioner shall determine a new tax rate equal to the tax rate that would have yielded the prescribed CAT collections during that test period less one-half of the amount of the excess that was certified to the director of budget and management for the test period under division (D) of this section. The tax rate shall be the rate that would have to be imposed under division (A) of *section 5751.03 of the Revised Code* before any applicable phase-in percentages under *section 5751.031 [5751.03.1] of the Revised Code* or otherwise provided by law to yield the prescribed CAT collection after applying any applicable phase-in percentages.

(2) A new tax rate computed under division (C)(1) of this section shall be expressed as a number of mills per dollar, rounded to the nearest one-hundredth of one mill. The rate shall be rounded upward by one-hundredth of one mill only if the next decimal digit is five or more.

(3) Not later than the last day of September following the end of the CAT test period on the basis of which a new tax rate is computed, the tax commissioner shall certify the new tax rate to the governor, the president of the senate, the speaker of the house of representatives, and all other members of the general assembly. The commissioner shall publish the new tax rate by journal entry and provide notice of the new tax rate to taxpayers. The new tax rate shall be the rate imposed under division (A) of *section 5751.03 of the Revised Code* beginning with the ensuing calendar year, and is subject to any applicable phase-in percentages provided for under *section 5751.031 [5751.03.1] of the Revised Code.*

(D) If the amount of CAT collected during a CAT test period exceeds one hundred ten per cent of the prescribed CAT collections for that test period, the tax commissioner shall certify the excess amount to the director of budget and management not later than the last day of September immediately following the end of that test period. The director shall forthwith transfer from the general revenue fund one-half of the amount of the excess so certified to the commercial activity tax refund fund, which is hereby created in the state treasury, and the remaining one-half of the amount of the excess to the budget stabilization fund. All money credited to the commercial activity tax refund fund shall be applied to reimburse the general revenue fund, school district tangible property tax replacement fund, and local government tangible property tax replacement fund for the diminution in revenue caused by the credit provided under division (D) of *section 5751.03 of the Revised Code*. On or before the last day of May, August, and October of the calendar year that begins after the end of the test period, and on or before the last day of February of the following calendar year, the director of budget and management shall transfer one-fourth of the amount that had been transferred to the commercial activity tax refund fund to each of those funds in the proportions specified under division (B) of *section 5751.21 of the Revised Code.*

In the calendar year that begins immediately after the year in which a transfer is made to the commercial activity tax refund fund, the tax commissioner shall compute the amount to be credited, under division (D) of *section 5751.03 of the Revised Code*, to each taxpayer that paid in full the tax imposed under this chapter for the calendar year in which the transfer was made. The credit allowed to each such taxpayer shall equal the amount transferred to the commercial activity tax refund fund multiplied by a fraction, the numerator of which is the amount of tax paid by that taxpayer for that calendar year and the denominator of which is the total of the taxes paid by all such taxpayers for which the credit is allowed. The credit applies only to the calendar year that begins immediately after the year in which a transfer is made to the commercial activity tax refund fund under this division."

(E) It is the intent of the General Assembly to conduct a review of the prescribed CAT collections and rate adjustments provided for under divisions (A) to (D) of this section every two years in conjunction with its biennial budget deliberations, and to establish lower prescribed CAT collections or reduce the rate of tax levied under this chapter on the basis of the following three factors:

(1) The revenue yield of the tax;

(2) The condition of the Ohio economy;

(3) Savings realized by ongoing reform to medicaid and other policy initiatives.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06; 152 v H 67, § 101.01, eff. 6-30-07.

NOTES:

Section Notes

The effective date is set by § 609.10 of 152 v H 67.

The effective date is set by § 818.03 of 151 v H 530.

See provisions of § 831.06 of 151 v H 530 following *RC § 5751.01.*

151 v H 530, effective March 30, 2006, made minor stylistic changes.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

152 v H 67, effective June 30, 2007, in the introductory language of (B), deleted "less than ninety per cent or" preceding "greater than"; in (B)(2) and (3), substituted "refund" for "reduction"; deleted (C)(1), pertaining to a tax rate established from a CAT test period that is less than ninety per cent of the prescribed CAT collections for that test period; and corrected internal references and made minor stylistic changes.

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TITLE 57. TAXATION
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ORC Ann. 5751.033 (2008)

§ 5751.033. Situsing of gross receipts to Ohio

For the purposes of this chapter, gross receipts shall be sitused to this state as follows:

(A) Gross rents and royalties from real property located in this state shall be sitused to this state.

(B) Gross rents and royalties from tangible personal property shall be sitused to this state to the extent the tangible personal property is located or used in this state.

(C) Gross receipts from the sale of electricity and electric transmission and distribution services shall be sitused to this state in the manner provided under *section 5733.059 [5733.05.9] of the Revised Code.*

(D) Gross receipts from the sale of real property located in this state shall be sitused to this state.

(E) Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by common carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

(F) Gross receipts from the sale, exchange, disposition, or other grant of the right to use trademarks, trade names, patents, copyrights, and similar intellectual property shall be sitused to this state to the extent that the receipts are based on the amount of use of the property in this state. If the receipts are not based on the amount of use of the property, but rather on the right to use the property, and the payor has the right to use the property in this state, then the receipts from the sale, exchange, disposition, or other grant of the right to use such property shall be sitused to this state to the extent the receipts are based on the right to use the property in this state.

(G) Gross receipts from the sale of transportation services by a common or contract carrier shall be sitused to this state in proportion to the mileage traveled by the carrier during the tax period on roadways, waterways, airways, and railways in this state to the mileage traveled by the carrier during the tax period on roadways, waterways, airways, and railways everywhere. With prior written approval of the tax commissioner, a common or contract carrier may use an alternative situsing procedure for transportation services.

(H) Gross receipts from dividends, interest, and other sources of income from financial instruments described in divisions (F)(4), (5), (6), (7), (8), (9), (10), (11), and (13) of *section 5733.056 of the Revised Code* shall be sitused to this state in accordance with the situsing provisions set forth in those divisions. When applying the provisions of divisions (F)(6), (8), and (13) of *section 5733.056 [5733.05.6] of the Revised Code*, "gross receipts" shall be substituted for "net gains" wherever "net gains" appears in those divisions. Nothing in this division limits or modifies the exclusions enumerated in divisions (E) and (F)(2) of *section 5751.01 of the Revised Code*. The tax commissioner may promulgate rules to further specify the manner in which to situs gross receipts subject to this division.

(I) Gross receipts from the sale of all other services, and all other gross receipts not otherwise sitused under this section, shall be sitused to this state in the proportion that the purchaser's benefit in this state with respect to what was purchased bears to the purchaser's benefit everywhere with respect to what was purchased. The physical location where the purchaser ultimately uses or receives the benefit of what was purchased shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere. If a taxpayer's records do not allow the taxpayer to determine that location, the taxpayer may use an alternative method to situs gross receipts under this division if the alternative method is reasonable, is consistently and uniformly applied, and is supported by the taxpayer's records as the records exist when the service is provided or within a reasonable period of time thereafter.

(J) If the situsing provisions of divisions (A) to (H) of this section do not fairly represent the extent of a person's activity in this state, the person may request, or the tax commissioner may require or permit, an alternative method. Such request by a person must be made within the applicable statute of limitations set forth in this chapter.

(K) The tax commissioner may adopt rules to provide additional guidance to the application of this section, and provide alternative methods of situsing gross receipts that apply to all persons, or subset of persons, that are engaged in similar business or trade activities.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 699, § 101.01, eff. 3-29-07.

NOTES:

Section Notes

The effective date is set by § 612.03 of 151 v H 699.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 699, effective March 29, 2007, added the last sentence to (I); and made minor stylistic changes.

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TITLE 57. TAXATION
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ORC Ann. 5751.04 (2008)

§ 5751.04. Registration with tax commissioner; fee

(A) Not later than the later of November 15, 2005, or thirty days after a person first has more than one hundred fifty thousand dollars in taxable gross receipts in a calendar year, each person subject to this chapter shall register with the tax commissioner on the form prescribed by the commissioner. The form shall include the following:

(1) The person's name;

(2) If applicable, the name of the state or country under the laws of which the person is incorporated;

(3) If applicable, the location of a person's principal office and the name and address of the officer or agent of the corporation in charge of the business;

(4) If applicable, the names of the person's president, secretary, treasurer, and statutory agent designated pursuant to *section 1703.041 [1703.04.1] of the Revised Code*, with the post office address of each;

(5) The kind of business in which the person is engaged, including applicable business or industry codes;

(6) If required by the tax commissioner, the date of the beginning of the person's annual accounting period that includes the first day of January of the taxable calendar year;

(7) If the person is not a corporation or a sole proprietor, the names of the person's owners and officers, if required by the tax commissioner;

(8) The person's federal employer identification number or numbers or, if those are not applicable, the person's social security number or equivalent;

(9) All other information that the commissioner requires to administer and enforce this chapter.

(B) Except as otherwise provided in this division, each person registering with the tax commissioner as required by division (A) of this section shall pay a registration fee. The fee shall be in the amount of fifteen dollars if a person registers electronically and twenty dollars if a person does not register electronically. The registration fee shall be paid in the manner prescribed by the tax commissioner at the same time the registration is due if a person is subject to the tax imposed under this chapter before January 1, 2006. If a person first becomes subject to the tax after that date, the registration fee is payable with the first tax period return the person is required to file as prescribed by *section 5751.051 [5751.05.1] of the Revised Code*. If a registration fee is not paid when due, an additional fee is imposed in the amount of one hundred dollars per month or part thereof the fee is outstanding, not to exceed one thousand dollars. The tax commissioner may abate the additional fee. The fee imposed under this division may be assessed in the same manner as the

tax imposed under this chapter. Proceeds from the fee shall be credited to the commercial activity tax administrative fund, which is hereby created in the state treasury for the commissioner to use in implementing and administering the tax imposed under this chapter.

No registration fee is payable by a person for a calendar year if the person first begins business operations in this state after the thirtieth day of November of that calendar year or if the person's taxable gross receipts for the calendar year exceed one hundred fifty thousand dollars but do not exceed one hundred fifty thousand dollars as of the first day of December of the calendar year.

Registration fees paid under this section, excluding any additional fee imposed for late payment of the registration fee, shall be credited against the first payment of tax payable under *section 5751.03 of the Revised Code* after the registration fee is paid.

(C) If a person that has registered under this section is no longer a taxpayer subject to this chapter, including no longer being a taxpayer because of the application of division (E)(1) of *section 5751.01 of the Revised Code*, the person shall notify the commissioner that the person's registration should be cancelled.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06.

NOTES:

Section Notes

The effective date is set by § 818.03 of 151 v H 530.

Not analogous to former RC § 5751.04 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 530, effective March 30, 2006, in (A)(3), deleted "and, in the case of a foreign corporation, the location of its principal place of business in this state" preceding "and the name" and "in this state" from the end; added "if required by the tax commissioner" to the beginning and end of (A)(6) and (7), respectively; and made minor stylistic changes.

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ORC Ann. 5751.05 (2008)

§ 5751.05. Election to be calendar year taxpayer; nonelecting taxpayer is calendar quarter taxpayer; approval of deviation

(A) If a person subject to this chapter anticipates that the person's taxable gross receipts will be one million dollars or less in calendar year 2006, the person may elect to be a calendar year taxpayer. If a person is not required to be registered under this section for calendar year 2006 and anticipates that the person's taxable gross receipts will be one million dollars or less in the first calendar year the person is required to register under this section, the person may elect to be a calendar year taxpayer.

(B) Any person that is a calendar year taxpayer pursuant to an election under division (A) of this section shall become a calendar quarter taxpayer in the subsequent calendar year if the person's taxable gross receipts for the prior calendar year are more than one million dollars, and shall remain a calendar quarter taxpayer until the person notifies the tax commissioner, and receives approval in writing from the tax commissioner, to switch back to being a calendar year taxpayer. Nothing in this division prohibits a person that has elected to be a calendar year taxpayer from notifying the tax commissioner, using the procedures prescribed by the commissioner, that it is switching back to being a calendar quarter taxpayer.

(C) Any taxpayer that is not a calendar year taxpayer pursuant to this section is a calendar quarter taxpayer. The tax commissioner may grant written approval for a calendar quarter taxpayer to use an alternative reporting schedule or estimate the amount of tax due for a calendar quarter if the taxpayer demonstrates to the commissioner the need for such a deviation. The commissioner may adopt a rule to apply division (C) of this section to a group of taxpayers without the taxpayers having to receive written approval from the commissioner.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06.

NOTES:

Section Notes

The effective date is set by § 818.03 of 151 v H 530.

Not analogous to former RC § 5751.05 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 530, effective March 30, 2006, made minor stylistic changes.

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ORC Ann. 5751.051 (2008)

§ 5751.051. Filing of quarterly or annual tax return; minimum tax paid by person first becoming subject to tax

(A) (1) Not later than forty days after the end of each calendar quarter, every taxpayer other than a calendar year taxpayer shall file with the tax commissioner a tax return in such form as the commissioner prescribes. The return shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar quarter and shall indicate the amount of tax due under *section 5751.03 of the Revised Code* for the calendar quarter.

(2) (a) Subject to division (C) of *section 5751.05 of the Revised Code*, a calendar quarter taxpayer shall report the taxable gross receipts for that calendar quarter.

(b) With respect to taxable gross receipts incorrectly reported in a calendar quarter that has a lower tax rate, the tax shall be computed at the tax rate in effect for the quarterly return in which such receipts should have been reported. Nothing in division (A)(2)(b) of this section prohibits a taxpayer from filing an application for refund under *section 5751.08 of the Revised Code* with regard to the incorrect reporting of taxable gross receipts discovered after filing the annual return described in division (A)(3) of this section.

A tax return shall not be deemed to be an incorrect reporting of taxable gross receipts for the purposes of division (A)(2)(b) of this section if the return reflects between ninety-five and one hundred five per cent of the actual taxable gross receipts for the calendar quarter.

(3) The tax return filed for the fourth calendar quarter of a calendar year is the annual return for the privilege tax imposed by this chapter. Such return shall report any additional taxable gross receipts not previously reported in the calendar year and shall adjust for any over-reported taxable gross receipts in the calendar year. If the taxpayer ceases to be a taxpayer before the end of the calendar year, the last return the taxpayer is required to file shall be the annual return for the taxpayer and the taxpayer shall report any additional taxable gross receipts not previously reported in the calendar year and shall adjust for any over-reported taxable gross receipts in the calendar year.

(4) Because the tax imposed by this chapter is a privilege tax, the tax rate with respect to taxable gross receipts for a calendar quarter is not fixed until the end of the measurement period for each calendar quarter. Subject to division (A)(2)(b) of this section, the total amount of taxable gross receipts reported for a given calendar quarter shall be subject to the tax rate in effect in that quarter.

(5) Not later than forty days after the end of each calendar year, every calendar year taxpayer shall file with the tax commissioner a tax return in such form as the commissioner prescribes. The return shall include, but is not limited to, the amount of the taxpayer's taxable gross receipts for the calendar year and shall indicate the amount of tax due under *section 5751.03 of the Revised Code* for the calendar year.

(B) (1) A person that first becomes subject to the tax imposed under this chapter shall pay the minimum tax imposed under division (B) of *section 5751.03 of the Revised Code* along with the registration fee imposed under this section, if applicable, on or before the day the return is required to be filed for that quarter under division (A)(1) of this section, regardless of whether the person elects to be a calendar year taxpayer under *section 5751.05 of the Revised Code*.

(2) The amount of the minimum tax for a person subject to division (B)(1) of this section shall be reduced to seventy-five dollars if the registration is timely filed after the first day of May and before the first day of January of the following calendar year.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06.

NOTES:

Section Notes

The effective date is set by § 818.03 of 151 v H 530.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 530, effective March 30, 2006, rewrote (B).

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ORC Ann. 5751.06 (2008)

§ 5751.06. Penalties and interest

(A) Any taxpayer that fails to file a return or pay the full amount of the tax due within the period prescribed therefor under this chapter shall pay a penalty in an amount not exceeding the greater of fifty dollars or ten per cent of the tax required to be paid for the tax period.

(B) (1) If any additional tax is found to be due, the tax commissioner may impose an additional penalty of up to fifteen per cent on the additional tax found to be due.

(2) Any delinquent payments of the tax made after a taxpayer is notified of an audit or a tax discrepancy by the commissioner is subject to the penalty imposed by division (B) of this section. If an assessment is issued under *section 5751.10 of the Revised Code* in connection with such delinquent payments, the payments shall be credited to the assessment.

(C) After calendar year 2008, the tax commissioner may impose an additional penalty against a taxpayer that fails to switch to being a calendar quarter taxpayer at the time it had over two million in taxable gross receipts in the calendar year, as required under *section 5751.04 of the Revised Code*. The penalty may be imposed in an amount not to exceed ten per cent of the tax due above two million dollars in taxable gross receipts for the calendar year. Any penalty imposed under this division is in addition to any other penalties imposed under this section.

(D) If the tax commissioner notifies a person required to register under *section 5751.05 of the Revised Code* of such requirement and of the requirement to remit the tax due under this chapter, and the person fails to so register and remit the tax within sixty days after such notice, the tax commissioner may impose an additional penalty of up to thirty-five per cent of the tax due. The penalty imposed under this division is in addition to any other penalties imposed under this section.

(E) The tax commissioner may collect any penalty or interest imposed by this section in the same manner as the tax imposed under this chapter. Penalties and interest so collected shall be considered as revenue arising from the tax imposed under this chapter.

(F) The tax commissioner may abate all or a portion of any penalties imposed under this section and may adopt rules governing such abatements.

(G) If any tax due is not timely paid in accordance with this chapter, the taxpayer shall pay interest, calculated at the rate per annum prescribed by *section 5703.47 of the Revised Code*, from the date the tax payment was due to the date of payment or to the date an assessment was issued, whichever occurs first.

(H) The tax commissioner may impose a penalty of up to ten per cent for any additional tax that is due under division (A)(2)(b) of *section 5751.051 [5751.05.1] of the Revised Code* from a taxpayer incorrectly reporting its taxable gross receipts.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

Not analogous to former RC § 5751.06 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

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TITLE 57. TAXATION
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ORC Ann. 5751.07 (2008)

§ 5751.07. Electronic filing and payment

(A) Any person required to file returns for a calendar quarter shall remit each tax payment, and, if required by the tax commissioner, file the tax return or the annual report, electronically. The commissioner may require taxpayers to use the Ohio business gateway as defined in *section 718.051 [718.05.1] of the Revised Code* to file returns and remit the tax, or may provide another means for taxpayers to file and remit the tax electronically.

(B) A person required by this section to remit taxes or file returns electronically may apply to the tax commissioner, on the form prescribed by the commissioner, to be excused from that requirement. The commissioner may excuse a person from the requirements of this division for good cause.

(C) (1) If a person required to remit taxes or file a return electronically under this section fails to do so, the commissioner may impose a penalty not to exceed the following:

(a) For either of the first two calendar quarters the person so fails, five per cent of the amount of the payment that was required to be remitted;

(b) For the third and any subsequent calendar quarters the person so fails, ten per cent of the amount of the payment that was required to be remitted.

(2) The penalty imposed under division (C)(1) of this section is in addition to any other penalty imposed under this chapter and shall be considered as revenue arising from the tax imposed under this chapter. A penalty may be collected by assessment in the manner prescribed by *section 5751.09 of the Revised Code*. The tax commissioner may abate all or a portion of such a penalty.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

Not analogous to former RC § 5751.07 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

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ORC Ann. 5751.08 (2008)

§ 5751.08. Refunds

(A) An application for refund to the taxpayer of the amount of taxes imposed under this chapter that are overpaid, paid illegally or erroneously, or paid on any illegal or erroneous assessment shall be filed with the tax commissioner, on the form prescribed by the commissioner, within four years after the date of the illegal or erroneous payment of the tax. The applicant shall provide the amount of the requested refund along with the claimed reasons for, and documentation to support, the issuance of a refund.

(B) On the filing of the refund application, the tax commissioner shall determine the amount of refund to which the applicant is entitled. If the amount is not less than that claimed, the commissioner shall certify the amount to the director of budget and management and treasurer of state for payment from the tax refund fund created under *section 5703.052 [5703.05.2] of the Revised Code.* If the amount is less than that claimed, the commissioner shall proceed in accordance with *section 5703.70 of the Revised Code.*

(C) Interest on a refund applied for under this section, computed at the rate provided for in *section 5703.47 of the Revised Code*, shall be allowed from the later of the date the tax was paid or when the tax payment was due.

(D) A calendar quarter taxpayer with more than one million dollars in taxable gross receipts in a calendar year other than calendar year 2005 and that is not able to exclude one million dollars in taxable gross receipts because of the operation of the taxpayer's business in that calendar year may file for a refund under this section to obtain the full exclusion of one million dollars in taxable gross receipts for that calendar year.

(E) No person with an active registration as a taxpayer under this chapter may claim a refund under this section for the tax imposed under division (B) of *section 5751.03 of the Revised Code* unless the person cancelled the registration before the tenth day of February of the current calendar year pursuant to division (C) of *section 5751.04 of the Revised Code.*

(F) Except as provided in section 5751.091 [5751.09.1] of the Revised Code, the tax commissioner may, with the consent of the taxpayer, provide for the crediting against tax due for a tax year the amount of any refund due the taxpayer under this chapter for a preceding tax year.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

Not analogous to former RC § 5751.08 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.081 (2008)

§ 5751.081. Debts due Ohio to be offset against refund

As used in this section, "debt to this state" means unpaid taxes due the state, unpaid workers' compensation premiums due under *section 4123.35 of the Revised Code*, unpaid unemployment compensation contributions due under *section 4141.25 of the Revised Code*, unpaid unemployment compensation payment in lieu of contribution under *section 4141.241 [4141.24.1] of the Revised Code*, unpaid fee payable to the state or to the clerk of courts pursuant to *section 4505.06 of the Revised Code*, incorrect medical assistance payments under *section 5111.02 of the Revised Code*, or any unpaid charge, penalty, or interest arising from any of the foregoing.

If a taxpayer entitled to a refund under *section 5751.08 of the Revised Code* owes any debt to this state, the amount refundable may be applied in satisfaction of the debt. If the amount refundable is less than the amount of the debt, it may be applied in partial satisfaction of the debt. If the amount refundable is greater than the amount of the debt, the amount remaining after satisfaction of the debt shall be refunded. This section applies only to debts that have become final. For the purposes of this section, a debt becomes final when, under the applicable law, any time provided for petition for reassessment, request for reconsideration, or other appeal of the legality or validity of the amount giving rise to the debt expires without an appeal having been filed in the manner provided by law.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.09 (2008)

§ 5751.09. Assessments; sampling of gross receipts; secretary of state as statutory agent

(A) The tax commissioner may make an assessment, based on any information in the commissioner's possession, against any person that fails to file a return or pay any tax as required by this chapter. The commissioner shall give the person assessed written notice of the assessment as provided in *section 5703.37 of the Revised Code*. With the notice, the commissioner shall provide instructions on the manner in which to petition for reassessment and request a hearing with respect to the petition.

(B) Unless the person assessed, within sixty days after service of the notice of assessment, files with the tax commissioner, either personally or by certified mail, a written petition signed by the person or the person's authorized agent having knowledge of the facts, the assessment becomes final, and the amount of the assessment is due and payable from the person assessed to the treasurer of state. The petition shall indicate the objections of the person assessed, but additional objections may be raised in writing if received by the commissioner prior to the date shown on the final determination.

If a petition for reassessment has been properly filed, the commissioner shall proceed under *section 5703.60 of the Revised Code*.

(C) (1) After an assessment becomes final, if any portion of the assessment, including accrued interest, remains unpaid, a certified copy of the tax commissioner's entry making the assessment final may be filed in the office of the clerk of the court of common pleas in the county in which the person resides or has its principal place of business in this state, or in the office of the clerk of court of common pleas of Franklin county.

(2) Immediately upon the filing of the entry, the clerk shall enter judgment for the state against the person assessed in the amount shown on the entry. The judgment may be filed by the clerk in a loose-leaf book entitled, "special judgments for the commercial activity tax" and shall have the same effect as other judgments. Execution shall issue upon the judgment at the request of the tax commissioner, and all laws applicable to sales on execution shall apply to sales made under the judgment.

(3) The portion of the assessment not paid within sixty days after the day the assessment was issued shall bear interest at the rate per annum prescribed by *section 5703.47 of the Revised Code* from the day the tax commissioner issues the assessment until it is paid. Interest shall be paid in the same manner as the tax and may be collected by the issuance of an assessment under this section.

(D) If the tax commissioner believes that collection of the tax will be jeopardized unless proceedings to collect or secure collection of the tax are instituted without delay, the commissioner may issue a jeopardy assessment against the

person liable for the tax. Immediately upon the issuance of the jeopardy assessment, the commissioner shall file an entry with the clerk of the court of common pleas in the manner prescribed by division (C) of this section. Notice of the jeopardy assessment shall be served on the person assessed or the person's authorized agent in the manner provided in *section 5703.37 of the Revised Code* within five days of the filing of the entry with the clerk. The total amount assessed is immediately due and payable, unless the person assessed files a petition for reassessment in accordance with division (B) of this section and provides security in a form satisfactory to the commissioner and in an amount sufficient to satisfy the unpaid balance of the assessment. Full or partial payment of the assessment does not prejudice the commissioner's consideration of the petition for reassessment.

(E) The tax commissioner shall immediately forward to the treasurer of state all amounts the commissioner receives under this section, and such amounts shall be considered as revenue arising from the tax imposed under this chapter.

(F) Except as otherwise provided in this division, no assessment shall be made or issued against a taxpayer for the tax imposed under this chapter more than four years after the due date for the filing of the return for the tax period for which the tax was reported, or more than four years after the return for the tax period was filed, whichever is later. Nothing in this division bars an assessment against a taxpayer that fails to file a return required by this chapter or that files a fraudulent return.

(G) If the tax commissioner possesses information that indicates that the amount of tax a taxpayer is required to pay under this chapter exceeds the amount the taxpayer paid, the tax commissioner may audit a sample of the taxpayer's gross receipts over a representative period of time to ascertain the amount of tax due, and may issue an assessment based on the audit. The tax commissioner shall make a good faith effort to reach agreement with the taxpayer in selecting a representative sample. The tax commissioner may apply a sampling method only if the commissioner has prescribed the method by rule.

(H) If the whereabouts of a person subject to this chapter is not known to the tax commissioner, the secretary of state is hereby deemed to be that person's agent for purposes of service of process of notice of any assessment, action, or proceedings instituted in this state against the person under this chapter. Such process or notice shall be served on such person by the commissioner or by one of the commissioner's agents by leaving at the office of the secretary of state, at least fifteen days before the return day of such process or notice, a true and attested copy of the notice, and by sending to such person by ordinary mail, with an endorsement thereon of the service upon the secretary of state, addressed to such person at the person's last known address.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

Not analogous to former RC § 5751.09 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.10 (2008)

§ 5751.10. Winding-up obligations

If any person liable for the tax imposed under this chapter sells the trade or business, disposes in any manner other than in the regular course of business at least seventy-five per cent of assets of the trade or business, or quits the trade or business, any tax owed by such person shall become due and payable immediately, and the person shall pay the tax under this section, including any applicable penalties and interest, within forty-five days after the date of selling or quitting the trade or business. The person's successor shall withhold a sufficient amount of the purchase money to cover the amount due and unpaid until the former owner produces a receipt from the tax commissioner showing that the amounts are paid or a certificate indicating that no taxes are due. If a purchaser fails to withhold purchase money, that person is personally liable up to the purchase money amount, for such amounts that are unpaid during the operation of the business by the former owner.

The tax commissioner may adopt rules regarding the issuance of certificates under this section, including the waiver of the need for a certificate if certain criteria are met.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06.

NOTES:

Section Notes

The effective date is set by § 818.03 of 151 v H 530.

Not analogous to former RC § 5751.10 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 530, effective March 30, 2006, in the first paragraph, substituted "forty-five" for "fifteen".

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ORC Ann. 5751.11 (2008)

§ 5751.11. Quo warranto action to revoke person's privileges or franchise

If any person subject to this chapter fails to report or pay the tax as required under this chapter, or fails to pay any penalty imposed under this chapter within ninety days after the time prescribed for payment of the penalty, the attorney general, on the request of the tax commissioner, shall commence an action in quo warranto in the court of appeals of the county in which the person has its principal place of business to forfeit and annul its privileges or franchise within this state. If the court finds that the person is in default for the amount claimed, it shall render judgment revoking the person's privileges or franchise within this state and shall otherwise proceed as provided in Chapter 2733. of the Revised Code.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

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The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.12 (2008)

§ 5751.12. Recordkeeping requirements; electronic list of registered taxpayers

The tax commissioner may prescribe requirements for the keeping of records and other pertinent documents, the filing of copies of federal income tax returns and determinations, and computations reconciling federal income tax returns with the returns and reports required by *section 5751.05 of the Revised Code*. The commissioner may require any person, by rule or notice served on that person, to keep those records that the commissioner considers necessary to show whether, and the extent to which, a person is subject to this chapter. Those records and other documents shall be open during business hours to the inspection of the commissioner, and shall be preserved for a period of four years unless the commissioner, in writing, consents to their destruction within that period, or by order requires that they be kept longer. If such records are normally kept by the person electronically, the person shall provide such records to the commissioner electronically at the commissioner's request.

Any information required by the tax commissioner under this chapter is confidential as provided for in *section 5703.21 of the Revised Code*. However, the commissioner shall make public an electronic list of all actively registered persons required to remit the tax under this chapter, including legal names, trade names, addresses, and account numbers. In addition, such list shall include all persons that cancelled their registration at any time during the preceding four calendar years, including the date the registration was cancelled.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.20 (2008)

§ 5751.20. Commercial activities tax receipts fund, school district tangible property tax replacement fund, and local government tangible property tax

(A) As used in *sections 5751.20* to *5751.22 of the Revised Code*:

(1) "School district," "joint vocational school district," "local taxing unit," "recognized valuation," "fixed-rate levy," and "fixed-sum levy" have the same meanings as used in *section 5727.84 of the Revised Code.*

(2) "State education aid" for a school district means the sum of state aid amounts computed for the district under division (A) of *section 3317.022 [3317.02.2] of the Revised Code*, including the amounts calculated under *sections 3317.029 [3317.02.9]* and *3317.0217 [3317.02.17] of the Revised Code*; divisions (C)(1), (C)(4), (D), (E), and (F) of section 3317.022 [3317.02.2]; divisions (B), (C), and (D) of section 3317.023 [3317.02.3]; divisions (L) and (N) of section 3317.024 [3317.02.4]; section 3317.0216 [3317.02.16]; and any unit payments for gifted student services paid under *sections 3317.05, 3317.052 [3317.05.2]*, and *3317.053 [3317.05.3] of the Revised Code*; except that, for fiscal years 2008 and 2009, the amount computed for the district under Section 269.20.80 of H.B. 119 of the 127th general assembly and as that section subsequently may be amended shall be substituted for the amount computed under division (D) of *section 3317.022 [3317.02.2] of the Revised Code*, and the amount computed under Section 269.30.80 of H.B. 119 of the 127th general assembly and as that section subsequently may be amended shall be included.

(3) "State education aid" for a joint vocational school district means the sum of the state aid computed for the district under division (N) of *section 3317.024 [3317.02.4]* and *section 3317.16 of the Revised Code*, except that, for fiscal years 2008 and 2009, the amount computed under Section 269.30.80 of H.B. 119 of the 127th general assembly and as that section subsequently may be amended shall be included.

(4) "State education aid offset" means the amount determined for each school district or joint vocational school district under division (A)(1) of *section 5751.21 of the Revised Code.*

(5) "Machinery and equipment property tax value loss" means the amount determined under division (C)(1) of this section.

(6) "Inventory property tax value loss" means the amount determined under division (C)(2) of this section.

(7) "Furniture and fixtures property tax value loss" means the amount determined under division (C)(3) of this section.

(8) "Machinery and equipment fixed-rate levy loss" means the amount determined under division (D)(1) of this section.

(9) "Inventory fixed-rate levy loss" means the amount determined under division (D)(2) of this section.

(10) "Furniture and fixtures fixed-rate levy loss" means the amount determined under division (D)(3) of this section.

(11) "Total fixed-rate levy loss" means the sum of the machinery and equipment fixed-rate levy loss, the inventory fixed-rate levy loss, the furniture and fixtures fixed-rate levy loss, and the telephone company fixed-rate levy loss.

(12) "Fixed-sum levy loss" means the amount determined under division (E) of this section.

(13) "Machinery and equipment" means personal property subject to the assessment rate specified in division (F) of *section 5711.22 of the Revised Code.*

(14) "Inventory" means personal property subject to the assessment rate specified in division (E) of *section 5711.22 of the Revised Code.*

(15) "Furniture and fixtures" means personal property subject to the assessment rate specified in division (G) of *section 5711.22 of the Revised Code.*

(16) "Qualifying levies" are levies in effect for tax year 2004 or applicable to tax year 2005 or approved at an election conducted before September 1, 2005. For the purpose of determining the rate of a qualifying levy authorized by *section 5705.212 [5705.21.2]* or *5705.213 [5705.21.3] of the Revised Code*, the rate shall be the rate that would be in effect for tax year 2010.

(17) "Telephone property" means tangible personal property of a telephone, telegraph, or interexchange telecommunications company subject to an assessment rate specified in *section 5727.111 [5727.11.1] of the Revised Code* in tax year 2004.

(18) "Telephone property tax value loss" means the amount determined under division (C)(4) of this section.

(19) "Telephone property fixed-rate levy loss" means the amount determined under division (D)(4) of this section.

(B) The commercial activities tax receipts fund is hereby created in the state treasury and shall consist of money arising from the tax imposed under this chapter. All money in that fund shall be credited for each fiscal year in the following percentages to the general revenue fund, to the school district tangible property tax replacement fund, which is hereby created in the state treasury for the purpose of making the payments described in *section 5751.21 of the Revised Code*, and to the local government tangible property tax replacement fund, which is hereby created in the state treasury for the purpose of making the payments described in *section 5751.22 of the Revised Code*, in the following percentages:

Fiscal year	General Revenue Fund	School District Tangible Property Tax Replacement Fund	Local Government Tangible Property Tax Replacement Fund
2006	67.7%	22.6%	9.7%
2007	0%	70.0%	30.0%
2008	0%	70.0%	30.0%
2009	0%	70.0%	30.0%
2010	0%	70.0%	30.0%
2011	0%	70.0%	30.0%
2012	5.3%	70.0%	24.7%
2013	10.6%	70.0%	19.4%
2014	14.1%	70.0%	15.9%
2015	17.6%	70.0%	12.4%
2016	21.1%	70.0%	8.9%
2017	24.6%	70.0%	5.4%
2018	28.1%	70.0%	1.9%
2019 and thereafter	30%	70%	0%

(C) Not later than September 15, 2005, the tax commissioner shall determine for each school district, joint vocational school district, and local taxing unit its machinery and equipment, inventory property, furniture and fixtures prop-

erty, and telephone property tax value losses, which are the applicable amounts described in divisions (C)(1), (2), (3), and (4) of this section, except as provided in division (C)(5) of this section:

(1) Machinery and equipment property tax value loss is the taxable value of machinery and equipment property as reported by taxpayers for tax year 2004 multiplied by:

(a) For tax year 2006, thirty-three and eight-tenths per cent;

(b) For tax year 2007, sixty-one and three-tenths per cent;

(c) For tax year 2008, eighty-three per cent;

(d) For tax year 2009 and thereafter, one hundred per cent.

(2) Inventory property tax value loss is the taxable value of inventory property as reported by taxpayers for tax year 2004 multiplied by:

(a) For tax year 2006, a fraction, the numerator of which is five and three-fourths and the denominator of which is twenty-three;

(b) For tax year 2007, a fraction, the numerator of which is nine and one-half and the denominator of which is twenty-three;

(c) For tax year 2008, a fraction, the numerator of which is thirteen and one-fourth and the denominator of which is twenty-three;

(d) For tax year 2009 and thereafter a fraction, the numerator of which is seventeen and the denominator of which is twenty-three.

(3) Furniture and fixtures property tax value loss is the taxable value of furniture and fixture property as reported by taxpayers for tax year 2004 multiplied by:

(a) For tax year 2006, twenty-five per cent;

(b) For tax year 2007, fifty per cent;

(c) For tax year 2008, seventy-five per cent;

(d) For tax year 2009 and thereafter, one hundred per cent.

The taxable value of property reported by taxpayers used in divisions (C)(1), (2), and (3) of this section shall be such values as determined to be final by the tax commissioner as of August 31, 2005. Such determinations shall be final except for any correction of a clerical error that was made prior to August 31, 2005, by the tax commissioner.

(4) Telephone property tax value loss is the taxable value of telephone property as taxpayers would have reported that property for tax year 2004 if the assessment rate for all telephone property for that year were twenty-five per cent, multiplied by:

(a) For tax year 2006, zero per cent;

(b) For tax year 2007, zero per cent;

(c) For tax year 2008, zero per cent;

(d) For tax year 2009, sixty per cent;

(e) For tax year 2010, eighty per cent;

(f) For tax year 2011 and thereafter, one hundred per cent.

(5) Division (C)(5) of this section applies to any school district, joint vocational school district, or local taxing unit in a county in which is located a facility currently or formerly devoted to the enrichment or commercialization of uranium or uranium products, and for which the total taxable value of property listed on the general tax list of personal property for any tax year from tax year 2001 to tax year 2004 was fifty per cent or less of the taxable value of such property listed on the general tax list of personal property for the next preceding tax year.

In computing the fixed-rate levy losses under divisions (D)(1), (2), and (3) of this section for any school district, joint vocational school district, or local taxing unit to which division (C)(5) of this section applies, the taxable value of such property as listed on the general tax list of personal property for tax year 2000 shall be substituted for the taxable value of such property as reported by taxpayers for tax year 2004, in the taxing district containing the uranium facility, if the taxable value listed for tax year 2000 is greater than the taxable value reported by taxpayers for tax year 2004. For the purpose of making the computations under divisions (D)(1), (2), and (3) of this section, the tax year 2000 valuation is to be allocated to machinery and equipment, inventory, and furniture and fixtures property in the same proportions as the tax year 2004 values. For the purpose of the calculations in division (A) of *section 5751.21 of the Revised Code*, the tax year 2004 taxable values shall be used.

To facilitate the calculations required under division (C) of this section, the county auditor, upon request from the tax commissioner, shall provide by August 1, 2005, the values of machinery and equipment, inventory, and furniture and fixtures for all single-county personal property taxpayers for tax year 2004.

(D) Not later than September 15, 2005, the tax commissioner shall determine for each tax year from 2006 through 2009 for each school district, joint vocational school district, and local taxing unit its machinery and equipment, inventory, and furniture and fixtures fixed-rate levy losses, and for each tax year from 2006 through 2011 its telephone property fixed-rate levy loss, which are the applicable amounts described in divisions (D)(1), (2), (3), and (4) of this section:

(1) The machinery and equipment fixed-rate levy loss is the machinery and equipment property tax value loss multiplied by the sum of the tax rates of fixed-rate qualifying levies.

(2) The inventory fixed-rate loss is the inventory property tax value loss multiplied by the sum of the tax rates of fixed-rate qualifying levies.

(3) The furniture and fixtures fixed-rate levy loss is the furniture and fixture property tax value loss multiplied by the sum of the tax rates of fixed-rate qualifying levies.

(4) The telephone property fixed-rate levy loss is the telephone property tax value loss multiplied by the sum of the tax rates of fixed-rate qualifying levies.

(E) Not later than September 15, 2005, the tax commissioner shall determine for each school district, joint vocational school district, and local taxing unit its fixed-sum levy loss. The fixed-sum levy loss is the amount obtained by subtracting the amount described in division (E)(2) of this section from the amount described in division (E)(1) of this section:

(1) The sum of the machinery and equipment property tax value loss, the inventory property tax value loss, and the furniture and fixtures property tax value loss, and, for 2008 through 2017 the telephone property tax value loss of the district or unit multiplied by the sum of the fixed-sum tax rates of qualifying levies. For 2006 through 2010, this computation shall include all qualifying levies remaining in effect for the current tax year and any school district emergency levies that are qualifying levies not remaining in effect for the current year. For 2011 through 2017 in the case of school district emergency levies and for all years after 2010 in the case of other fixed-sum levies, this computation shall include only qualifying levies remaining in effect for the current year. For purposes of this computation, a qualifying school district emergency levy remains in effect in a year after 2010 only if, for that year, the board of education levies a school district emergency levy for an annual sum at least equal to the annual sum levied by the board in tax year 2004 less the amount of the payment certified under this division for 2006.

(2) The total taxable value in tax year 2004 less the sum of the machinery and equipment, inventory, furniture and fixtures, and telephone property tax value losses in each school district, joint vocational school district, and local taxing unit multiplied by one-half of one mill per dollar.

(3) For the calculations in divisions (E)(1) and (2) of this section, the tax value losses are those that would be calculated for tax year 2009 under divisions (C)(1), (2), and (3) of this section and for tax year 2011 under division (C)(4) of this section.

(4) To facilitate the calculation under divisions (D) and (E) of this section, not later than September 1, 2005, any school district, joint vocational school district, or local taxing unit that has a qualifying levy that was approved at an election conducted during 2005 before September 1, 2005, shall certify to the tax commissioner a copy of the county auditor's certificate of estimated property tax millage for such levy as required under division (B) of *section 5705.03 of the Revised Code*, which is the rate that shall be used in the calculations under such divisions.

If the amount determined under division (E) of this section for any school district, joint vocational school district, or local taxing unit is greater than zero, that amount shall equal the reimbursement to be paid pursuant to division (D) of section 5751.21 or division (A)(3) of *section 5751.22 of the Revised Code*, and the one-half of one mill that is subtracted under division (E)(2) of this section shall be apportioned among all contributing fixed-sum levies in the proportion that each levy bears to the sum of all fixed-sum levies within each school district, joint vocational school district, or local taxing unit.

(F) Not later than October 1, 2005, the tax commissioner shall certify to the department of education for every school district and joint vocational school district the machinery and equipment, inventory, furniture and fixtures, and telephone property tax value losses determined under division (C) of this section, the machinery and equipment, inventory, furniture and fixtures, and telephone fixed-rate levy losses determined under division (D) of this section, and the fixed-sum levy losses calculated under division (E) of this section. The calculations under divisions (D) and (E) of this section shall separately display the levy loss for each levy eligible for reimbursement.

(G) Not later than October 1, 2005, the tax commissioner shall certify the amount of the fixed-sum levy losses to the county auditor of each county in which a school district, joint vocational school district, or local taxing unit with a fixed-sum levy loss reimbursement has territory.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06; 151 v S 321, § 101.01, eff. 9-5-06; 152 v H 119, § 101.01, eff. 9-29-07.

NOTES:

Section Notes

The effective date is set by § 812.03 of 152 v H 119.

The effective date is set by § 512.03 of 151 v S 321.

The effective date is set by § 818.03 of 151 v H 530.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

152 v H 119, effective September 29, 2007, deleted "state education aid" following "local taxing unit" in (A)(1); inserted (A)(2) and (3) and redesignated the remaining subdivisions accordingly; in the table in (B), substituted "10.6%" for "19.4%", "19.4%" for "10.6%", "30%" for "100%", and "70%" for "0%"; and, in (E)(1), inserted "in the case of school district emergency levies and for all years after 2010 in the case of other fixed-sum levies".

151 v S 321, effective September 5, 2006, in the first paragraph following (C)(5), substituted "fixed-rate levy" for "property tax value", and added the last sentence; and corrected internal references.

151 v H 530, effective March 30, 2006, in (A)(14), deleted "and first levied in tax year 2006" from the end of the first sentence; added the exception to the end of the introductory language of (C); and added the first two paragraphs of (C)(5).

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*** ANNOTATIONS CURRENT THROUGH JANUARY 1, 2008 ***
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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.21 (2008)

§ 5751.21. Payments from school district tangible property tax replacement fund

(A) Not later than the fifteenth day of July of 2007 through 2017, the department of education shall consult with the director of budget and management and determine the following for each school district and each joint vocational school district eligible for payment under division (B) of this section:

(1) The state education aid offset, which is the difference obtained by subtracting the amount described in division (A)(1)(b) of this section from the amount described in division (A)(1)(a) of this section:

(a) The state education aid computed for the school district or joint vocational school district for the current fiscal year as of the fifteenth day of July;

(b) The state education aid that would be computed for the school district or joint vocational school district for the current fiscal year as of the fifteenth day of July if the recognized valuation included the machinery and equipment, inventory, furniture and fixtures, and telephone property tax value losses for the school district or joint vocational school district for the second preceding tax year.

(2) The greater of zero or the difference obtained by subtracting the state education aid offset determined under division (A)(1) of this section from the sum of the machinery and equipment fixed-rate levy loss, the inventory fixed-rate levy loss, furniture and fixtures fixed-rate levy loss, and telephone property fixed-rate levy loss certified under division (F) of *section 5751.20 of the Revised Code* for all taxing districts in each school district and joint vocational school district for the second preceding tax year.

By the twentieth day of July of each such year, the department of education and the director of budget and management shall agree upon the amount to be determined under division (A)(1) of this section.

(B) The department of education shall pay from the school district tangible property tax replacement fund to each school district and joint vocational school district all of the following for fixed-rate levy losses certified under division (F) of *section 5751.20 of the Revised Code*:

(1) On or before May 31, 2006, one-seventh of the total fixed-rate levy loss for tax year 2006;

(2) On or before August 31, 2006, and October 31, 2006, one-half of six-sevenths of the total fixed-rate levy loss for tax year 2006;

(3) On or before May 31, 2007, one-seventh of the total fixed-rate levy loss for tax year 2007;

(4) On or before August 31, 2007, and October 31, 2007, forty-three per cent of the amount determined under division (A)(2) of this section for fiscal year 2008, but not less than zero, plus one-half of six-sevenths of the difference between the total fixed-rate levy loss for tax year 2007 and the total fixed-rate levy loss for tax year 2006.

(5) On or before May 31, 2008, fourteen per cent of the amount determined under division (A)(2) of this section for fiscal year 2008, but not less than zero, plus one-seventh of the difference between the total fixed-rate levy loss for tax year 2008 and the total fixed-rate levy loss for tax year 2006.

(6) On or before August 31, 2008, and October 31, 2008, forty-three per cent of the amount determined under division (A)(2) of this section for fiscal year 2009, but not less than zero, plus one-half of six-sevenths of the difference between the total fixed-rate levy loss in tax year 2008 and the total fixed-rate levy loss in tax year 2007.

(7) On or before May 31, 2009, fourteen per cent of the amount determined under division (A)(2) of this section for fiscal year 2009, but not less than zero, plus one-seventh of the difference between the total fixed-rate levy loss for tax year 2009 and the total fixed-rate levy loss for tax year 2007.

(8) On or before August 31, 2009, and October 31, 2009, forty-three per cent of the amount determined under division (A)(2) of this section for fiscal year 2010, but not less than zero, plus one-half of six-sevenths of the difference between the total fixed-rate levy loss in tax year 2009 and the total fixed-rate levy loss in tax year 2008.

(9) On or before May 31, 2010, fourteen per cent of the amount determined under division (A)(2) of this section for fiscal year 2010, but not less than zero, plus one-seventh of the difference between the total fixed-rate levy loss in tax year 2010 and the total fixed-rate levy loss in tax year 2008.

(10) On or before August 31, 2010, and October 31, 2010, forty-three per cent of the amount determined under division (A)(2) of this section for fiscal year 2011, but not less than zero, plus one-half of six-sevenths of the difference between the telephone property fixed-rate levy loss for tax year 2010 and the telephone property fixed-rate levy loss for tax year 2009.

(11) On or before May 31, 2011, fourteen per cent of the amount determined under division (A)(2) of this section for fiscal year 2011, but not less than zero, plus one-seventh of the difference between the telephone property fixed-rate levy loss for tax year 2011 and the telephone property fixed-rate levy loss for tax year 2009.

(12) On or before August 31, 2011, and October 31, 2011, the amount determined under division (A)(2) of this section multiplied by a fraction, the numerator of which is fourteen and the denominator of which is seventeen, but not less than zero, multiplied by forty-three per cent, plus one-half of six-sevenths of the difference between the telephone property fixed-rate levy loss for tax year 2011 and the telephone property fixed-rate levy loss for tax year 2010.

(13) On or before May 31, 2012, fourteen per cent of the amount determined under division (A)(2) of this section for fiscal year 2012, multiplied by a fraction, the numerator of which is fourteen and the denominator of which is seventeen, plus one-seventh of the difference between the telephone property fixed-rate levy loss for tax year 2011 and the telephone property fixed-rate levy loss for tax year 2010.

(14) On or before August 31, 2012, October 31, 2012, and May 31, 2013, the amount determined under division (A)(2) of this section multiplied by a fraction, the numerator of which is eleven and the denominator of which is seventeen, but not less than zero, multiplied by one-third.

(15) On or before August 31, 2013, October 31, 2013, and May 31, 2014, the amount determined under division (A)(2) of this section multiplied by a fraction, the numerator of which is nine and the denominator of which is seventeen, but not less than zero, multiplied by one-third.

(16) On or before August 31, 2014, October 31, 2014, and May 31, 2015, the amount determined under division (A)(2) of this section multiplied by a fraction, the numerator of which is seven and the denominator of which is seventeen, but not less than zero, multiplied by one-third.

(17) On or before August 31, 2015, October 31, 2015, and May 31, 2016, the amount determined under division (A)(2) of this section multiplied by a fraction, the numerator of which is five and the denominator of which is seventeen, but not less than zero, multiplied by one-third.

(18) On or before August 31, 2016, October 31, 2016, and May 31, 2017, the amount determined under division (A)(2) of this section multiplied by a fraction, the numerator of which is three and the denominator of which is seventeen, but not less than zero, multiplied by one-third.

(19) On or before August 31, 2017, October 31, 2017, and May 31, 2018, the amount determined under division (A)(2) of this section multiplied by a fraction, the numerator of which is one and the denominator of which is seventeen, but not less than zero, multiplied by one-third.

The department of education shall report to each school district and joint vocational school district the apportionment of the payments among the school district's or joint vocational school district's funds based on the certifications under division (F) of *section 5751.20 of the Revised Code.*

Any qualifying levy that is a fixed-rate levy that is not applicable to a tax year after 2010 does not qualify for any reimbursement after the tax year to which it is last applicable.

(C) For taxes levied within the ten-mill limitation for debt purposes in tax year 2005, payments shall be made equal to one hundred per cent of the loss computed as if the tax were a fixed-rate levy, but those payments shall extend from fiscal year 2006 through fiscal year 2018, as long as the qualifying levy continues to be used for debt purposes. If the purpose of such a qualifying levy is changed, that levy becomes subject to the payments determined in division (B) of this section.

(D) (1) Not later than January 1, 2006, for each fixed-sum levy of each school district or joint vocational school district and for each year for which a determination is made under division (F) of *section 5751.20 of the Revised Code* that a fixed-sum levy loss is to be reimbursed, the tax commissioner shall certify to the department of education the fixed-sum levy loss determined under that division. The certification shall cover a time period sufficient to include all fixed-sum levies for which the commissioner made such a determination. The department shall pay from the school district property tax replacement fund to the school district or joint vocational school district one-third of the fixed-sum levy loss so certified for each year on or before the last day of May, August, and October of the current year.

(2) Beginning in 2006, by the first day of January of each year, the tax commissioner shall review the certification originally made under division (D)(1) of this section. If the commissioner determines that a debt levy that had been scheduled to be reimbursed in the current year has expired, a revised certification for that and all subsequent years shall be made to the department of education.

(E) Beginning in September 2007 and through June 2018, the director of budget and management shall transfer from the school district tangible property tax replacement fund to the general revenue fund each of the following:

(1) On the first day of September, one-fourth of the amount determined for that fiscal year under division (A)(1) of this section;

(2) On the first day of December, one-fourth of the amount determined for that fiscal year under division (A)(1) of this section;

(3) On the first day of March, one-fourth of the amount determined for that fiscal year under division (A)(1) of this section;

(4) On the first day of June, one-fourth of the amount determined for that fiscal year under division (A)(1) of this section.

If, when a transfer is required under division (E)(1), (2), (3), or (4) of this section, there is not sufficient money in the school district tangible property tax replacement fund to make the transfer in the required amount, the director shall transfer the balance in the fund to the general revenue fund and may make additional transfers on later dates as determined by the director in a total amount that does not exceed one-fourth of the amount determined for the fiscal year.

(F) For each of the fiscal years 2006 through 2018, if the total amount in the school district tangible property tax replacement fund is insufficient to make all payments under divisions (B), (C), and (D) of this section at the times the payments are to be made, the director of budget and management shall transfer from the general revenue fund to the school district tangible property tax replacement fund the difference between the total amount to be paid and the amount in the school district tangible property tax replacement fund. For each fiscal year after 2018, at the time payments under division (D) of this section are to be made, the director of budget and management shall transfer from the general revenue fund to the school district property tax replacement fund the amount necessary to make such payments.

(G) (1) On the fifteenth day of June of 2006 through 2011, the director of budget and management may transfer any balance in the school district tangible property tax replacement fund to the general revenue fund. At the end of fiscal

years 2012 through 2018, any balance in the school district tangible property tax replacement fund shall remain in the fund to be used in future fiscal years for school purposes.

(2) In each fiscal year beginning with fiscal year 2019, all amounts credited to the school district tangible personal property tax replacement fund shall be appropriated for school purposes.

(H) If all of the territory of a school district or joint vocational school district is merged with another district, or if a part of the territory of a school district or joint vocational school district is transferred to an existing or newly created district, the department of education, in consultation with the tax commissioner, shall adjust the payments made under this section as follows:

(1) For a merger of two or more districts, the machinery and equipment, inventory, furniture and fixtures, and telephone property fixed-rate levy losses and the fixed-sum levy losses of the successor district shall be equal to the sum of the machinery and equipment, inventory, furniture and fixtures, and telephone property fixed-rate levy losses and debt levy losses as determined in *section 5751.20 of the Revised Code*, for each of the districts involved in the merger.

(2) If property is transferred from one district to a previously existing district, the amount of machinery and equipment, inventory, furniture and fixtures, and telephone property tax value losses and fixed-rate levy losses that shall be transferred to the recipient district shall be an amount equal to the total machinery and equipment, inventory, furniture and fixtures, and telephone property fixed-rate levy losses times a fraction, the numerator of which is the value of business tangible personal property on the land being transferred in the most recent year for which data are available, and the denominator of which is the total value of business tangible personal property in the district from which the land is being transferred in the most recent year for which data are available. For each of the first five years after the property is transferred, but not after fiscal year 2012, if the tax rate in the recipient district is less than the tax rate of the district from which the land was transferred, one-half of the payments arising from the amount of fixed-rate levy losses so transferred to the recipient district shall be paid to the recipient district and one-half of the payments arising from the fixed-rate levy losses so transferred shall be paid to the district from which the land was transferred. Fixed-rate levy losses so transferred shall be computed on the basis of the sum of the rates of fixed-rate qualifying levies of the district from which the land was transferred, notwithstanding division (D) of this section.

(3) After December 31, 2004, if property is transferred from one or more districts to a district that is newly created out of the transferred property, the newly created district shall be deemed not to have any machinery and equipment, inventory, furniture and fixtures, or telephone property fixed-rate levy losses and the districts from which the property was transferred shall have no reduction in their machinery and equipment, inventory, furniture and fixtures, and telephone property fixed-rate levy losses.

(4) If the recipient district under division (H)(2) of this section or the newly created district under divisions (H)(3) of this section is assuming debt from one or more of the districts from which the property was transferred and any of the districts losing the property had fixed-sum levy losses, the department of education, in consultation with the tax commissioner, shall make an equitable division of the fixed-sum levy loss reimbursements.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06; 151 v S 321, § 101.01, eff. 9-5-06; 152 v H 119, § 101.01, eff. 6-30-07.

NOTES:

Section Notes

The effective date is set by § 815.03 of 152 v H 119.

The effective date is set by § 512.03 of 151 v S 321.

The effective date is set by § 818.03 of 151 v H 530.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

152 v H 119, effective June 30, 2007, substituted "fifteenth" for "thirty-first" three times throughout (A); in the introductory language of (A), inserted "consult with the director of budget and management and"; rewrote the last paragraph of (A); substituted "forty-three per cent" for "one-third" in (B)(10) and (12); in (B)(12), deleted "and May 31, 2012" following "October 31, 2011" and made related changes; deleted (B)(20), which read "After May 31, 2018, no payments shall be made under this section"; rewrote (E); added (G)(2).

151 v S 321, effective September 5, 2006, in (H)(2), inserted "tax value losses and", and added the last two sentences.

151 v H 530, effective March 30, 2006, in (D)(1), substituted "October" for "November"; and made minor stylistic changes.

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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.22 (2008)

§ 5751.22. Payments from local government tangible property tax replacement fund

(A) Not later than January 1, 2006, the tax commissioner shall compute the payments to be made to each local taxing unit for each year according to divisions (A)(1), (2), (3), and (4) of this section, and shall distribute the payments in the manner prescribed by division (C) of this section. The calculation of the fixed-sum levy loss shall cover a time period sufficient to include all fixed-sum levies for which the commissioner determined, pursuant to division (E) of *section 5751.20 of the Revised Code,* that a fixed-sum levy loss is to be reimbursed.

(1) Except as provided in division (A)(4) of this section, for machinery and equipment, inventory, and furniture and fixtures fixed-rate levy losses determined under division (D) of *section 5751.20 of the Revised Code*, payments shall be made in an amount equal to each of those losses multiplied by the following:

(a) For tax years 2006 through 2010, one hundred per cent;

(b) For tax year 2011, a fraction, the numerator of which is fourteen and the denominator of which is seventeen;

(c) For tax year 2012, a fraction, the numerator of which is eleven and the denominator of which is seventeen;

(d) For tax year 2013, a fraction, the numerator of which is nine and the denominator of which is seventeen;

(e) For tax year 2014, a fraction, the numerator of which is seven and the denominator of which is seventeen;

(f) For tax year 2015, a fraction, the numerator of which is five and the denominator of which is seventeen;

(g) For tax year 2016, a fraction, the numerator of which is three and the denominator of which is seventeen;

(h) For tax year 2017, a fraction, the numerator of which is one and the denominator of which is seventeen;

(i) For tax years 2018 and thereafter, no fixed-rate payments shall be made.

Any qualifying levy that is a fixed-rate levy that is not applicable to a tax year after 2010 shall not qualify for any reimbursement after the tax year to which it is last applicable.

(2) Except as provided in division (A)(4) of this section, for telephone property fixed-rate levy losses determined under division (D)(4) of *section 5751.20 of the Revised Code*, payments shall be made in an amount equal to each of those losses multiplied by the following:

(a) For tax years 2009 through 2011, one hundred per cent;

(b) For tax year 2012, seven-eighths;

(c) For tax year 2013, six-eighths;

(d) For tax year 2014, five-eighths;

(e) For tax year 2015, four-eighths;

(f) For tax year 2016, three-eighths;

(g) For tax year 2017, two-eighths;

(h) For tax year 2018, one-eighth;

(i) For tax years 2019 and thereafter, no fixed-rate payments shall be made.

Any qualifying levy that is a fixed-rate levy that is not applicable to a tax year after 2011 shall not qualify for any reimbursement after the tax year to which it is last applicable.

(3) For fixed-sum levy losses determined under division (E) of *section 5751.20 of the Revised Code*, payments shall be made in the amount of one hundred per cent of the fixed-sum levy loss for payments required to be made in 2006 and thereafter.

(4) For taxes levied within the ten-mill limitation for debt purposes in tax year 2005, payments shall be made based on the schedule in division (A)(1) of this section for each of the calendar years 2006 through 2010. For each of the calendar years 2011 through 2017, the percentages for calendar year 2010 shall be used, as long as the qualifying levy continues to be used for debt purposes. If the purpose of such a qualifying levy is changed, that levy becomes subject to the payment schedules in divisions (A)(1)(a) to (h) of this section. No payments shall be made for such levies after calendar year 2017.

(B) Beginning in 2007, by the thirty-first day of January of each year, the tax commissioner shall review the calculation originally made under division (A) of this section of the fixed-sum levy losses determined under division (E) of *section 5751.20 of the Revised Code*. If the commissioner determines that a fixed-sum levy that had been scheduled to be reimbursed in the current year has expired, a revised calculation for that and all subsequent years shall be made.

(C) Payments to local taxing units required to be made under division (A) of this section shall be paid from the local government tangible property tax replacement fund to the county undivided income tax fund in the proper county treasury. Beginning in May 2006, one-seventh of the amount certified under that division shall be paid by the last day of May each year, and three-sevenths shall be paid by the last day of August and October each year. Within forty-five days after receipt of such payments, the county treasurer shall distribute amounts determined under division (A) of this section to the proper local taxing unit as if they had been levied and collected as taxes, and the local taxing unit shall apportion the amounts so received among its funds in the same proportions as if those amounts had been levied and collected as taxes.

(D) For each of the fiscal years 2006 through 2019, if the total amount in the local government tangible property tax replacement fund is insufficient to make all payments under division (C) of this section at the times the payments are to be made, the director of budget and management shall transfer from the general revenue fund to the local government tangible property tax replacement fund the difference between the total amount to be paid and the amount in the local government tangible property tax replacement fund. For each fiscal year after 2019, at the time payments under division (A)(2) of this section are to be made, the director of budget and management shall transfer from the general revenue fund to the local government property tax replacement fund the amount necessary to make such payments.

(E) On the fifteenth day of June of each year from 2006 through 2018, the director of budget and management may transfer any balance in the local government tangible property tax replacement fund to the general revenue fund.

(F) If all or a part of the territories of two or more local taxing units are merged, or unincorporated territory of a township is annexed by a municipal corporation, the tax commissioner shall adjust the payments made under this section to each of the local taxing units in proportion to the tax value loss apportioned to the merged or annexed territory, or as otherwise provided by a written agreement between the legislative authorities of the local taxing units certified to the commissioner not later than the first day of June of the calendar year in which the payment is to be made.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06.

NOTES:

Section Notes

The effective date is set by § 818.03 of 151 v H 530.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 530, effective March 30, 2006, in (C), substituted "one-seventh" for "one-third", inserted "each year, and three-sevenths shall be paid by the last day of", and added "each year" to the end of the second sentence.

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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.23 (2008)

§ 5751.23. Partial reimbursement of county administrative fee loss

(A) As used in this section:

(1) "Administrative fees" means the dollar percentages allowed by the county auditor for services or by the county treasurer as fees, or paid to the credit of the real estate assessment fund, under divisions (A) and (C) of section 319.54 and division (A) of *section 321.26 of the Revised Code.*

(2) "Administrative fee loss" means a county's loss of administrative fees due to its tax value loss, determined as follows:

(a) For purposes of the determination made under division (B) of this section in the years 2006 through 2010, the administrative fee loss shall be computed by multiplying the amounts determined for all taxing districts in the county under divisions (D) and (E) of *section 5751.20 of the Revised Code* by nine thousand six hundred fifty-nine ten-thousandths of one per cent if total taxes collected in the county in 2004 exceeded one hundred fifty million dollars, or one and one thousand one hundred fifty-nine ten-thousandths of one per cent if total taxes collected in the county in 2004 were one hundred fifty million dollars or less;

(b) For purposes of the determination under division (B) of this section in the years after 2010, the administrative fee losses shall be determined by multiplying the administrative fee losses calculated for 2010 by the fractions in divisions (A)(1)(b) to (i) of *section 5751.22 of the Revised Code.*

(3) "Total taxes collected" means all money collected on any tax duplicate of the county, other than the estate tax duplicates. "Total taxes collected" does not include amounts received pursuant to divisions (F) and (G) of *section 321.24* or *section 323.156 [323.15.6] of the Revised Code.*

(B) Not later than December 31, 2005, the tax commissioner shall certify to each county auditor the tax levy losses calculated under divisions (D) and (E) of *section 5751.20 of the Revised Code* for each school district, joint vocational school district, and local taxing unit in the county. Not later than the thirty-first day of January of 2006 through 2017, the county auditor shall determine the administrative fee loss for the county and apportion that loss ratably among the school districts, joint vocational school districts, and local taxing units on the basis of the tax levy losses certified under this division.

(C) On or before each of the days prescribed for the settlements under divisions (A) and (C) of *section 321.24 of the Revised Code* in the years 2006 through 2017, the county treasurer shall deduct one-half of the amount apportioned to each school district, joint vocational school district, and local taxing unit from the portions of revenue payable to them.

(D) On or before each of the days prescribed for settlements under divisions (A) and (C) of *section 321.24 of the Revised Code* in the years 2006 through 2017, the county auditor shall cause to be deposited an amount equal to one-half of the amount of the administrative fee loss in the same funds as if allowed as administrative fees.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 152 v H 119, § 101.01, eff. 6-30-07.

NOTES:

Section Notes

The effective date is set by § 818.03 of 152 v H 119.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

152 v H 119, effective June 30, 2007, corrected internal references.

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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.31 (2008)

§ 5751.31. Direct appeal to Ohio Supreme Court

Notwithstanding any section of law to the contrary, the tax commissioner may issue one or more final determinations under *section 5703.60 of the Revised Code* for which any appeal must be made directly to the supreme court within thirty days after the date the commissioner issued the determination if the primary issue raised by the petitioner is the constitutionality of division (H)(3) of *section 5751.01 of the Revised Code* or an issue arising under Section 3, 5a, or *13 of Article XII, Ohio Constitution.* Such final determination shall clearly indicate that any appeal thereof must be made directly to the supreme court within the thirty-day period prescribed in this division.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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TITLE 57. TAXATION
CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.50 (2008)

§ 5751.50. Refundable jobs creation credit; nonrefundable jobs retention credit

(A) For tax periods beginning on or after January 1, 2008, a refundable credit granted by the tax credit authority under *section 122.17 of the Revised Code* may be claimed under this chapter in the order required under *section 5751.98 of the Revised Code*. For purposes of making tax payments under this chapter, taxes equal to the amount of the refundable credit shall be considered to be paid to this state on the first day of the tax period. A credit claimed in calendar year 2008 may not be applied against the tax otherwise due for a tax period beginning before July 1, 2008. The refundable credit shall not be claimed against the tax otherwise due for any tax period beginning after the date on which a relocation of employment positions occurs in violation of an agreement entered into under *sections 122.17* or *122.171 [122.17.1] of the Revised Code.*

(B) For tax periods beginning on or after January 1, 2008, a nonrefundable credit granted by the tax credit authority under *section 122.171 [122.17.1] of the Revised Code* may be claimed under this chapter in the order required under *section 5751.98 of the Revised Code*. A credit claimed in calendar year 2008 may not be applied against the tax otherwise due under this chapter for a tax period beginning before July 1, 2008. The credit shall not be claimed against the tax otherwise due for any tax period beginning after the date on which a relocation of employment positions occurs in violation of an agreement entered into under *sections 122.17* or *122.171 [122.17.1] of the Revised Code*. No credit shall be allowed under this chapter if the credit was available against the tax imposed by *section 5733.06* or *5747.02 of the Revised Code*, except to the extent the credit was not applied against such tax.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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CHAPTER 5751. COMMERCIAL ACTIVITY TAX

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ORC Ann. 5751.51 (2008)

§ 5751.51. Nonrefundable credit for qualified research expenses

(A) As used in this section, "qualified research expenses" has the same meaning as in *section 41 of the Internal Revenue Code.*

(B) (1) For tax periods beginning on or after January 1, 2008, a nonrefundable credit may be claimed under this chapter equal to seven per cent of the excess of (a) qualified research expenses incurred in this state by the taxpayer in the tax period for which the credit is claimed over (b) the taxpayer's average annual qualified research expenses incurred in this state for the three preceding tax periods.

(2) The taxpayer shall claim the credit allowed under division (B)(1) of this section in the order required by *section 5751.98 of the Revised Code.* A credit claimed in tax year 2008 may not be applied against the tax otherwise due under this chapter for a tax period beginning before July 1, 2008. Any credit amount in excess of the tax due under *section 5751.03 of the Revised Code*, after allowing for any other credits that precede the credit under this section in the order required under that section, may be carried forward for seven tax years, but the amount of the excess credit claimed against the tax for any tax period shall be deducted from the balance carried forward to the next tax period.

(3) No credit shall be allowed under this chapter if the credit was available against the tax imposed by *section 5733.06 of the Revised Code*, except to the extent the credit was not applied against such tax.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.52 (2008)

§ 5751.52. Nonrefundable credit for research and development loan payments

(A) As used in this section:

(1) "Borrower" means any person that receives a loan from the director of development under *section 166.21 of the Revised Code*, regardless of whether the borrower is subject to the tax imposed by this chapter.

(2) "Qualified research and development loan payments" has the same meaning as in *section 166,21 of the Revised Code.*

(3) "Related member" has the same meaning as in *section 5733.042 [5733.04.2] of the Revised Code.*

(B) For tax periods beginning on or after January 1, 2008, a nonrefundable credit may be claimed under this chapter equal to a borrower's qualified research and development loan payments made during the calendar year immediately preceding the tax period for which the credit is claimed. The amount of the credit for a calendar year shall not exceed one hundred fifty thousand dollars. No taxpayer is entitled to claim a credit under this section unless the taxpayer has obtained a certificate issued by the director of development under division (D) of *section 166.21 of the Revised Code.* The credit shall be claimed in the order required under section 5151.98 of the Revised Code. A credit claimed in calendar year 2008 may not be applied against the tax otherwise due under this chapter for a tax period beginning before July 1, 2008. No credit shall be allowed under this chapter if the credit was available against the tax imposed by *section 5733.06* or *5747.02 of the Revised Code* except to the extent the credit was not applied against such tax. The credit, to the extent it exceeds the taxpayer's tax liability for a tax period after allowance for any other credits that precede the credit under this section in that order, shall be carried forward to the next succeeding tax period or periods, but the amount of the excess credit claimed against the tax for any tax period shall be deducted from the balance carried forward to the next tax period.

(C) A borrower entitled to a credit under this section may assign the credit, or a portion thereof, to any of the following:

(1) A related member of that borrower;

(2) The owner or lessee of the eligible research and development project;

(3) A related member of the owner or lessee of the eligible research and development project.

A borrower making an assignment under this division shall provide written notice of the assignment to the tax commissioner and the director of development, in such form as the commissioner prescribes, before the credit that was

assigned is used. The assignor may not claim the credit to the extent it was assigned to an assignee. The assignee may claim the credit only to the extent the assignor has not claimed it.

(D) If any taxpayer is a partner in a partnership or a member in a limited liability company treated as a partnership for federal income tax purposes, the taxpayer shall be allowed the taxpayer's distributive or proportionate share of the credit available through the partnership or limited liability company.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.53 (2008)

§ 5751.53. Credit for unused net operating loss deductions, other deferred tax assets

(A) As used in this section:

(1) "Net income" and "taxable year" have the same meanings as in *section 5733.04 of the Revised Code.*

(2) "Franchise tax year" means "tax year" as defined in *section 5733.04 of the Revised Code.*

(3) "Deductible temporary differences" and "taxable temporary differences" have the same meanings as those terms have for purposes of paragraph 13 of the statement of financial accounting standards, number 109.

(4) "Qualifying taxpayer" means a taxpayer under this chapter that has a qualifying Ohio net operating loss carryforward equal to or greater than the qualifying amount.

(5) "Qualifying Ohio net operating loss carryforward" means an Ohio net operating loss carryforward that the taxpayer could deduct in whole or in part for franchise tax year 2006 under *section 5733.04 of the Revised Code* but for the application of division (H) of this section. A qualifying Ohio net operating loss carryforward shall not exceed the amount of loss carryforward from franchise tax year 2005 as reported by the taxpayer either on a franchise tax report for franchise tax year 2005 pursuant to *section 5733.02 of the Revised Code* or on an amended franchise tax report prepared in good faith for such year and filed before July 1, 2006.

(6) "Disallowed Ohio net operating loss carryforward" means the lesser of the amounts described in division (A)(6)(a) or (b) of this section, but the amounts described in divisions (A)(6)(a) and (b) of this section shall each be reduced by the qualifying amount.

(a) The qualifying taxpayer's qualifying Ohio net operating loss carryforward;

(b) The Ohio net operating loss carryforward amount that the qualifying taxpayer used to compute the related deferred tax asset reflected on its books and records on the last day of its taxable year ending in 2004, adjusted for return to accrual, but this amount shall be reduced by the qualifying related valuation allowance amount. For the purposes of this section, the "qualifying related valuation allowance amount" is the amount of Ohio net operating loss reflected in the qualifying taxpayer's computation of the valuation allowance account, as shown on its books and records on the last day of its taxable year ending in 2004, with respect to the deferred tax asset relating to its Ohio net operating loss carryforward amount.

(7) "Other net deferred tax items apportioned to this state" is the product of (a) the amount of other net deferred tax items and (b) the fraction described in division (B)(2) of section 5733.05 for the qualifying taxpayer's franchise tax year 2005.

(8) (a) Subject to divisions (A)(8)(b) to (d) of this section, the "amount of other net deferred tax items" is the difference between (i) the qualifying taxpayer's deductible temporary differences, net of related valuation allowance amounts, shown on the qualifying taxpayer's books and records on the last day of its taxable year ending in 2004, and (ii) the qualifying taxpayer's taxable temporary differences as shown on those books and records on that date. The amount of other net deferred tax items may be less than zero.

(b) For the purposes of computing the amount of the qualifying taxpayer's other net deferred tax items described in division (A)(8)(a) of this section, any credit carryforward allowed under Chapter 5733. of the Revised Code shall be excluded from the amount of deductible temporary differences to the extent such credit carryforward amount, net of any related valuation allowance amount, is otherwise included in the qualifying taxpayer's deductible temporary differences, net of related valuation allowance amounts, shown on the qualifying taxpayer's books and records on the last day of the qualifying taxpayer's taxable year ending in 2004.

(c) No portion of the disallowed Ohio net operating loss carryforward shall be included in the computation of the amount of the qualifying taxpayer's other net deferred tax items described in division (A)(8)(a) of this section.

(d) In no event shall the amount of other net deferred tax items apportioned to this state exceed twenty-five per cent of the qualifying Ohio net operating loss carryforward.

(9) "Amortizable amount" means:

(a) If the qualifying taxpayer's other net deferred tax items apportioned to this state is equal to or greater than zero, eight per cent of the sum of the qualifying taxpayer's disallowed Ohio net operating loss carryforward and the qualifying taxpayer's other net deferred tax items apportioned to this state;

(b) If the amount of the qualifying taxpayer's other net deferred tax items apportioned to this state is less than zero and if the absolute value of the amount of qualifying taxpayer's other net deferred tax items apportioned to this state is less than the qualifying taxpayer's disallowed net operating loss, eight per cent of the difference between the qualifying taxpayer's disallowed net operating loss carryforward and the absolute value of the qualifying taxpayer's other net deferred tax items apportioned to this state;

(c) If the amount of the qualifying taxpayer's other net deferred tax items apportioned to this state is less than zero and if the absolute value of the amount of qualifying taxpayer's other net deferred tax items apportioned to this state is equal to or greater than the qualifying taxpayer's disallowed net operating loss, zero.

(10) "Books and records" means the qualifying taxpayer's books, records, and all other information, all of which the qualifying taxpayer maintains and uses to prepare and issue its financial statements in accordance with generally accepted accounting principles.

(11) (a) Except as modified by division (A)(11)(b) of this section, "qualifying amount" means fifty million dollars per person.

(b) If for franchise tax year 2005 the person was a member of a combined franchise tax report, as provided by *section 5733.052 [5733.05.2] of the Revised Code*, the "qualifying amount" is, in the aggregate, fifty million dollars for all members of that combined franchise tax report, and for purposes of divisions (A)(6)(a) and (b) of this section, those members shall allocate to each member any portion of the fifty million dollar amount. The total amount allocated to the members who are qualifying taxpayers shall equal fifty million dollars.

(B) For each calendar period beginning prior to January 1, 2030, there is hereby allowed a nonrefundable tax credit against the tax levied each year by this chapter on each qualifying taxpayer, on each consolidated elected taxpayer having one or more qualifying taxpayers as a member, and on each combined taxpayer having one or more qualifying taxpayers as a member. The credit shall be claimed in the order specified in *section 5751.98 of the Revised Code* and is allowed only to reduce the first one-half of any tax remaining after allowance of the credits that precede it in *section 5751.98 of the Revised Code*. No credit under division (B) of this section shall be allowed against the second one-half of such remaining tax.

Except as otherwise limited by divisions (C) and (D) of this section, the maximum amount of the nonrefundable credit that may be used against the first one-half of the remaining tax for each calendar year is as follows:

(1) For calendar year 2010, ten per cent of the amortizable amount;

(2) For calendar year 2011, twenty per cent of the amortizable amount, less all amounts previously used;

(3) For calendar year 2012, thirty per cent of the amortizable amount, less all amounts previously used;

(4) For calendar year 2013, forty per cent of the amortizable amount, less all amounts previously used;

(5) For calendar year 2014, fifty per cent of the amortizable amount, less all amounts previously used;

(6) For calendar year 2015, sixty per cent of the amortizable amount, less all amounts previously used;

(7) For calendar year 2016, seventy per cent of the amortizable amount, less all amounts previously used;

(8) For calendar year 2017, eighty per cent of the amortizable amount, less all amounts previously used;

(9) For calendar year 2018, ninety per cent of the amortizable amount, less all amounts previously used;

(10) For each of calendar years 2019 through 2029, one hundred per cent of the amortizable amount, less all amounts used in all previous years.

In no event shall the cumulative credit used for calendar years 2010 through 2029 exceed one hundred per cent of the amortizable amount.

(C) (1) Except as otherwise set forth in division (C)(2) of this section, a refundable credit is allowed in calendar year 2030 for any portion of the qualifying taxpayer's amortizable amount that is not used in accordance with division (B) of this section against the tax levied by this chapter on all taxpayers.

(2) Division (C)(1) of this section shall not apply and no refundable credit shall be available to any person if during any portion of the calendar year 2030 the person is not subject to the tax imposed by this chapter.

(D) Not later than June 30, 2006, each qualifying taxpayer, consolidated elected taxpayer, or combined taxpayer that will claim for any year the credit allowed in divisions (B) and (C) of this section shall file with the tax commissioner a report setting forth the amortizable amount available to such taxpayer and all other related information that the commissioner, by rule, requires. If the taxpayer does not timely file the report or fails to provide timely all information required by this division, the taxpayer is precluded from claiming any credit amounts described in divisions (B) and (C) of this section. Unless extended by mutual consent, the tax commissioner may, until June 30, 2010, audit the accuracy of the amortizable amount available to each taxpayer that will claim the credit, and adjust the amortizable amount or, if appropriate, issue any assessment or final determination, as applicable, necessary to correct any errors found upon audit.

(E) For the purpose of calculating the amortizable amount, if the tax commissioner ascertains that any portion of that amount is the result of a sham transaction as described in *section 5703.56 of the Revised Code*, the commissioner shall reduce the amortizable amount by two times the adjustment.

(F) If one entity transfers all or a portion of its assets and equity to another entity as part of an entity organization or reorganization or subsequent entity organization or reorganization for which no gain or loss is recognized in whole or in part for federal income tax purposes under the Internal Revenue Code, the credits allowed by this section shall be computed in a manner consistent with that used to compute the portion, if any, of federal net operating losses allowed to the respective entities under the Internal Revenue Code. The tax commissioner may prescribe forms or rules for making the computations required by this division.

(G) (1) Except as provided in division (F) of this section, no person shall pledge, collateralize, hypothecate, assign, convey, sell, exchange, or otherwise dispose of any or all tax credits, or any portion of any or all tax credits allowed under this section.

(2) No credit allowed under this section is subject to execution, attachment, lien, levy, or other judicial proceeding.

(H) (1) (a) Except as set forth in division (H)(1)(b) of this section and notwithstanding division (I)(1) of *section 5733.04 of the Revised Code* to the contrary, each person timely and fully complying with the reporting requirements set forth in division (D) of this section shall not claim, and shall not be entitled to claim, any deduction or adjustment for any Ohio net operating loss carried forward to any one or more franchise tax years after franchise tax year 2005.

(b) Division (H)(1)(a) of this section applies only to the portion of the Ohio net operating loss represented by the disallowed Ohio net operating loss carryforward.

(2) Notwithstanding division (I) of *section 5733.04 of the Revised Code* to the contrary, with respect to all franchise tax years after franchise tax year 2005, each person timely and fully complying with the reporting requirements set

forth in division (D) of this section shall not claim, and shall not be entitled to claim, any deduction, exclusion, or adjustment with respect to deductible temporary differences reflected on the person's books and records on the last day of its taxable year ending in 2004.

(3) (a) Except as set forth in division (H)(3)(b) of this section and notwithstanding division (I) of *section 5733.04 of the Revised Code* to the contrary, with respect to all franchise tax years after franchise tax year 2005, each person timely and fully complying with the reporting requirements set forth in division (D) of this section shall exclude from Ohio net income all taxable temporary differences reflected on the person's books and records on the last day of its taxable year ending in 2004.

(b) In no event shall the exclusion provided by division (H)(3)(a) of this section for any franchise tax year exceed the amount of the taxable temporary differences otherwise included in Ohio net income for that year.

(4) Divisions (H)(2) and (3) of this section shall apply only to the extent such items were used in the calculations of the credit provided by this section.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05; 151 v H 530, § 101.01, eff. 3-30-06.

NOTES:

Section Notes

The effective date is set by § 818.03 of 151 v H 530.

The effective date is set by § 612.21 of 151 v H 66.

EFFECT OF AMENDMENTS

151 v H 530, effective March 30, 2006, in (D), inserted "or final determination, as applicable"; and made minor stylistic changes.

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ORC Ann. 5751.98 (2008)

§ 5751.98. Order of claiming credits; credit exceeding tax due

(A) To provide a uniform procedure for calculating the amount of tax due under this chapter, a taxpayer shall claim any credits to which it is entitled in the following order:

(1) The nonrefundable jobs retention credit under division (B) of *section 5751.50 of the Revised Code*;

(2) The nonrefundable credit for qualified research expenses under division (B) of *section 5751.51 of the Revised Code*;

(3) The nonrefundable credit for a borrower's qualified research and development loan payments under division (B) of *section 5751.52 of the Revised Code*;

(4) The nonrefundable credit for calendar years 2010 to 2029 for unused net operating losses under division (B) of *section 5751.53 of the Revised Code*;

(5) The refundable credit for calendar year 2030 for unused net operating losses under division (C) of *section 5751.53 of the Revised Code*;

(6) The refundable jobs creation credit under division (A) of *section 5751.50 of the Revised Code*.

(B) For any credit except the credit enumerated in division (A)(4) of this section, the amount of the credit for a tax period shall not exceed the tax due after allowing for any other credit that precedes it in the order required under this section. Any excess amount of a particular credit may be carried forward if authorized under the section creating the credit.

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

The effective date is set by § 612.21 of 151 v H 66.

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ORC Ann. 5751.99 (2008)

§ 5751.99. Criminal penalties

(A) Whoever files a fraudulent refund claim under *section 5751.08 of the Revised Code* shall be fined the greater of not more than one thousand dollars or the amount of the fraudulent refund requested or imprisoned not more than sixty days, or both.

(B) Except as provided in this section, whoever violates any section of this chapter, or any rule adopted by the tax commissioner under this chapter, shall be fined not more than five hundred dollars or imprisoned not more than thirty days, or both.

(C) The penalties provided in this section are in addition to any penalties imposed by the tax commissioner under *section 5751.06 of the Revised Code.*

HISTORY:

151 v H 66, § 101.01, eff. 6-30-05.

NOTES:

Section Notes

Not analogous to former RC § 5751.99 (137 v H 415, § 7), repealed 139 v H 694, § 2, eff 11-15-81.

The effective date is set by § 612.21 of 151 v H 66.

EXHIBIT 11

United States of America
State of Ohio
Office of the Secretary of State

*I, **JENNIFER BRUNNER**, Secretary of State, do hereby certify that I am the duly elected, qualified and acting Secretary of State of the State of Ohio, and I further certify that* I am the custodian of certain records pertaining to constitutional amendments proposed by the General Assembly, constitutional amendments proposed by initiative petition, laws proposed by initiative petition, and referendums of laws enacted by the General Assembly, in accordance with the provisions of Sections 1-1g of Article II, Ohio Constitution, section 1 of Article XVI, Ohio Constitution, and Title XXXV of the Revised Code of Ohio, including but not limited to the ballot language for each proposed constitutional amendment, law and referendum that was printed on the ballot for the election at which such proposed constitutional amendment, law or referendum was submitted to the electors of the State of Ohio for their approval or rejection;

And I further certify that attached hereto is a true and accurate copy of the ballot language that was printed on the ballot submitted to electors throughout the State of Ohio for the election held on November 3, 1936, on an amendment to the Ohio Constitution, proposed by initiative petition, to adopt a new section to be known as Section 12 of Article XII, prohibiting the levy or collection of an excise tax on the sale or purchase of food for human consumption off the premises where sold.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the official Seal of the Secretary of State of Ohio, at Columbus, Ohio, this 27th *day of* February, 2009

Jennifer Brunner
Secretary of State

SEC4000 (Rev. 1/07)

C 183350

11-3-1936

PROPOSAL SUBMITTED BY INITIATIVE PETITION Proposing Amendment to the Constitution of Ohio by Adopting a New Section to Be Known as Section 12 of Article XII.

To be submitted to the Electors of the State for their approval or rejection at the election to be held November 3, 1936.

PROPOSAL PROHIBITING TAX LEVY ON SALE OR PURCHASE OF FOOD.

(Title)

An amendment to the Constitution of the State of Ohio proposing the adoption of a new section to be known as Section 12 of Article XII, prohibiting the levy or collection of an excise tax on the sale or purchase of food for human consumption off the premises where sold.

TEXT OF PROPOSED AMENDMENT

BE IT RESOLVED by the people of the State of Ohio:

That the Constitution of the State of Ohio be amended by the adoption of a new section to be known as Section 12 of Article XII, which section shall read as follows:

Section 12. On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

Schedule: If the votes for the foregoing proposed amendment shall exceed in number those against it, the amendment shall go into effect on November 11, 1936.

FORM OF OFFICIAL BALLOT

PROPOSED AMENDMENT TO THE CONSTITUTION OF OHIO
(Proposed by Initiative Petition)
VOTE BALLOT WITH AN X

Amendment adopting a new section to be known as Section 12 of Article XII of the Constitution of Ohio, prohibiting the levy of an excise tax on the sale or purchase of food for human consumption off the premises where sold.

ARTICLE XII, SECTION 12

On and after November 11, 1936, no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold.

SCHEDULE

If the votes for the foregoing proposed amendment shall exceed in number those against it, the amendment shall go into effect November 11, 1936.

	YES	SHALL THE AMENDMENT PROPOSING THE ADOPTION OF SECTION 12 OF ARTICLE XII, PROHIBITING THE LEVY AND COLLECTION OF AN EXCISE TAX ON THE SALE OR PURCHASE OF FOOD FOR HUMAN CONSUMPTION OFF THE PREMISES WHERE SOLD, BE ADOPTED.
	NO	

ARGUMENT IN FAVOR OF THE INITIATED PROPOSED AMENDMENT TO ARTICLE XII OF THE CONSTITUTION OF OHIO BY ADOPTING SECTION 12.

Let us repeal the sales tax on food for home consumption by voting "yes" on the constitutional amendment at the election, November 3rd, 1936. Food is the greatest necessity of life. A special tax on food is the most unjust and obnoxious that could be levied. It certainly is not needed now.

Prosperity is returning steadily, and with it all local revenues are increasing. Likewise all state revenues are gradually on the increase. The repeal of the sales tax on food will save the people of Ohio twelve million dollars per year. But according to present estimates, the increase in other local and state revenues will make up for this loss.

The schools of Ohio are safe, because of our new Public School Foundation Law, and because of other state money that has been provided for them. If this is not quite enough, we will guarantee to change the present system of distribution of state funds, so that our schools will be fully provided for. We are committed, without reservation, to a strong and financially secure school system.

The repeal of the sales tax on food will not affect our real estate tax. The state has no power under the constitution to tax real estate. Moreover, the state has bound itself by law and by moral commitment to provide the additional money, above local revenues, needed to keep our schools operating full time, so that all the boys and girls of Ohio may have a good education.

In our effort to repeal the sales tax on food, we are being opposed by certain unfriendly interests by secret and underground methods. This includes our political opponents and their co-conspirators. Let us roll up a smashing victory on November third and remove this unjust food-tax forever! Answer our opponents with votes.

Committee for the Amendment: MARTIN L. DAVEY, MYRNA Y. SMITH, CHARLES S. LEASURE, T. GERTRUDE FORTUNE, JOHN CAREN.

ARGUMENT IN OPPOSITION TO THE INITIATED PROPOSED AMENDMENT TO ARTICLE XII OF THE CONSTITUTION OF OHIO BY ADOPTING SECTION 12.

The repeal of the sales tax on food will reduce the revenue from the sales tax by about twenty per cent, or nearly $12,000,000.00. If the sales tax on food is removed, many citizens in the lower income brackets will cease to make any direct substantial contribution for the support of schools, government and poor relief. It is as much the obligation of every citizen to pay taxes as it is his right to enjoy the protection and freedom that is guaranteed by government. If the amendment carries, your schools will lose $7,200,000.00 and your local governments $4,800,000.00. These amounts are needed by your schools and your local governments.

The present sales tax law represents emergency legislation designed to meet financial problems up to March 31, 1937, when it will expire by its own limitation. Why not leave the Legislature free in its unfettered discretion to work out a permanent solution of your tax problem. The Legislature chosen by you in November at the popular election can best express your will through legislation creating the type of tax system that you desire.

Tax exemptions should not be written into the Constitution. They are properly the subject for consideration by legislative bodies and have no place in the organic law of the state.

The exemption of food will increase the difficulty of administration, reduce the revenue, raise serious problems in connection with fair enforcement of the sales tax law and will increase the cost of administration by a substantial amount.

Every citizen, regardless of his income, should bear some portion of the cost of his government. The passage of the amendment will relieve many of that responsibility. Every citizen favoring a broad base for the tax system of this state and the adequate financing of local government and schools should vote "no" on the proposal to exempt food for human consumption from the sales tax.

Committee Against the Amendment: W. H. PATTON, T. T. FRANKENBERG, MOSES ROBERT.

EXHIBIT 12

United States of America
State of Ohio
Office of the Secretary of State

*I, **JENNIFER BRUNNER**, Secretary of State, do hereby certify that I am the duly elected, qualified and acting Secretary of State of the State of Ohio, and I further certify that* I am the custodian of certain records pertaining to constitutional amendments proposed by the General Assembly, constitutional amendments proposed by initiative petition, laws proposed by initiative petition, and referendums of laws enacted by the General Assembly, in accordance with the provisions of Sections 1-1g of Article II, Ohio Constitution, section 1 of Article XVI, Ohio Constitution, and Title XXXV of the Revised Code of Ohio, including but not limited to the ballot language for each proposed constitutional amendment, law and referendum that was printed on the ballot for the election at which such proposed constitutional amendment, law or referendum was submitted to the electors of the State of Ohio for their approval or rejection;

And I further certify that attached hereto is a true and accurate copy of the ballot language that was printed on the Official Questions and Issues Ballot submitted to electors throughout the State of Ohio for the election held on November 8, 1994, on four proposed amendments to the Ohio Constitution, including an amendment proposed by initiative petition, designated on the ballot as Issue 4, to amend Article XII by the addition of Section 13, expanding the prohibitions of taxes on the sale or purchase of food for human consumption off the premises where sold.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed the official Seal of the Secretary of State of Ohio, at Columbus, Ohio, this 27th *day of* February, 2009

Jennifer Brunner
Secretary of State

SEC4000 (Rev. 1/07)

C 183326

(Perforate)

11-8-94

OFFICIAL QUESTIONS AND ISSUES BALLOT

Vote ballot with an "X"

PROPOSED CONSTITUTIONAL AMENDMENT

1

(Proposed by Resolution of the General Assembly of Ohio)

To amend Sections 2 and 3 of Article IV of the Constitution of the State of Ohio.

TO CHANGE THE PROCEDURE FOR APPEALS OF CASES IN WHICH THE DEATH PENALTY IS IMPOSED, THIS AMENDMENT WILL:

1. REMOVE JURISDICTION FROM THE COURTS OF APPEALS TO REVIEW DEATH PENALTY CASES ON DIRECT APPEAL.

2. PROVIDE FOR DIRECT APPEALS OF DEATH PENALTY CASES TO THE OHIO SUPREME COURT FROM THE COURTS OF COMMON PLEAS OR OTHER COURTS OF RECORD INFERIOR TO THE COURT OF APPEALS.

3. APPLY TO CASES IN WHICH THE DEATH PENALTY IS IMPOSED FOR OFFENSES COMMITTED ON OR AFTER JANUARY 1, 1995.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE JANUARY 1, 1995.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

PROPOSED CONSTITUTIONAL AMENDMENT

2

(Proposed by Resolution of the General Assembly of Ohio)

To amend Article I of the Ohio Constitution by the addition of Section 10a.

TO AFFORD VICTIMS OF CRIMINAL OFFENSES CONSTITUTIONAL RIGHTS, THIS AMENDMENT WILL:

1. REQUIRE THAT VICTIMS OF CRIME BE ACCORDED FAIRNESS, DIGNITY AND RESPECT IN THE CRIMINAL JUSTICE SYSTEM.

2. AS PROVIDED BY LAW, REQUIRE THAT VICTIMS OF CRIME BE GIVEN REASONABLE AND APPROPRIATE NOTICE, INFORMATION, ACCESS, AND PROTECTION AND A MEANINGFUL ROLE IN THE CRIMINAL JUSTICE PROCESS.

IF ADOPTED, THIS AMENDMENT WILL NOT GIVE ANY PERSON NEW OR ADDITIONAL RIGHTS TO APPEAL OR MODIFY A COURT DECISION, ABRIDGE ANY OTHER RIGHT GUARANTEED BY THE U.S. OR OHIO CONSTITUTIONS, OR CREATE A LEGAL CLAIM FOR COMPENSATION OR DAMAGES AGAINST THE STATE OF OHIO, ITS POLITICAL SUBDIVISIONS OR ANY PUBLIC OFFICER OR EMPLOYEE.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE IMMEDIATELY.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

PROPOSED CONSTITUTIONAL AMENDMENT

3 (Proposed by Resolution of the General Assembly of Ohio)

To amend Article VI of the Ohio Constitution by the addition of Section 6.

TO INCREASE OPPORTUNITIES TO THE RESIDENTS OF THE STATE OF OHIO FOR HIGHER EDUCATION AND TO ENCOURAGE OHIO FAMILIES TO SAVE AHEAD TO BETTER AFFORD HIGHER EDUCATION, THIS AMENDMENT WILL:

1. ALLOW THE STATE TO MAINTAIN A PROGRAM FOR THE SALE OF TUITION CREDITS WHEREBY THE PROCEEDS OF SUCH CREDITS PURCHASED FOR THE BENEFIT OF STATE RESIDENTS ARE GUARANTEED BY THE STATE TO COVER A SPECIFIED AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY STATE INSTITUTION OF HIGHER EDUCATION AND THE SAME OR A DIFFERENT AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY OTHER HIGHER EDUCATION INSTITUTION AS MAY BE PROVIDED BY LAW.

2. TO REQUIRE THAT TUITION CREDITS PAID FROM THE TUITION CREDITS PROGRAM AND THE OHIO TUITION TRUST FUND BE SUPPORTED BY THE FULL FAITH AND CREDIT OF THE STATE OF OHIO AND REQUIRE THE PASSAGE OF LAWS FOR THE CONDUCT OF THE TUITION CREDITS PROGRAM CONSISTENT WITH THIS AMENDMENT.

3. REQUIRE THE GENERAL ASSEMBLY TO APPROPRIATE MONEY TO OFFSET ANY DEFICIENCY IN THE OHIO TUITION TRUST FUND TO GUARANTEE THE PAYMENT OF THE FULL AMOUNT OF ANY TUITION PAYMENT OR REFUND REQUIRED BY A TUITION PAYMENT CONTRACT, AND ALLOW A MAJORITY OF THE MEMBERS OF EACH HOUSE OF THE GENERAL ASSEMBLY TO APPROPRIATE FUNDS FOR THE PAYMENT OF ANY TUITION PAYMENT CONTRACT PREVIOUSLY ENTERED INTO.

4. REQUIRE THAT ALL OHIO TUITION TRUST FUND ASSETS BE USED FOR THE PURPOSE OF THE FUND AND, IF THE FUND IS LIQUIDATED, REQUIRE THAT ANY REMAINING ASSETS BE TRANSFERRED TO THE GENERAL REVENUE FUND OF THE STATE.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE IMMEDIATELY.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

PROPOSED CONSTITUTIONAL AMENDMENT

4 (Proposed by Initiative Petition)

To amend Article XII of the Ohio Constitution by the addition of Section 13.

CURRENT SECTION 3(C) OF ARTICLE XII PROHIBITS TAXES ON THE SALE OR PURCHASE OF FOOD FOR HUMAN CONSUMPTION OFF THE PREMISES WHERE SOLD. THE AMENDMENT WOULD EXPAND THE CURRENT RESTRICTIONS BY:

1. PROHIBITING THE CURRENT WHOLESALE TAX ON SOFT DRINKS AND OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES.

2. PROHIBITING ENACTMENT OF A WHOLESALE TAX ON THE SALE OR PURCHASE OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

3. PROHIBITING ENACTMENT OF A TAX ON THE SALE TO OR PURCHASE BY A MANUFACTURER, PROCESSOR, PACKAGER, OR RESELLER OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

4. PROHIBITING ENACTMENT OF RETAIL TAXES ON PACKAGING THAT CONTAINS SOFT DRINKS, OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE 30 DAYS AFTER ADOPTION.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

United States of America
State of Ohio } ss.
Office of the Secretary of State

I, Bob Taft, Secretary of State of the State of Ohio, do hereby certify that the ballot as shown above is the prescribed form for the General Election to be held on November 8, 1994.

Witness my hand and official seal at Columbus, Ohio this 9th day of September, 1994.

BALLOT LANGUAGE, EXPLANATIONS, ARGUMENTS AND RESOLUTIONS FOR AMENDMENTS TO THE OHIO CONSTITUTION PROPOSED BY THE GENERAL ASSEMBLY AND BALLOT LANGUAGE, ARGUMENTS AND THE FULL TEXT OF AN AMENDMENT TO THE OHIO CONSTITUTION PROPOSED BY INITIATIVE PETITION TO BE SUBMITTED TO THE VOTERS AT THE GENERAL ELECTION, NOVEMBER 8, 1994.

PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT

1 (Proposed by Resolution of the General Assembly of Ohio)

To amend Sections 2 and 3 of Article IV of the Constitution of the State of Ohio.

TO CHANGE THE PROCEDURE FOR APPEALS OF CASES IN WHICH THE DEATH PENALTY IS IMPOSED, THIS AMENDMENT WILL:

1. REMOVE JURISDICTION FROM THE COURTS OF APPEALS TO REVIEW DEATH PENALTY CASES ON DIRECT APPEAL.

2. PROVIDE FOR DIRECT APPEALS OF DEATH PENALTY CASES TO THE OHIO SUPREME COURT FROM THE COURTS OF COMMON PLEAS OR OTHER COURTS OF RECORD INFERIOR TO THE COURT OF APPEALS.

3. APPLY TO CASES IN WHICH THE DEATH PENALTY IS IMPOSED FOR OFFENSES COMMITTED ON OR AFTER JANUARY 1, 1995.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE JANUARY 1, 1995.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

EXPLANATION FOR STATE ISSUE 1
(as prepared by the Ohio Ballot Board)

Currently, a case in which the death penalty is imposed is reviewed for legal sufficiency by a district court of appeals consisting of at least three judges. This portion of the appeals process takes on the average from one to two years. If the death penalty is upheld, the case is then reviewed by the Ohio Supreme Court. If the death penalty is overturned by the Court of Appeals, appeal to the Ohio Supreme Court is discretionary.

If adopted, the amendment will eliminate the review of death penalty cases by a district court of appeals and provide that these cases be reviewed directly by the Ohio Supreme Court. This may increase the Ohio Supreme Court's burden and caseload in these mandated appeals. The adoption of the amendment would not affect review of death penalty cases by federal courts.

ARGUMENT FOR STATE ISSUE 1

VOTE FOR ISSUE 1
SUPPORT SWIFT JUSTICE IN OHIO

According to the current law, a person sentenced to death in Ohio has the right to an appeals process that contains two steps on the state level: The Court of Appeals and The Ohio Supreme Court. Issue 1 seeks to delete the Court of Appeals step in an effort to streamline the process and make the system more efficient. Issue 1 will give persons convicted and sentenced to death in Ohio a direct appeal to the Ohio Supreme Court.

By eliminating the Courts of Appeal in this process, duplication of efforts and many years will be saved. According to present law, the court of appeals must review the entire record, that is all evidence that was presented at the original hearing. If this decision is appealed, the case travels to the Ohio Supreme Court. This court gives the case the same review as was given by the court of appeals and makes a decision. **In total, from the day that the death sentence was imposed, to the day that the Supreme Court gives its decision, an average of five years may have passed.**

Ohioans should vote in favor of Issue 1 because it is a reasonable step toward reforming our current judicial system. Too often criminals are allowed to manipulate and exploit our judicial process through endless appeals that take years to review. Meanwhile, the families of victims wait for final justice to be administered. Unfortunately, many families are still waiting. **Support for Issue 1 is support for these families.**

SUPPORTERS OF ISSUE 1
Governor George Voinovich
Attorney General Lee Fisher
Ohio Prosecuting Attorneys Association

COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 1
State Representative Johnnie Maier
State Representative Barbara Pringle
State Representative Mike Fox
Senator Nancy Chiles Dix
Senator Anthony Sinagra

ARGUMENT AGAINST STATE ISSUE 1

THIS ISSUE SIMPLY WILL NOT DO WHAT IT CLAIMS. This proposal should be defeated because:

1. It will not significantly shorten the time between a sentence of death and execution.

2. It increases the risk that an innocent person will be executed.

Ohio's death penalty cases are now reviewed by one of the 12 district courts of appeal. Without this lower court review, Supreme Court Justices will have to assemble and review the records of the case at much greater length, cutting into alleged time-saving. Individuals on both sides of the issue agree that these mandated appeals may increase the Ohio Supreme Court's burden and caseload.

This proposal should be defeated because it selectively denies a right of appeal only to those subject to the state's most extreme penalty, death.

This proposal should be defeated because it opens our death penalty law to a lengthy and expensive constitutional challenge. The U.S. Supreme Court has never upheld a death penalty statute allowing fewer levels of appeal in capital cases than in other cases.

This proposal should be defeated because it increases the risk that an innocent person will be executed. There have been several instances where people convicted and awaiting the death penalty have been falsely convicted. This measure should be defeated so we can solve the problem in ways that carry less risk of executing the wrong person.

VOTE NO ON ISSUE 1.

COMMITTEE TO PREPARE ARGUMENT AGAINST ISSUE 1
Representative Mary Abel
Representative J. Donald Mottley
Representative Vernon Sykes
Senator Ben E. Espy
Senator Merle Kearns

ISSUE 1
TEXT OF PROPOSED
CONSTITUTIONAL AMENDMENT

(Substitute House Joint Resolution No. 15)

Proposing to amend Sections 2 and 3 of Article IV of the Constitution of the State of Ohio to give the Supreme Court jurisdiction in direct appeals in death penalty cases as a matter of right, thus removing the jurisdiction of the courts of appeals on direct review in death penalty cases.

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring herein, that there shall be submitted to the electors of the state, in the manner prescribed by law at the general election to be held on the first Tuesday after the first Monday in November 1994, a proposal to amend Sections 2 and 3 of Article IV of the Constitution of the State of Ohio to read as follows:

ARTICLE IV

Section 2. (A) The supreme court shall, until otherwise provided by law, consist of seven judges, who shall be known as the chief justice and justices. In case of the absence or disability of the chief justice, the judge having the period of longest total service upon the court shall be the acting chief justice. If any member of the court shall be unable, by reason of illness, disability or disqualification, to hear, consider and decide a cause or causes, the chief justice or the acting chief justice may direct any judge of any court of appeals to sit with the judges of the supreme court in the place and stead of the absent judge. A majority of the supreme court shall be necessary to constitute a quorum or to render a judgment.

(B)(1) The supreme court shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination;
(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters relating to the practice of law.

(2) The supreme court shall have appellate jurisdiction as follows:

(a) In appeals from the courts of appeals as a matter of right in the following:

(i) Cases originating in the courts of appeals;

~~(ii) Cases in which the death penalty has been affirmed;~~

~~(iii)~~ (ii) Cases involving questions arising under the constitution of the United States or of this state.

(b) In appeals from the courts of appeals in cases of felony on leave first obtained;

(c) IN DIRECT APPEALS FROM THE COURTS OF COMMON PLEAS OR OTHER COURTS OF RECORD INFERIOR TO THE COURT OF APPEALS AS A MATTER OF RIGHT IN CASES IN WHICH THE DEATH PENALTY HAS BEEN IMPOSED;

(d) Such revisory jurisdiction of the proceedings of administrative officers or agencies as may be conferred by law;

~~(d)~~ (e) In cases of public or great general interest, the supreme court may direct any court of appeals to certify its record to the supreme court, and may review and affirm, modify, or reverse the judgment of the court of appeals;

~~(e)~~ (f) The supreme court shall review and affirm, modify, or reverse the judgment in any case certified by any court of appeals pursuant to section 3 (B)(4) of this article.

(3) No law shall be passed or rule made whereby any person shall be prevented from invoking the original jurisdiction of the supreme court.

(C) The decisions in all cases in the supreme court shall be reported, together with the reasons therefor.

Section 3. (A) The state shall be divided by law into compact appellate districts in each of which there shall be a court of appeals consisting of three judges. Laws may be passed increasing the number of judges in any district wherein the volume of business may require such additional judge or judges. In districts having additional judges, three judges shall participate in the hearing and disposition of each case. The court shall hold sessions in each county of the district as the necessity arises. The county commissioners of each county shall provide a proper and convenient place for the court of appeals to hold court.

(B)(1) The courts of appeals shall have original jurisdiction in the following:

(a) Quo warranto;
(b) Mandamus;
(c) Habeas corpus;
(d) Prohibition;
(e) Procedendo;
(f) In any cause on review as may be necessary to its complete determination.

(2) Courts of appeals shall have such jurisdiction as may be provided by law to review and affirm, modify, or reverse judgments or final orders of the courts of record inferior to the court of appeals within the district and, EXCEPT THAT COURTS OF APPEALS SHALL NOT HAVE JURISDICTION TO REVIEW ON DIRECT APPEAL A JUDGMENT THAT IMPOSES A SENTENCE OF DEATH. COURTS OF APPEALS shall have such appellate jurisdiction as may be provided by law to review and affirm, modify, or reverse final orders or actions of administrative officers or agencies.

(3) A majority of the judges hearing the cause shall be necessary to render a judgment. Judgments of the courts of appeals are final except as provided in section 2(B)(2) of this article. No judgment resulting from a trial by jury shall be reversed on the weight of the evidence except by the concurrence of all three judges hearing the cause.

(4) Whenever the judges of a court of appeals find that a judgment upon which they have agreed is in conflict with a judgment pronounced upon the same question by any other court of appeals of the state, the judges shall certify the record of the case to the supreme court for review and final determination.

(C) Laws may be passed providing for the reporting of cases in the courts of appeals.

EFFECTIVE DATE AND REPEAL

If adopted by a majority of the electors voting on this amendment, the amendment shall take effect on January 1, 1995, and existing Sections 2 and 3 of Article IV of the Constitution of the State of Ohio shall be repealed on that effective date.

SCHEDULE

Upon the adoption of the amendment to Sections 2 and 3 of Article IV of the Constitution of the State of Ohio, the General Assembly shall amend the Revised Code of Ohio to implement the direct appeals of death sentences to the Ohio Supreme Court.

The amendments to Sections 2 and 3 of Article IV of the Constitution of Ohio regarding the direct appeal of a sentence of death apply only to cases in which a sentence of death is imposed for an offense committed on or after January 1, 1995. A direct appeal of a sentence of death imposed for an offense committed prior to January 1, 1995, shall be taken in the same manner as if the amendment had not been adopted.

ISSUE 3
TEXT OF PROPOSED
CONSTITUTIONAL AMENDMENT

(Amended Senate Joint Resolution No. 9)

Proposing to enact Section 6 of Article VI of the Constitution of the State of Ohio to authorize the tuition credits sold or to be sold that are to be paid from the Ohio Tuition Trust Fund to be supported by the full faith and credit of the state and to make other changes governing that program.

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring herein, that there shall be submitted to the electors of the state in the manner prescribed by law at the general election to be held on the first Tuesday after the first Monday in November 1994, a proposal to enact a new section immediately following Section 5 of Article VI of the Constitution of Ohio to read as follows:

ARTICLE VI

Section 6. (A) TO INCREASE OPPORTUNITIES TO THE RESIDENTS OF THIS STATE FOR HIGHER EDUCATION, IT IS HEREBY DETERMINED TO BE IN THE PUBLIC INTEREST AND A PROPER PUBLIC PURPOSE FOR THE STATE TO MAINTAIN A PROGRAM FOR THE SALE OF TUITION CREDITS SUCH THAT THE PROCEEDS OF SUCH CREDITS PURCHASED FOR THE BENEFIT OF A PERSON THEN A RESIDENT OF THIS STATE SHALL BE GUARANTEED TO COVER A SPECIFIED AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY STATE INSTITUTION OF HIGHER EDUCATION, AND THE SAME OR A DIFFERENT AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY OTHER INSTITUTION OF HIGHER EDUCATION, AS MAY BE PROVIDED BY LAW.

(B) THE TUITION CREDITS PROGRAM AND THE OHIO TUITION TRUST FUND PREVIOUSLY CREATED BY LAW, WHICH TERMS INCLUDE ANY SUCCESSOR TO THAT PROGRAM OR FUND, SHALL BE CONTINUED SUBJECT TO THE SAME LAWS, EXCEPT AS MAY HEREAFTER BE AMENDED. TO SECURE THE GUARANTEES REQUIRED BY DIVISION (A) OF THIS SECTION, THE GENERAL ASSEMBLY SHALL APPROPRIATE MONEY SUFFICIENT TO OFFSET ANY DEFICIENCY THAT OCCURS IN THE OHIO TUITION TRUST FUND, AT ANY TIME NECESSARY TO MAKE PAYMENT OF THE FULL AMOUNT OF ANY TUITION PAYMENT OR REFUND THAT WOULD HAVE BEEN REQUIRED BY A TUITION PAYMENT CONTRACT, EXCEPT FOR THE CONTRACT'S LIMIT OF PAYMENT TO MONEY AVAILABLE IN THE TRUST FUND. NOTWITHSTANDING SECTION 29 OF ARTICLE II OF THIS CONSTITUTION, OR THE LIMITATION OF A TUITION PAYMENT CONTRACT EXECUTED BEFORE THE EFFECTIVE DATE OF THIS SECTION, SUCH APPROPRIATIONS MAY BE MADE BY A MAJORITY OF THE MEMBERS ELECTED TO EACH HOUSE OF THE GENERAL ASSEMBLY, AND THE FULL AMOUNT OF ANY SUCH ENHANCED TUITION PAYMENT OR REFUND MAY BE DISBURSED TO AND ACCEPTED BY THE BENEFICIARY OR PURCHASER. TO THESE ENDS THERE IS HEREBY PLEDGED THE FULL FAITH AND CREDIT AND TAXING POWER OF THE STATE.

ALL ASSETS THAT ARE MAINTAINED IN THE OHIO TUITION TRUST FUND SHALL BE USED SOLELY FOR THE PURPOSES OF THAT FUND. HOWEVER, IF THE PROGRAM IS TERMINATED OR THE FUND IS LIQUIDATED, THE REMAINING ASSETS AFTER THE OBLIGATIONS OF THE FUND HAVE BEEN SATISFIED IN ACCORDANCE WITH LAW SHALL BE TRANSFERRED TO THE GENERAL REVENUE FUND OF THE STATE.

LAWS SHALL BE PASSED, WHICH MAY PRECEDE AND BE MADE CONTINGENT UPON THE ADOPTION OF THIS AMENDMENT BY THE ELECTORS, TO PROVIDE THAT FUTURE CONDUCT OF THE TUITION CREDITS PROGRAM SHALL BE CONSISTENT WITH THIS AMENDMENT. NOTHING IN THIS AMENDMENT SHALL BE CONSTRUED TO PROHIBIT OR RESTRICT ANY AMENDMENTS TO THE LAWS GOVERNING THE TUITION CREDITS PROGRAM OR THE OHIO TUITION TRUST FUND THAT ARE NOT INCONSISTENT WITH THIS AMENDMENT.

EFFECTIVE DATE

If adopted by a majority of the electors voting on the proposal, Section 6 of Article VI of the Constitution of Ohio shall take effect immediately.

PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT

2 (Proposed by Resolution of the General Assembly of Ohio)

To amend Article I of the Ohio Constitution by the addition of Section 10a.

TO AFFORD VICTIMS OF CRIMINAL OFFENSES CONSTITUTIONAL RIGHTS, THIS AMENDMENT WILL:

1. REQUIRE THAT VICTIMS OF CRIME BE ACCORDED FAIRNESS, DIGNITY AND RESPECT IN THE CRIMINAL JUSTICE SYSTEM.

2. AS PROVIDED BY LAW, REQUIRE THAT VICTIMS OF CRIME BE GIVEN REASONABLE AND APPROPRIATE NOTICE, INFORMATION, ACCESS, AND PROTECTION AND A MEANINGFUL ROLE IN THE CRIMINAL JUSTICE PROCESS.

IF ADOPTED, THIS AMENDMENT WILL NOT GIVE ANY PERSON NEW OR ADDITIONAL RIGHTS TO APPEAL OR MODIFY A COURT DECISION, ABRIDGE ANY OTHER RIGHT GUARANTEED BY THE U.S. OR OHIO CONSTITUTIONS, OR CREATE A LEGAL CLAIM FOR COMPENSATION OR DAMAGES AGAINST THE STATE OF OHIO, ITS POLITICAL SUBDIVISIONS OR ANY PUBLIC OFFICER OR EMPLOYEE.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE IMMEDIATELY.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

EXPLANATION FOR STATE ISSUE 2
(as prepared by the Ohio Ballot Board)

The amendment would give crime victims a constitutional right to fairness, dignity, and respect in the criminal justice system. The amendment would also require the General Assembly to pass laws giving crime victims reasonable notice and information about, and access to, criminal proceedings, and a meaningful role in the criminal justice process.

The amendment does not give any person new or additional rights to appeal or modify decisions in criminal cases or change or limit rights currently guaranteed by the U.S. or Ohio Constitutions. Finally, the amendment does not create any new legal claim against the State of Ohio, its political subdivisions, or public officers or employees.

ARGUMENT FOR STATE ISSUE 2

1. Currently, there are laws regarding crime victims, but there are constitutional rights that protect the accused. In a judicial setting, when a judge must weigh the laws of the victim against the constitutional rights of the accused, the constitutional rights will prevail. The proposed amendment will mean that when judges make decisions, they will weigh the constitutional rights of both the victim and the accused. The amendment will not take away any rights of the accused. It will, however, give the rights of victims of criminal offenses equal standing and protection in our state constitution. Issue 2 is a question of balance.

2. The constitutional amendment will serve as a guide to our state lawmakers in passing victim rights legislation. Our constitution serves as our highest authority and statement of public policy. Lawmakers will know it is the will of its citizens that victims of crime should have a right to reasonable and appropriate notice, information, access, and protection, and a meaningful role in the criminal justice process.

3. The Constitution protects certain fundamental rights that every person has and that no other person, institution, or government can take away or deny. The Bill of Rights to the Constitution of the United States and Article 1, Section 10 of the Ohio Constitution were adopted so that no one, who is accused of committing a crime, can be denied the rights that are enumerated there. However, there is no corresponding section in either Constitution to protect the fundamental rights of victims of crime. The fundamental rights of victims to be treated with fairness, dignity, and respect need to be in the fundamental law of our state, the Ohio Constitution.

COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 2

Representative Katherine H. Walsh
Representative Sean Logan
Representative Tim Greenwood

ARGUMENT AGAINST STATE ISSUE 2

No argument was submitted against the proposed constitutional amendment. No member of the General Assembly voted against the amendment.

ISSUE 2
TEXT OF PROPOSED
CONSTITUTIONAL AMENDMENT

(Amended Substitute House Joint Resolution No. 3)

Proposing to enact Section 10a of Article I of the Constitution of the State of Ohio relative to rights of victims of crime.

Be it resolved by the General Assembly of the State of Ohio, three-fifths of the members elected to each house concurring herein, that there shall be submitted to the electors of the state in the manner prescribed by law at the general election to be held on the first Tuesday after the first Monday in November 1994, a proposal to enact Section 10a of Article I of the Constitution of Ohio to read as follows:

ARTICLE I

Section 10a. VICTIMS OF CRIMINAL OFFENSES SHALL BE ACCORDED FAIRNESS, DIGNITY, AND RESPECT IN THE CRIMINAL JUSTICE PROCESS, AND, AS THE GENERAL ASSEMBLY SHALL DEFINE AND PROVIDE BY LAW, SHALL BE ACCORDED RIGHTS TO REASONABLE AND APPROPRIATE NOTICE, INFORMATION, ACCESS, AND PROTECTION AND TO A MEANINGFUL ROLE IN THE CRIMINAL JUSTICE PROCESS. THIS SECTION DOES NOT CONFER UPON ANY PERSON A RIGHT TO APPEAL OR MODIFY ANY DECISION IN A CRIMINAL PROCEEDING, DOES NOT ABRIDGE ANY OTHER RIGHT GUARANTEED BY THE CONSTITUTION OF THE UNITED STATES OR THIS CONSTITUTION, AND DOES NOT CREATE ANY CAUSE OF ACTION FOR COMPENSATION OR DAMAGES AGAINST THE STATE, ANY POLITICAL SUBDIVISION OF THE STATE, ANY OFFICER, EMPLOYEE, OR AGENT OF THE STATE OR OF ANY POLITICAL SUBDIVISION, OR ANY OFFICER OF THE COURT.

EFFECTIVE DATE

If adopted by a majority of the electors voting on the proposal, Section 10a of Article I of the Constitution of Ohio shall take effect immediately.

PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT

3 (Proposed by Resolution of the General Assembly of Ohio)

To amend Article VI of the Ohio Constitution by the addition of Section 6.

TO INCREASE OPPORTUNITIES TO THE RESIDENTS OF THE STATE OF OHIO FOR HIGHER EDUCATION AND TO ENCOURAGE OHIO FAMILIES TO SAVE AHEAD TO BETTER AFFORD HIGHER EDUCATION, THIS AMENDMENT WILL:

1. ALLOW THE STATE TO MAINTAIN A PROGRAM FOR THE SALE OF TUITION CREDITS WHEREBY THE PROCEEDS OF SUCH CREDITS PURCHASED FOR THE BENEFIT OF STATE RESIDENTS ARE GUARANTEED BY THE STATE TO COVER A SPECIFIED AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY STATE INSTITUTION OF HIGHER EDUCATION AND THE SAME OR A DIFFERENT AMOUNT WHEN APPLIED TO THE COST OF TUITION AT ANY OTHER HIGHER EDUCATION INSTITUTION AS MAY BE PROVIDED BY LAW.

2. TO REQUIRE THAT TUITION CREDITS PAID FROM THE TUITION CREDITS PROGRAM AND THE OHIO TUITION TRUST FUND BE SUPPORTED BY THE FULL FAITH AND CREDIT OF THE STATE OF OHIO AND REQUIRE THE PASSAGE OF LAWS FOR THE CONDUCT OF THE TUITION CREDITS PROGRAM CONSISTENT WITH THIS AMENDMENT.

3. REQUIRE THE GENERAL ASSEMBLY TO APPROPRIATE MONEY TO OFFSET ANY DEFICIENCY IN THE OHIO TUITION TRUST FUND TO GUARANTEE THE PAYMENT OF THE FULL AMOUNT OF ANY TUITION PAYMENT OR REFUND REQUIRED BY A TUITION PAYMENT CONTRACT, AND ALLOW A MAJORITY OF THE MEMBERS OF EACH HOUSE OF THE GENERAL ASSEMBLY TO APPROPRIATE FUNDS FOR THE PAYMENT OF ANY TUITION PAYMENT CONTRACT PREVIOUSLY ENTERED INTO.

4. REQUIRE THAT ALL OHIO TUITION TRUST FUND ASSETS BE USED FOR THE PURPOSE OF THE FUND AND, IF THE FUND IS LIQUIDATED, REQUIRE THAT ANY REMAINING ASSETS BE TRANSFERRED TO THE GENERAL REVENUE FUND OF THE STATE.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE IMMEDIATELY.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

EXPLANATION FOR STATE ISSUE 3
(as prepared by the Ohio Ballot Board)

The amendment would require that tuition credits paid from the tuition credits program and the Ohio Tuition Trust Fund be supported by the full faith and credit of the State of Ohio. The amendment would also require the passage of laws to provide that future conduct of the tuition credits program be consistent with the amendment.

The amendment would allow the State of Ohio to maintain a program for the sale of tuition credits and to guarantee the proceeds of the credits sold. The guarantee would cover a specified amount of the cost of tuition at any state institution of higher education and the same or a different amount of the cost of tuition at any other higher education institution as may be provided by law.

The amendment would also require the General Assembly to appropriate money to offset any deficiency in the Ohio Tuition Trust Fund to guarantee the payment of the full amount of any tuition payment or refund required by a tuition payment contract, and allow a majority of the members of each house of the General Assembly to appropriate funds for the payment of any tuition payment contract previously entered into.

Finally, the amendment would require that all assets maintained in the Ohio Tuition Trust Fund be used solely for the purposes of the fund. If the fund is liquidated, any remaining assets would be transferred to the general revenue fund of the state.

ARGUMENT FOR STATE ISSUE 3

Passage of Issue 3 will not raise taxes or cost Ohio taxpayers more. It is needed to demonstrate to the Internal Revenue Service that the Prepaid Tuition Program qualifies for federal tax exemption. This "stamp of approval" will enable the program to continue providing an affordable means for families to prepay future higher education at competitive prices.

As a state agency, the Authority has many checks and balances to safeguard a fiscally-sound program for its participants. The funds are sufficient to meet future obligations. Passage of Issue 3 will officially back the Authority with the State's endorsement, satisfying federal guidelines.

The Ohio Tuition Trust Authority was created in 1989 as a state agency to provide Ohio families with a safe, simple and affordable way to prepay the cost of higher education in small increments. Also, scholarships can now be created by corporations or other organizations to prepay tuition for children from families who cannot afford advanced savings.

Since inception, the agency's Prepaid Tuition Program has more than 31,500 children enrolled, has been safely and prudently invested by Public Employees Retirement System money managers and has more than $113 million in assets.

Recent legislation passed by the General Assembly has improved the program's value, equity and affordability. To ensure its continued affordability and enable more Ohio children to access higher education, the State's formal, constitutionally-mandated "full faith and credit" is needed.

The proposed amendment has broad-based, bi-partisan support: state leadership supports its passage. Financial aid administrators endorse Issue 3 because advance family savings decreases reliance on scarce financial aid and burdensome student loans, opening greater access to education.

COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 3

Senator Richard H. Finan
Senator Robert R. Cupp
Representative Michael G. Verich
Representative Barbara H. Boyd
Representative Doug White

ARGUMENT AGAINST STATE ISSUE 3

THE OHIO CONSTITUTION SHOULD NOT BE AMENDED TO PLEDGE STATE TAXES TO GUARANTEE PERSONAL COLLEGE TUITION SAVINGS!

REASONS TO VOTE NO:

—INSURES PERSONAL SAVINGS PLANS: the investor would be assured of a fixed return when college tuition credits are purchased regardless of earnings on Trust Fund investments.

—COMMITS STATE TAXING POWER: should the investment of college tuition funds be insufficient to cover future tuition, tax-payers will have to pay the difference. In a time of difficult budget choices, where raising taxes or reducing spending are options, guaranteeing personal savings is wrong.

—GUARANTEES PAYMENT: an absolute constitutional guarantee is made only for long-term debt for state buildings. Guaranteeing payment for personal college savings accounts is BAD PUBLIC POLICY!

—IRS QUESTIONS: Internal Revenue Service will tax Trust Fund earnings unless the program is state backed. In reality these are private savings and should remain so.

—TRUST FUND NOT SELF-SUPPORTING: when this legislation was passed six years ago, it was to be independent of state government and investors had no claim on the General Revenue Fund. Now they will have first claim on the GRF!

—STATE COMPETES WITH PRIVATE INVESTMENTS: people who can afford to prepay tuition can do so without state help.

—REMOVES PRESSURE TO KEEP TUITION LOW: the leverage which the Trust Fund might have used to control tuition costs is eliminated.

—DISCRIMINATES! low income families cannot afford to contribute to a college savings account.

VOTE NO ON ISSUE 3!

COMMITTEE TO PREPARE ARGUMENT AGAINST ISSUE 3

State Representative Edward F. Kaptulla
State Representative Joan W. Lawrence
State Senator Charles F. Horn

PROPOSED AMENDMENT TO THE OHIO CONSTITUTION

PROPOSED CONSTITUTIONAL AMENDMENT

4 (Proposed by Initiative Petition)

To amend Article XII of the Ohio Constitution by the addition of Section 13.

CURRENT SECTION 3(C) OF ARTICLE XII PROHIBITS TAXES ON THE SALE OR PURCHASE OF FOOD FOR HUMAN CONSUMPTION OFF THE PREMISES WHERE SOLD. THE AMENDMENT WOULD EXPAND THE CURRENT RESTRICTIONS BY:

1. PROHIBITING THE CURRENT WHOLESALE TAX ON SOFT DRINKS AND OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES.

2. PROHIBITING ENACTMENT OF A WHOLESALE TAX ON THE SALE OR PURCHASE OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

3. PROHIBITING ENACTMENT OF A TAX ON THE SALE TO OR PURCHASE BY A MANUFACTURER, PROCESSOR, PACKAGER, OR RESELLER OF SOFT DRINKS, CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION, OR THEIR INGREDIENTS OR PACKAGING.

4. PROHIBITING ENACTMENT OF RETAIL TAXES ON PACKAGING THAT CONTAINS SOFT DRINKS, OTHER CARBONATED, NON-ALCOHOLIC BEVERAGES, OR FOOD FOR HUMAN CONSUMPTION.

IF ADOPTED, THIS AMENDMENT WILL BE EFFECTIVE 30 DAYS AFTER ADOPTION.

A majority yes vote is necessary for passage.

	YES	SHALL THE PROPOSED AMENDMENT BE ADOPTED?
	NO	

ARGUMENT FOR STATE ISSUE 4

VOTE "YES" ON ISSUE 4 — TO STOP TAXES ON FOOD

A YES vote on Issue 4 will restore Ohio's tradition of protecting consumers from paying taxes on food.

When the constitutionality of a new wholesale soft drink tax was challenged in 1992, the court ruling opened a gaping hole in Ohio's constitution, which had been thought to prohibit food taxes.

The court ruled that retail food taxes are indeed illegal. But, it concluded that wholesale taxes on food are legal!

A YES vote on Issue 4 will close this loophole, and restore Ohio's constitutional prohibition on taxing food.

Specifically, Issue 4 will prohibit wholesale taxes on food and other hidden taxes on food ingredients and food packaging. It also will repeal the 1992 soft drink tax.

Repealing the soft drink tax will not affect existing state programs. The revenues go into the General Fund, and are not dedicated to any specific area.

We urge you to support Issue 4 because:

1. Taxing food is wrong. Food taxes especially hurt those who can least afford to pay, such as families with children and seniors on fixed incomes.

2. Allowing state government to enact hidden taxes on food will set a dangerous precedent. The state is already looking at new food taxes to raise revenues.

3. Hidden, wholesale taxes on food are ultimately passed on to consumers. The soft drink tax already costs consumers $70 million annually. Future wholesale food taxes could cost us hundreds of millions of dollars more per year.

Let's restore our constitutional tradition of prohibiting food taxes — before state government goes any further.

Join our broad-based committee of thousands of Ohioans in voting YES on Issue 4.

COMMITTEE TO PREPARE ARGUMENT FOR ISSUE 4

Diane Winterhalter
Dan Schonhoft
STOP TAXES ON FOOD COMMITTEE

EXPLANATION AND ARGUMENT AGAINST STATE ISSUE 4

STATE ISSUE 4 is a constitutional amendment to repeal a state tax on soda pop. Don't be misled into believing it eliminates taxes on food. Since 1936 Ohio's Constitution has prohibited state taxes on food off the premises where sold.

This amendment is being proposed primarily by out-of-state soda pop vendors which seek to use the Ohio Constitution to promote their limited special interests. Here are five reasons why every Ohio voter — and taxpayer — should vote NO on ISSUE 4.

(1) Contrary to its supporters' misleading claims, ISSUE 4 is not a reaction to a tax on food. Its purpose is to prohibit the current wholesale tax on soft drinks and other carbonated, non-alcoholic beverages. The tax amounts to a penny a can, which is modest and fair.

(2) State law has never defined soft drinks as food. They are NOT a nutrition source for children or adults. So they should be subject to taxation just like other non-food products. It's only fair.

(3) If passed, ISSUE 4 will reduce state funds available for education and childrens programs in Ohio. The soda pop tax generates $130 million per budget period, which is needed to support education and other vital programs for children.

(4) Consumers don't pay Ohio's pop tax. The soda pop companies do. Marketplace competition continues to hold down pop prices at the store.

(5) To balance the state budget and prevent cuts in school funding, the wholesale pop tax was approved in 1992 by a bipartisan majority in the state legislature and Governor George Voinovich. Passage of ISSUE 4 could result in harmful cuts in education and other state programs — or it will necessitate the adoption of another tax hike more objectionable to consumers.

On November 8th, vote NO on ISSUE 4!

COMMITTEE TO PREPARE ARGUMENT AGAINST ISSUE 4

R. Gregory Browning
Stephen A. Perry
Gayle S. Channing
Mark Real
T. John Reimers

ISSUE 4
TEXT OF PROPOSED CONSTITUTIONAL AMENDMENT
(Proposed by Initiative Petition)

Be it resolved by the people of the State of Ohio:

Article XII of the Ohio Constitution is amended by the addition of a new section, Section 13, to read:

NO SALES OR OTHER EXCISE TAXES SHALL BE LAWFUL OR COLLECTED (1) UPON ANY WHOLESALE SALE OR WHOLESALE PURCHASE OF FOOD FOR HUMAN CONSUMPTION, ITS INGREDIENTS OR ITS PACKAGING, (2) UPON ANY SALE OR PURCHASE OF SUCH ITEMS SOLD TO OR PURCHASED BY A MANUFACTURER, PROCESSOR, PACKAGER, DISTRIBUTOR, OR RESELLER OF FOOD FOR HUMAN CONSUMPTION, OR ITS INGREDIENTS, FOR USE IN ITS TRADE OR BUSINESS; OR (3) IN ANY RETAIL TRANSACTION ON ANY PACKAGING THAT CONTAINS FOOD FOR HUMAN CONSUMPTION ON OR OFF THE PREMISES WHERE SOLD. FOR PURPOSES OF THIS SECTION, FOOD FOR HUMAN CONSUMPTION SHALL INCLUDE NON-ALCOHOLIC BEVERAGES. THIS SECTION SHALL NOT AFFECT THE EXTENT TO WHICH THE LEVY OR COLLECTION OF SALES OR OTHER EXCISE TAXES ON THE RETAIL SALE OR RETAIL PURCHASE OF FOOD FOR HUMAN CONSUMPTION IS PERMITTED OR PROHIBITED BY SECTION 3(C) OF THIS ARTICLE.

OFFICE OF THE SECRETARY OF STATE OF OHIO

I, Bob Taft, Secretary of State, do hereby certify that the foregoing are the full text of certain constitutional amendments proposed by the General Assembly and filed in the office of the Secretary of State pursuant to Article XVI, Section 1 of the Constitution of the State of Ohio and a certain constitutional amendment proposed by initiative petition filed in the office of the Secretary of State pursuant to Article II, Section 1a of the Constitution of the State of Ohio, together with the ballot language and explanations certified to me by the Ohio Ballot Board and arguments submitted to me by the proponents and opponents of the issues, as prescribed by law.

IN TESTIMONY WHEREOF, I have hereunto subscribed my name and affixed my official seal at Columbus, Ohio this 9th day of September, 1994.

Bob Taft
SECRETARY OF STATE

EXHIBIT 13

THE STATE OF OHIO.

GENERAL AND LOCAL ACTS

PASSED,

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

SIXTY-EIGHTH GENERAL ASSEMBLY

AT ITS REGULAR SESSION,

BEGUN AND HELD IN THE CITY OF COLUMBUS, JANUARY 2, 1888.

VOLUME LXXXV.

COLUMBUS:
PUBLISHED BY STATE AUTHORITY.
THE COLUMBIAN PRINTING CO.,
STATE PRINTERS.
1888.

3. All losses sustained by the corporation; and in the computation of such losses, all debts owing to the corporation shall be included, which shall have remained due, without prosecution, and no interest having been paid thereon for more than one year, or, on which judgment shall have been recovered, that shall have remained for more than two years unsatisfied, and on which no interest shall have been paid during that period; and no such corporation shall advertise a larger amount of capital stock than has actually been subscribed and paid in.

Prohibiting advertisement of capital not subscribed and paid in.

SECTION 4. Every director who shall violate, or be concerned in violating, any provision in the preceding sections of this act contained, shall be liable personally to the creditors and stockholders respectively, of the corporation of which he shall be a director, to the full extent of any loss they may respectively sustain from such violation.

Penalty for violation of sec. 3.

SECTION 5. This act shall take effect from and after its passage.

NOAH H. ALBAUGH,
Speaker pro tem. of the House of Representatives.
WM. C. LYON,
President of the Senate.

Passed April 11, 1888.

[House Bill No. 458].

AN ACT

To amend section 2745 of the Revised Statutes of Ohio.

SECTION 1. *Be it enacted by the General Assembly of the State of Ohio*, That section 2745, Revised Statutes, be amended so as to read as follows:

Foreign insurance companies:

SEC. 2745. Every agency of an insurance company incorporated by the authority of any other state or government, shall return to the auditor of each county in which such company does business, or from which it collects premiums, in the month of February, annually, the amount of the gross premium receipts of such agency, for the previous calendar year in such counties, which shall be entered upon the tax list of the proper county, and be subject to the same rate of taxation for all purposes that other personal property is subject to, at the place where located, for the year in which such premiums are received. And the whole of such tax shall be due and payable on the twentieth day of December next en-

Taxation of their gross premium receipts.

Duty of county auditor and superintendent of insurance.

suing; provided, that in making the first return under this act, no company shall be required to make a return of receipts previously placed upon the duplicate, under the act to which this is amendatory, requiring the return to be made in the month of May. And it shall be the duty of the county auditor, in the month of March, to certify to the superintendent of insurance, the amount of receipts returned under this act by each company, with the rate charged against the same; and it shall be the duty of the superintendent of insurance in the month of April, annually, to charge and collect from all such companies such a sum, as added to the sum payable to the county treasuries, will produce an amount equal to two and one-half per cent. on the gross premium receipts of such companies, as shown by their annual statement under oath, to the insurance department; provided, however, that if by the laws of any other state, territory or nation, a larger tax than two and one-half per cent. is charged companies organized under the laws of Ohio, then the superintendent of insurance shall charge a like tax upon companies from such state, territory or nation doing business in this state. If any such company refuses to pay said tax after demand therefor has been made, or if it shall make any false statement of its gross premium receipts, the superintendent of insurance shall revoke the license of such company to do business in this state. If at any time said superintendent has reason to suspect the correctness of the return made of the gross premium receipts of any such company, he may, at the expense of the state, make an examination of the books of such company, or of its agents, for the purpose of verifying the same. All taxes collected under the provisions of this section by the superintendent of insurance, shall be paid by him upon the warrant of the auditor, into the general revenue fund of the state.

SECTION 2. Said original section 2745 is hereby repealed.

SECTION 3. This act shall take effect and be in force from and after December 31, 1888.

NOAH H. ALBAUGH,
Speaker pro tem. of the House of Representatives.

THEO. F. DAVIS,
President pro tem. of the Senate.

Passed April 11, 1888.

EXHIBIT 14

THE STATE OF OHIO.
THE TAX COMMISSION
~~OF OHIO.~~
Columbus, - Ohio.

GENERAL AND LOCAL ACTS

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

SEVENTY-FIFTH GENERAL ASSEMBLY,

AT ITS REGULAR SESSION,

BEGUN AND HELD IN THE CITY OF COLUMBUS, JANUARY 6, 1902.

VOLUME XCV.

COLUMBUS, OHIO:
PUBLISHED BY STATE AUTHORITY,
FRED. J. HEER, STATE PRINTER,
1902.

Salary of judges of common pleas court residing in Stark county.

held on the first Tuesday after the first Monday in Novem-ber, next preceding the expiration of his term of office, b any of such judges provided for by this act, and any jud or judges of the court of common pleas who at the ti of their election, respectively reside in Stark county, a shall thereafter continue to reside in the same county at the time of election as aforesaid, shall receive in additi to the salary payable out of the state treasury, the sum fifteen hundred dollars per annum, upon the warrant of t county auditor, on the county treasury in the same man and at such times as is provided for the payment of suc judge or judges out of the state treasury.

Repeals, etc.

SECTION 2. Said original section 481-88 of the Revis Statutes of Ohio be and the same is hereby repealed, a this act shall take effect and be in force on and after passage.

W. S. MCKINNON,
Speaker of the House of Representative
F. B. ARCHER,
President pro tem. of the Sena

Passed April 10, 1902. 103G

[House Bill No. 57.]

AN ACT

To require corporations to file annual reports with the secreta of state and to pay annual fees therefor.

Be it enacted by the General Assembly of the State of Oh

Domestic corporations, for profit, required to file annual report with secretary of state.

SECTION 1. Every corporation organized under t laws of this state, for profit, shall make a report in wr ing to the secretary of state, annually, during the month May, in such form as the secretary of state may prescri containing the following facts:

1. The name of the corporation.

2. The location of its principal office.

3. The names of the president, secretary, treasur and members of the board of directors, with postoffice a dress of each.

4. The date of the annual election of officers of su corporation.

5. The amount of authorized capital stock and t par value of each share.

6. The amount of capital stock subscribed, the amou of capital stock issued and outstanding, and the amount capital stock paid up.

7. The nature and kind of business in which t company is engaged and its place or places of business.

8. The change or changes, if any, in the above pa ticulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice president, secretary, or general manager of the corporation, and forwarded to the secretary of state.

Fee to be paid upon filing such report.

Upon the filing of such report, the secretary of state shall charge and collect from such corporation a fee of one-tenth of one per cent. upon the subscribed or issued and outstanding capital stock of said corporation, and to be not less than ten dollars in any case.

Foreign corporations, for profit, required to file annual report with secretary of state.

SECTION 2. Every foreign corporation for profit, now or hereafter doing business in this state, and owning or using a part or all of its capital or plant in this state, and subject to compliance with the provisions of section 148*c* of the Revised Statutes of Ohio, shall, in addition to the statements required by section 148*c* and 148*d*, Revised Statutes of Ohio, make a report in writing to the secretary of state, annually, during the month of September, in such form as the secretary of state may prescribe, containing the following facts:

1. The name of the corporation and under the laws of what state or country organized.

2. The location of its principal office.

3. The names of the president, secretary, treasurer and members of the board of directors, with the postoffice address of each.

4. The date of the annual election of officers.

5. The amount of authorized capital stock, and the par value of each share.

6. The amount of capital stock subscribed, the amount of capital stock issued, and the amount of capital stock paid up.

7. The nature and kind of business in which the company is engaged and its place or places of business, both within and without the state of Ohio.

8. The name and location of its office or offices in Ohio, and the name and address of the officers or agents of the company in charge of its business in Ohio.

9. The value of the property owned and used by the company in Ohio, where situated, and the value of the property owned and used outside of Ohio and where situated.

10. The change or changes, if any, in the above particulars made since the last annual report.

Such report shall be signed and sworn to before an officer duly authorized to administer oaths, by the president, vice president, secretary, superintendent or managing agent in this state, and forwarded to the secretary of state.

Fee to be paid upon filing such report.

Upon the filing of such report the secretary of state, from the facts thus reported and any other facts coming to his knowledge bearing upon the question, shall determine the proportion of the authorized capital stock of the com-

pany represented by its property and business in Ohio, a shall charge and collect from such company, in addit to the initial fees provided for in sections 148*c* and 148*d* the Revised Statutes of Ohio, for the privilege of exercisi its franchises in Ohio, annually, one-tenth of one per ce upon the proportion of the authorized capital stock of t corporation represented by property owned and used a business transacted in Ohio, and to be not less than t dollars in any case.

Domestic corporations, not for profit and having no capital stock, required to file annual report with secretary of state.

SECTION 3. Every corporation organized under t laws of this state, not for profit, and having no capital stoc shall make a report in writing to the secretary of state, an nually, during the month of December, in such form as th secretary of state may prescribe, containing the followi facts:

1. The name of the corporation.

2. The location of its principal office.

3. The names of the president, secretary, treasur and members of the board of trustees, or directors, wit postoffice address of each.

4. The date of the annual election of such corporation

5. The object or purpose which such corporation is engaged in carrying out.

Such report shall be signed and sworn to before an of ficer authorized to administer oaths, by the president, vic president, secretary or other chief officer of the corpora tion, and forwarded to the secretary of state.

Fee to be paid upon filing such report.

Upon the filing of such report the secretary of state shall charge and collect the following fees: For all cor porations organized for the purposes mentioned in section 148*a*, paragraph 4, of the Revised Statutes of Ohio, ten dollars; for all corporations organized for the purposes mentioned in section 148*a*, paragraph 5, one dollar.

Certificate to be issued by secretary of state showing compliance with this act.

SECTION 4. Upon the filing of the report and the pay ment of the fee provided for in the preceding sections of this act, the secretary of state shall make out and deliver to such corporation a certificate of the compliance by such corporation with the preceding sections and the payment of the annual fee therein provided for.

All fees thus collected to be paid into the state treasury; monthly report to auditor of state.

The secretary of state shall make a report monthly to the auditor of state of the annual fees collected under this act, and shall pay the same into the state treasury to the credit of the general revenue fund.

Penalty for failure to make report or pay fee; corporations for profit.

SECTION 5. In case any corporation required to file the report and pay the fee prescribed in sections 1 and 2 of this act shall fail or neglect to make such report or pay such fee within the period prescribed in said sections, respectively, such corporation shall be subject to a penalty of five hundred dollars, and an additional penalty of one hundred dollars per day for each day's omission after the time limited in this act for filing such report and paying such

fee. Such penalty paid by the provi be recovered by a collection paid int eral revenue fund

The attorney state, shall institu pleas of Franklin which such corpo as he prefers.

The governor upon good cause s penalty on any pa

In case any c pay the fee presc or neglect to mak months after the act, and such def ney general shall, bring an action in county, or of any poration is located, corporation, and if is wilful and inten and annul such ch

SECTION 6. A heard by the secre mination of the am this act. Any corp secretary of state r itor of state, treas whose decision in t

SECTION 7. I gas, water works, urban railroad, ste press, freight line, other corporations, with the auditor of building and loan, required by law t tendent of insuranc of the preceding s that a corporation nual report under before provided for the expiration of si tion or admission to

SECTION 8. E solution, revocation porate purposes, sl certificate of such d donment; in case o

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ake such report or pay such
bed in said sections, respec
be subject to a penalty of
dditional penalty of one hun
day's omission after the time
such report and paying such

fee. Such penalty and the annual fee or fees required to be paid by the provisions of sections 1 and 2 of this act may be recovered by an action in the name of the state, and on collection paid into the treasury to the credit of the general revenue fund.

How penalty recovered.

The attorney general, on request of the secretary of state, shall institute such action in the court of common pleas of Franklin county, or of any county in the state in which such corporation has an office or place of business, as he prefers.

The governor, secretary of state and attorney general, upon good cause shown, may, in their discretion, remit the penalty on any part thereof prescribed in this section.

Remission of penalty.

In case any corporation required to file the report and pay the fee prescribed in section 3 of this act shall fail or neglect to make such report or pay such fee for three months after the expiration of the time limited by this act, and such default is wilful and intentional, the attorney general shall, on the request of the secretary of state, bring an action in the court of common pleas of Franklin county, or of any county in this state in which such corporation is located, to forfeit and annul the charter of such corporation, and if such court is satisfied that such default is wilful and intentional, the court is authorized to revoke and annul such charter.

Penalty for failure to make report or pay fee; corporation not for profit.

SECTION 6. Any corporation shall have the right to be heard by the secretary of state upon the matter of determination of the amount of fees due under the provisions of this act. Any corporation aggrieved by the decision of the secretary of state may, within ten days, appeal to the auditor of state, treasurer of state and the attorney general, whose decision in the matter shall be final.

Hearing by secretary of state and appeal from decision thereof.

SECTION 7. Provided that electric light, gas, natural gas, water works, pipe line, street railroad, electric interurban railroad, steam railroad, messenger, union depot, express, freight line, sleeping car, telegraph, telephone and other corporations, required by law to file annual reports with the auditor of state, and insurance, fraternal beneficial, building and loan, bond investment, and other corporations required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of the preceding sections of this act. Provided further, that a corporation shall not be required to file its first annual report under this act until the proper month hereinbefore provided for the filing of such report, next following the expiration of six months from the date of its incorporation or admission to do business in this state.

Certain corporations excepted from the provisions of this act.

First report of newly organized corporation; when to be filed.

SECTION 8. Every domestic corporation, in case of dissolution, revocation of charter or abandonment of its corporate purposes, shall file with the secretary of state a certificate of such dissolution, revocation of charter or abandonment; in case of dissolution or abandonment by volun-

Certificate of dissolution, revocation of charter or abandonment to be filed with secretary of state.

tary action of the corporation, such certificate shall be signed by the president and secretary of the corporation; in case of dissolution, or revocation of charter by action of a competent court, such certificate shall be signed by the clerk of the court entering the decree of dissolution or revocation. The fees for making and filing such certificate with the secretary of state shall be taxed in the costs in favor of the party paying the same, and shall have the same priority as other costs in the dissolution proceedings.

Foreign corporation retiring from state shall file certificate to that effect.

Every foreign corporation when it shall retire from business in this state is hereby required to file with the secretary of state a certificate to that effect, signed by the president and secretary of the corporation.

Fees for filing such certificates.

The fee for filing certificates of dissolution, revocation of charter, abandonment, or retirement of corporations, for profit, shall be five dollars; for filing such certificates of corporations, not for profit, one dollar. Provided, that the charter of a corporation which is shown to have been no longer in active existence at the time of the passage of this act, may be surrendered on the payment of one dollar, on proof as otherwise provided by law.

Surrender of charter of corporation not in active existence at time of passage of this act.

Mere retirement from business or voluntary dissolution of corporation shall not exempt it from provisions of this act.

The mere retirement from business or voluntary dissolution of a domestic or foreign corporation without having filed the certificate provided for in this section, shall not exempt it from the requirements to make reports and pay fees in accordance with the provisions of this act.

SECTION 8. This act shall take effect and be in force from and after its passage.

A. G. COMINGS,
Speaker pro tem. of the House of Representatives.
CARL L. NIPPERT,
President of the Senate.

Passed April 11, 1902. 104G

[House Bill No. 109.]

AN ACT

To further supplement section 4889 of the Revised Statutes of Ohio.

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

Repair of improved roads:

SECTION 1. That section 4889 of the Revised Statutes of Ohio be further supplemented by the enactment of the following sections, with the sectional numbering herein provided.

Townships in Stark and Columbiana counties made road districts.

Sec. 4889*b*. That the several townships in the counties of Stark and Columbiana, state of Ohio, be and the same are hereby constituted and made separate and independent road districts for the purpose of repairing and improving the roads and highways as herein set forth, independent of and free from the operation of existing laws relating to the improvement of roads and highways,

EXHIBIT 15

THE STATE OF OHIO

LEGISLATIVE ACTS

PASSED

(EXCEPTING APPROPRIATION LAWS)

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

EIGHTY-SIXTH GENERAL ASSEMBLY OF OHIO

At Its Regular Session

BEGUN AND HELD IN THE CITY OF COLUMBUS,
JANUARY 5, 1925 to April 17, 1925
(both inclusive)

Also the Times for Holding the Courts of Appeals,
and Courts of Common Pleas in Ohio,
A. D. 1925

VOLUME CXI

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1925.

such commission, but the tax commission of Ohio shall have direct supervision and control over, and power of appointment, compensation and removal of, such employes.

SECTION 2. That existing section 154-38 of the General Code be and the same is hereby repealed. Repeal.

HARRY D. SILVER,
Speaker of the House of Representatives.

CHARLES H. LEWIS,
President of the Senate.

Passed March 27, 1925.

HOUSE OF REPRESENTATIVES—

Passed—notwithstanding the objections of the Governor—April 17, 1925.

HARRY D. SILVER,
Speaker of the House of Representatives.

The sectional number in this act is in conformity to the General Code.
C. C. CRABBE,
Attorney General.

SENATE—

Passed—notwithstanding the objections of the Governor—April 17, 1925.

CHARLES H. LEWIS,
President of the Senate.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 21st day of April, A. D. 1925.

THAD H. BROWN,
Secretary of State.

194B.

[House Bill No. 338.]

AN ACT

To provide for the determination, charging and collection of a corporation franchise tax for the privilege of exercising its franchise and doing business within this state, to repeal sections 5495, 5496, 5497, 5498, 5499, 5500, 5501, 5502, 5503, 5504, 5516, 5518 and 8728-11 and to amend section 5461 of the General Code.

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

Sec. 5495.

SECTION 1. Within thirty days after the taking effect of this act and annually, thereafter, during the month of April, except as otherwise provided by law, each corporation, incorporated under the laws of this state for profit, and each foreign corporation for profit, doing business in this state or owning or using a part or all of its capital or property in this state or having complied with the provisions of section 183 of the General Code and having been authorized by the secretary of state to transact business in this state, shall make a report in writing to the tax commission Report in writing to the tax commission; form.

in such form as the commission may prescribe, provided, however, that if any such corporation shall be adjudicated a bankrupt or a receiver shall be appointed therefor or a general assignment shall be made thereby for the benefit of creditors, such corporation shall file the report herein provided but it shall not be charged with any fee as hereinafter specified except for the portion of the then current year and of subsequent years during which such corporation had the power to exercise its corporate franchise unimpaired by such proceedings or act.

Sec. 5496.

Signature on report.

SECTION 2. Such report shall be signed and sworn to before an officer authorized to administer oaths by the president, vice president, secretary, treasurer, general manager, superintendent, or managing agent in this state of such corporation. If a domestic corporation has not organized then such report shall be signed and sworn to by one of the incorporators of such corporation.

Sec. 5497.

Enumeration of facts included in statement.

SECTION 3. Such report shall include statements of the following facts as of the date of the beginning of the current annual accounting period of such corporation:

1. The name of the corporation;

2. The name of the state or country under the laws of which it is incorporated;

3. The location of its principal office and, in the case of a foreign corporation, the location of its principal place of business in this state and the name and address of the officer or agent of the corporation in charge of the business in this state;

4. The names of the president, secretary, treasurer, with the post office address of each;

5. The nature and kind of business in which such corporation is engaged;

6. In the case of a corporation owning property within and without the state of Ohio, the location and value of the property owned and used by the corporation, both within and without the state, given separately;

7. In the case of a corporation doing business within and without the state of Ohio, the total amount of business done and the amount of business done within the state by said corporation, during its preceding annual accounting period, given separately.

8. A statement of the amount of the fair value of the capital stock of the company on an asset basis as shown by the taxpayer in its latest report to the commissioner of internal revenue of the United States under the provisions of section 700 of the revenue act of 1924, or in the event that for any reason a corporation has not filed any such report, in lieu of the statement above specified, such corporation shall file with the tax commission a statement of

the amount of the fair value of its capital stock on an asset basis as of the 31st day of March next preceding the time of filing the report on the same basis required by the commissioner of internal revenue of the United States under the provisions of the revenue act of 1924 above specified;

9. A statement of the amount of the tax last paid to the United States under the provisions of section 700 of the revenue act of 1924;

10. All other information necessary to the proper administration of this act.

Sec. 5498. SECTION 4. Upon the filing of the report provided for in the last preceding sections, the tax commission, if it shall find such report to be correct, shall, on the first Monday in September, determine the amount of the fair value on an asset basis of the capital stock of every domestic corporation, required to file a report under section 1 of this act; and the proportionate amount of the fair value on an asset basis of the capital stock of every foreign corporation, required to file a report under section 1 of this act, represented by the sum of all the property owned or used and business done by it, located or transacted within this state. On the first Monday in October the tax commission shall certify to the auditor of state the amount so determined by it for each such corporation.

Determination of the amount of the fair value on an asset basis of the capital stock of domestic corporation, when.

Sec. 5499. SECTION 5. On or before October 15th the auditor of state shall charge for collection from each such corporation a fee of one-twelfth of one per cent upon such amount so certified, which fee shall not be less than fifteen dollars in any case and shall immediately certify the same to the treasurer of state. Such fee shall be charged for the privilege of exercising its franchises and doing business within the state in the calendar year in which the tax is payable. Promptly upon receipt of the certificate of the auditor of state the treasurer of state shall mail to each such corporation at its principal office in the state of Ohio a statement showing the portion of the value of the capital stock upon which such fee is charged and the amount of the fee. Such fee shall be payable to the treasurer of state on or before the first day of the following December.

Charging for collection a fee from each corporation; minimum fee; certification to treasurer.

SECTION 6. That section 5461 of the General Code be amended to read as follows:

Sec. 5461. When any public utility or corporation fails to make any report to the tax commission required by law or makes such report and fails to report or report erroneously any information essential to the determination of any amount, value, proportion or other fact to be de-

How valuations determined on failure of report or statement.

termined by the tax commission pursuant to law which is necessary for the fixing of any fee, tax, or assessment, the tax commission shall proceed to determine such amount, value, proportion, or other fact as nearly as practicable and shall certify the same as required by law. Such power and duty of the tax commission shall extend to and only to the five years next preceding the year in which such inquiry is made. Upon the determination and certification by the tax commission herein authorized a tax fee, or assessment shall be charged for collection from such public utility or corporation at the rate provided by law for the year or years when such tax, fee, or assessment was omitted, or erroneously charged so that the total tax, fee, or assessment paid and to be paid for such year or years shall be in the full amount chargeable to such public utility or corporation by law. Such charge shall be without prejudice to the collection of any penalty authorized by law.

The sectional numbers on the margin hereof are designated as provided by law.
C. C. CRABBE,
Attorney General.

Sec. 5500.
False or fraudulent report, return affidavit, etc.; penalty.

SECTION 7. Any person who knowingly makes or presents or aids, or assists in the preparation or presentation of a false or fraudulent report, return, affidavit, or document authorized or required by this act or knowingly procures, counsels or advises the preparation or presentation of such report, return, affidavit, or document shall be fined not more than $10,000, or imprisoned in the penitentiary for not more than five years, or both.

Sec. 5501.
Sections or parts of sections independent.

SECTION 8. The sections of this act, and every part of such sections, are hereby declared to be independent sections and parts of sections and the holding of any section or part thereof to be void or ineffective shall not affect any other section or part thereof.

Sec. 5502.
Certain sections applicable.

SECTION 9. Sections 5505 to 5515 inclusive and sections 5516-1 to 5517 inclusive and sections 5519 to 5525b inclusive of the General Code shall be deemed to refer and have application to this act and the appropriate sections thereof.

Sec. 5503.
When incorporated company shall not be subject to the provisions of certain sections.

SECTION 10. An incorporated company, whether foreign or domestic, owning and operating a public utility in this state, and as such required by law to file reports to the tax commission and to pay an excise tax upon its gross receipts or gross earnings as provided in this act, and insurance, fraternal, beneficial, building and loan, bond investment and other corporations, required by law to file annual reports with the superintendent of insurance, shall not be subject to the provisions of sections one to five inclusive of this act.

SECTION 11. That existing sections 5461, 5495, 5496, 5497, 5498, 5499, 5500, 5501, 5502, 5503, 5504, 5516, 5518 and 8728-11, of the General Code be, and the same are hereby repealed. Repeal.

HARRY D. SILVER,
Speaker of the House of Representatives.

CHARLES H. LEWIS,
President of the Senate.

Passed March 27 1925.

HOUSE OF REPRESENTATIVES—

Passed—notwithstanding the objections of the Governor—April 17, 1925.

HARRY D. SILVER,
Speaker of the House of Representatives.

The sectional numbers on the margin hereof are designated as provided by law.
C. C. CRABBE,
Attorney General.

SENATE—

Passed—notwithstanding the objections of the Governor—April 17, 1925.

CHARLES H. LEWIS,
President of the Senate.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 21st day of April, A. D 1925.

THAD H. BROWN,
Secretary of State.

195B.

[Amended Senate Bill No. 300.]

AN ACT

Providing for the creation of a state building commission.

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

SECTION 1. There is hereby created a state building commission, to be composed of the governor of Ohio, attorney general and auditor of state. Such board shall organize by electing a chairman and a secretary and shall establish rules and regulations for the conduct of its business, and shall keep a journal of its proceedings. The members shall receive no compensation for their services but shall be paid their necessary and actual expenses incurred while engaged in the business of the commission. The commission shall employ such clerical and other help as may be necessary and shall fix their compensation. State building commission; composition; organization; compensation.

EXHIBIT 16

THE STATE OF OHIO

LEGISLATIVE ACTS

PASSED

(EXCEPTING APPROPRIATION ACTS)

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

EIGHTY-NINTH GENERAL ASSEMBLY OF OHIO

At Its Regular Session

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VOLUME CXIV

COLUMBUS, OHIO
THE F. J. HEER PRINTING CO.
1931
Bound at the State Bindery

the boards of elections be permitted to apply the provisions hereof to the forthcoming primary election of August 11, 1931.

ARTHUR HAMILTON,
Speaker of the House of Representatives.

WILLIAM G. PICKREL,
President of the Senate.

Passed June 11, 1931.

Approved June 29, 1931.

GEORGE WHITE,
Governor.

The sectional numbers herein are in conformity to the General Code.

GILBERT BETTMAN,
Attorney General.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 2nd day of July, A. D. 1931.

CLARENCE J. BROWN,
Secretary of State.

File No. 141.

(Amended Senate Bill No. 323)

AN ACT

Providing for the levy of taxes on intangible property at classified rates and for the assessment of tangible personal property for taxation and for said purposes amending sections 5323, 5324, 5325, 5326, 5327, 5328, 5360, 5382, 5385, 5386, 5388 and 5389 of the General Code, enacting supplemental sections 5325-1, 5328-1 and 5328-2 and section 5638 of the General Code, amending sections 2583, 2585, 2586, 2588, 2589, 2590, 2591, 2592, 2596, 2624, 2641, 2643, 2645, 2649, 2650, 2651, 2653, 2654, 2657, 2683, 2684, 2685, 2687, 2688, 2689, 2746, 5366, 5367, 5368, 5370, 5371, 5372, 5372-1, 5372-2, 5372-3, 5372-4, 5373, 5376, 5378, 5379, 5390, 5391, 5392, 5393, 5398, 5406, 5407, 5408, 5409, 5410, 5411, 5412, 5413, 5414, 5419, 5422, 5428, 5429, 5430, 5445, 5446, 5448, 5450, 5455, 5456, 5457, 5459, 5460, 5498, 5499, 5562, 5563, 5579, 5591, 5596, 5597, 5599, 5601, 5604, 5605, 5606, 5609, 5610, 5612, 5613, 5614, 5615, 5624-4, 5624-5, 5624-7, 5624-14, 5672, 5673, 10509-80, 10509-81, 10509-82, 10509-176, 12924-4, 12924-7, 12924-8, 12924-9, and 12924-10 of the General Code, enacting supplemental sections 2585-1, 2587-1, 2602-1, 2649-1, 5372-5, 5398-1, 5411-1, 5411-2, 5412-1, 5414-1, 5414-2, 5414-3, 5414-4, 5414-5, 5414-6, 5414-7, 5414-8, 5414-9, 5414-10, 5414-11, 5414-12, 5414-13, 5414-14, 5626-2, 5671-1, 5671-2, 5673-1, 5673-2, 5673-3, 5673-4 and 12924-11 and sections 2584, 2602, 2656, 5375, 5377, 5394 and 5395 of the General Code and repealing sections 192, 2588-1, 2595, 5321, 5366-1, 5369, 5371-1, 5371-2, 5371-3, 5371-4, 5371-5, 5374-1, 5375-1, 5375-4, 5384,

the tax commission of Ohio shall have, exercise and discharge the same powers and duties as are provided by section 5413 of the General Code with respect to the statements of finanical institutions.

Terms "insurance company", "domestic insurance company", and "foreign insurance company" defined.

Sec. 5414-8. The term "insurance company" as used in this chapter includes every corporation, association and society engaged in the business of insurance of any character whatsoever, or engaged in the business of entering into contracts substantially amounting to insurance of any character, or of indemnifying or guaranteeing against loss or damage or acting as surety on bonds or undertakings.

The term "domestic insurance company" includes every insurance company organized and existing under the laws of this state and excludes every "foreign insurance company" which term includes every insurance company organized or existing under the laws of any other state, territory or country or of the United States.

Capital and surplus of domestic insurance company, how and where listed and assessed.

Sec. 5414-9. The capital and surplus of a domestic insurance company having capital divided into shares and the surplus of a domestic insurance company not having capital divided into shares shall be listed and assessed in the name of and against the company in the county where its actual principal place of business is located at the value thereof as reported by the company in its annual statement for the preceding year filed with and approved by the superintendent of insurance setting forth the admitted assets and the liabilities of the company, including in such liabilities (1) the reserve and unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company by reason of its oustanding policies in gross, (2) amounts set apart for the payment of dividends to policy holders, and all actual liabilities set forth in the annual statement.

Tax on real estate of domestic insurance company.

Sec. 5414-10. The real estate of a domestic insurance company shall be taxed in the place where it is located, in like manner as the real estate of other persons is taxed; but the tax provided for in this chapter shall be in lieu of all other taxes on the other property and assets of such domestic insurance company and of all other taxes, charges and excises on or against such domestic insurance companies, and of all other taxes on or against the stockholders, members or policy-holders of such company by reason of their stock or other interest in such insurance company, excepting with respect to annuities, or with respect to the right to receive the proceeds of a policy payable after the maturity thereof in installments or left with the company at interest; and this chapter shall not be construed as assessing any tax on or against any foreign insurance com-

pany or to affect any tax of any foreign insurance company under any laws of this state.

Domestic insurance company may make consolidated return, when.

Sec. 5414-11. A domestic insurance company which owns or controls ninety-five per centum of the common stock of another corporation may make a consolidated return to the superintendent of insurance for the purpose of this chapter, as is provided for consolidated returns of other corporations in section 5379 of the General Code, and shall not be required to list therein any of the stocks, securities or other obligations of such subsidiary corporation.

Certification to tax commission by superintendent of insurance; contents.

Sec. 5414-12. On or before the first Monday of May in each year the superintendent of insurance shall certify to the tax commission of Ohio the amount of the capital and surplus of each domestic insurance company having capital divided into shares and the surplus of each domestic insurance company, not having capital divided into shares, as the same shall be reported in such annual statement of the company and approved by the superintendent of insurance, and the county wherein the actual principal place of business of each is located.

Certification of assessment of domestic insurance company to county auditor; duty of auditor.

Sec. 5414-13. On or before the first Monday of June in each year the tax commission of Ohio shall certify to each county auditor the assessment of the capital and surplus or of the surplus, as the case may be, of each domestic insurance company located in his county, such certificate to be in the amount of capital and surplus or of surplus, as the case may be, so certified by the superintendent of insurance. The county auditor shall place the amounts so certified on the classified list and duplicate in his county in the respective names of the insurance companies against which such taxes shall be so assessed, and such taxes shall be paid by the insurance companies against which they are respectively assessed at the time and in the manner other taxes on the classified list are required to be paid.

Tax commission to prescribe forms of returns; power of commission to require additional statement, etc.; each question to be answered specifically.

Sec. 5414-14. The tax commission of Ohio shall prescribe the forms of returns to be made by financial institutions and dealers in intangibles, consistently with the provisions of this chapter, and may adopt regulations, not inconsistent with such provisions, governing the making of such returns. The enumeration in this chapter of facts required to be stated in any such return shall not be deemed exclusive, but the commission

EXHIBIT 17

THE STATE OF OHIO

LEGISLATIVE ACTS

PASSED

(EXCEPTING APPROPRIATION ACTS)

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

NINETIETH GENERAL ASSEMBLY OF OHIO

At Its Regular Session

BEGUN AND HELD IN THE CITY OF COLUMBUS, OHIO,
JANUARY 2, 1933 to JULY 10, 1933,
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A. D. 1933.

VOLUME CXV

Columbus, Ohio
THE F. J. HEER PRINTING CO.
1933
Bound at State Bindery

(Amended Senate Bill No. 30)

AN ACT

Providing for the levy of taxes on intangible property for the support of municipal corporations, counties, school districts and public libraries; for the levy of taxes on intangible property of public utilities and inter-county corporations, capital stock and surplus of financial institutions and dealers in intangibles and deposits taxed at the source, and of a franchise tax on domestic insurance companies, all for the purpose of reimbursing the state for the expense of administering such taxes and the taxes on personal property and for the support of common schools; and revising, simplifying and improving the method of assessing tangible and intangible personal property for local taxation; and for such purposes amending sections 1465-33, 2293-4, 2584, 2587-1, 2588, 2602, 2692, 5323, 5325-1, 5327, 5328-1, 5328-2, 5366, 5367, 5370, 5371, 5372-2, 5372-3, 5372-4, 5375, 5376, 5377, 5378, 5379, 5388, 5389, 5390, 5391, 5392, 5394, 5395, 5406, 5408, 5411, 5412, 5412-1, 5413, 5414, 5414-1, 5414-2, 5414-4, 5414-5, 5414-6, 5414-7, 5414-8, 5414-9, 5414-11, 5414-12, 5414-13, 5414-14, 5422, 5430, 5433-1, 5446, 5448, 5450, 5456, 5457, 5459, 5498, 5625-20, 5625-24, 5638, 5671-1, 5672, 5673-1, 5673-2, 5673-3, 5673-4, 5694 and 12077 of the General Code, and enacting sections and supplemental sections of the General Code designated as sections 154-38a, 5327-1, 5368-1, 5387, 5389-1, 5389-2, 5392-1, 5414-15, 5414-16, 5414-17, 5414-18, 5414-19, 5414-20, 5414-21, 5414-22, 5638-1, 5639, 5640, 5674 and 7787-1 of the General Code, and repealing sections 5383 and 10509-80 of the General Code, and to declare an emergency.

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

SECTION 1. Sections 1465-33, 2293-4, 2584, 2587-1, 2588, 2602, 2692, 5323, 5325-1, 5327, 5328-1, 5328-2, 5366, 5367, 5370, 5371, 5372-2, 5372-3, 5372-4, 5375, 5376, 5377, 5378, 5379, 5388, 5389, 5390, 5391, 5392, 5394, 5395, 5406, 5408, 5411, 5412, 5412-1, 5413, 5414, 5414-1, 5414-2, 5414-4, 5414-5, 5414-6, 5414-7, 5414-8, 5414-9, 5414-11, 5414-12, 5414-13, 5414-14, 5422, 5430, 5433-1, 5446, 5448, 5450, 5456, 5457, 5459, 5498, 5625-20, 5625-24, 5638, 5671-1, 5672, 5673-1, 5673-2, 5673-3, 5673-4, 5694 and 12077 of the General Code are hereby amended and sections and supplemental sections to be designated as sections 154-38a, 5327-1, 5368-1, 5387, 5389-1, 5389-2, 5392-1, 5414-15, 5414-16, 5414-17, 5414-18, 5414-19, 5414-20, 5414-21, 5414-22, 5638-1, 5639, 5640, 5674 and 7787-1 of the General Code are hereby enacted to read as follows:

Appointment of deputy tax commissioners; compensation; unclassified service.

Sec. 154-38a. The tax commission of Ohio may appoint not more than fifteen deputy tax commissioners. Each of such deputy tax commissioners shall, under such regulations as may be prescribed by the tax

Certification of assessment of dealer in intangibles to state auditor; duty of auditor.

Sec. 5414-6. On or before the first Monday of May annually, the tax commission of Ohio shall certify to *** *the auditor of state* the assessment of the shares or property representing capital, or apportionment of either, of each dealer in intangibles doing business in *** *the state.*

The *** auditor *of state* shall place the amounts so certified on the *** *intangible property tax* list *** in his *** *office* in the names of the dealers represented by such certificates.

Duty of tax commission when dealer in intangibles fails to make required statement.

Sec. 5414-7. If a dealer in intangibles fails to make and furnish to the *** *tax commission of Ohio* the statement required, within the time herein fixed, the *** commission *** shall have, exercise and discharge the same powers and duties as are provided by section 5414 of the General Code with respect to the statements of financial institutions.

Terms "insurance company", "domestic insurance company", and "foreign insurance company" defined.

Sec. 5414-8. The term "insurance company" as used in this chapter includes every corporation, association and society engaged in the business of insurance of any character whatsoever, or engaged in the business of entering into contracts substantially amounting to insurance of any character, or of indemnifying or guaranteeing against loss or damage or acting as surety on bonds or undertakings.

The term "domestic insurance company" includes every insurance company organized and existing under the laws of this state, and every unincorporated association and society formed for the purpose of engaging in said business in this state, and excludes every "foreign insurance company" which term includes every insurance company organized or existing under the laws of any other state, territory or country or of the United States.

Annual franchise tax on the privilege of being an insurance company, how measured.

Sec. 5414-9. *An annual franchise tax on the privilege of being an insurance company as defined in section 5414-8 of the General Code is hereby levied, measured by* (a) the capital and surplus of a domestic insurance company having capital divided into shares *** *or* the surplus of a domestic insurance company not having capital divided into shares *** at the value thereof as reported by the company in its annual statement for the preceding year filed with and approved by the superintendent of insurance setting forth the admitted *and non-admitted* assets and the liabilities of the company, including in such liabilities (1) the reserve and

unearned premium liabilities computed as provided by law, the same being the amount of debts of an insurance company by reason of its outstanding policies in gross, (2) amounts set apart for the payment of dividends to policy holders, and all actual liabilities set forth in the annual statement; *or (b) eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year after making the deductions prescribed by section 5433 of the General Code in the case of foreign insurance companies, whichever basis of measurement shall, in the case of any domestic insurance company, be the smaller. The objects of such tax are those declared in section 5414-19 of the General Code to which only the same shall be applied.*

Report of valuation of certificates filed annually by fraternal benefit society; determination of assets and liabilities; exceptions.

Sec. 5414-11. *** *Excepting as otherwise provided in this section, a fraternal benefit society organized and existing under the laws of this state, which issues insurance certificates, but is exempt from the requirements of chapter four of subdivision I, division III, title 9, part second of the General Code, shall for the purpose of this chapter only file annually with the superintendent of insurance a report of valuation of its certificates in the form required by the superintendent of insurance of fraternal benefit societies subject to the requirements of said chapter and the superintendent of insurance shall for the purpose of this chapter determine the admitted and non-admitted assets and liabilities of such fraternal benefit societies on the same basis on which the admitted and non-admitted assets and liabilities of other fraternal benefit societies are so determined.*

Nothing contained in sections 5414-9 to 5414-13, both inclusive, of the General Code shall apply to any other domestic insurance company as defined in this chapter which is not required by law or by election made pursuant to law to file annual reports with the superintendent of insurance, nor to associations or corporations organized not for profit which admit to membership only employes of a person, firm or corporation or employes of a group of such employers engaged in the same or similar lines of business, who seek to provide indemnity among their members for loss from or to provide a benefit in the event of accident, sickness or death of any of their number, whether by means of the exchange of private contracts between themselves or by the exchange of contracts between themselves and a corporation or association, created by them not for profit, for their protection and not for profit.

Certification to state auditor by superintendent of insurance; contents.

Sec. 5414-12. On or before the first Monday of May in each year the superintendent of insurance shall certify to the *** *auditor of state* the amount of the capital and surplus of each domestic insurance company having capital divided into shares and the surplus of each domestic insur-

ance company not having capital divided into shares, *or, as the case may require, the amount equal to eight and one-third times the gross amount of premiums received by any such domestic insurance company from policies covering risks within this state during the preceding calendar year after making the deductions prescribed by section 5433 of the General Code in the case of foreign insurance companies, and* as the same shall be reported in such annual statement of the company and approved by the superintendent of insurance ***.

Franchise tax charged for collection from domestic insurance company annually; minimum tax.

Sec. 5414-13. *** *In the month of June annually the auditor of state shall charge for collection from each domestic insurance company a franchise tax of two-tenths of one per centum of the amount determined by the superintendent of insurance pursuant to this chapter and so certified to him. In no case shall such tax be less than twenty-five dollars.*

Tax commission to prescribe forms of returns; power of commission to require additional statement, etc.; each question to be answered specifically.

Sec. 5414-14. The tax commission of Ohio shall prescribe the forms of returns to be made by financial institutions and dealers in intangibles, consistently with the provisions of this chapter, and may adopt regulations, not inconsistent with such provisions, governing the making of such returns *and may upon verified application of any such institution or dealer, and for good cause shown, extend the time within which his return shall be made, of not to exceed ninety days.* The enumeration in this chapter of facts required to be stated in any such return shall not be deemed exclusive, but the commission shall have power to require any other statement, or to propound any question or questions in the forms of returns prescribed by it, which statement, or the answer to which questions shall be relevant and material for the purpose of enabling the commission to make any assessment which it is required by this chapter to make, or to assess the taxable property of any other taxpayer or taxpayers, pursuant to any provisions of this title, or to administer or cause to be administered any of the laws of this state relating to taxation. Each question so propounded shall be answered specifically, and no return shall be accepted until full disclosure has been made as required by the blank form so prescribed. This chapter shall be deemed to be one of the laws which the commission is required to administer, within the meaning of sections 1465-9, 1465-12 to 1465-30 inclusive, 1465-32, 1465-34 and 12924-3 of the General Code. *Neither the returns mentioned in this section nor any documents required to be filed therewith shall be open to public inspection.*

Notice when assessment in excess of value listed in annual report; appeal filed, when; re-assessment; final assessment certificate issued, when; contents; duties of auditor of state.

Sec. 5414-15. Whenever the commission assesses the shares, capital or taxable deposits of a financial institution or the shares or capital of a

dealer in intangibles represented by capital employed in this state in excess of the value or amount thereof as listed in the annual report of such institution or dealer, it shall give notice thereof to such institution or dealer by mail. Within thirty days after the receipt of such notice such institution or dealer may appeal to the commission from the assessment so made. Thereupon further proceedings shall be had in the manner, and with like effect, as is prescribed in section 5394 of the General Code.

All assessments made by the tax commission of Ohio and certified to the auditor of state under the provisions of section 5378 of the General Code or under any provision of this chapter, from which an appeal has not been taken pursuant to section 5394 of the General Code, or this section, shall be subject to reassessment at any time within two years after the time fixed by law for the certification of such original assessments. For such purpose the commission may utilize all facts or information coming to its knowledge or which it might acquire by the exercise of the powers invested in it by law and shall issue a final assessment certificate to the auditor of state as the case may require, giving notice thereof by registered mail to the corporation, financial institution or dealer in intangibles as the case may require. The commission may in like manner and at any time finally assess the shares, capital or deposits of a financial institution, or the shares or capital of a dealer in intangibles represented by capital employed in this state for any year in which such financial institution or dealer in intangibles has failed to make a return to the commission; and shall certify to the auditor of state as provided in this section the property of a corporation subject to assessment under section 5378 of the General Code if such property is finally assessed pursuant to the second clause of the first sentence of section 5395 of the General Code.

Such final assessment certificate shall set forth as to the year covered thereby the amount of the final assessment as to each class of property and the amount of the preliminary assessment, if any, of each as to the corporation, financial institution or dealer in intangibles thereby represented. In case the final assessment of any such class for any year exceeds the amount of the original assessment of such class for such year, the difference shall be designated as a "deficiency." In case the final assessment for such class for any such year is less in amount than the original assessment for such year, the difference shall be thereby designated as an "excess." If the commission shall find that any such "deficiency" was due to wilful failure to make true and correct returns or reports as required by law, it shall add to the assessment a penalty of ten per centum of such "deficiency."

The auditor of state to whom any such final assessment is certified shall compute the amount of taxes represented by the "deficiency" or the "excess" items therein contained at the rate or rates of taxation belonging to the year or years as of which such final assessment is made. He shall enter all "deficiency" items comprised in such final assessment certificate on the proper intangible property tax lists in his office, together with the amount of taxes so computed thereon, and shall give a certificate of

EXHIBIT 18

THE STATE OF OHIO

LEGISLATIVE ACTS

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

NINETIETH GENERAL ASSEMBLY

At Its Special Sessions

FIRST SPECIAL SESSION—BEGUN AND HELD IN THE CITY OF COLUMBUS, OHIO, AUGUST 16, 1933, TO SEPTEMBER 22, 1933, INCLUSIVE.

SECOND SPECIAL SESSION—DECEMBER 6, 1933, TO DECEMBER 22, 1933, JANUARY 30, 1934, TO MAY 4, 1934, AND NOVEMBER 19, 1934, TO DECEMBER 12, 1934 INCLUSIVE.

THIRD SPECIAL SESSION—JUNE 27, 1934, to JUNE 29, 1934 INCLUSIVE.

AND

TITLE AND TEXT OF LAWS AND CONSTITUTIONAL AMENDMENTS ADOPTED BY VOTE OF THE ELECTORS OF OHIO AT THE GENERAL ELECTION HELD NOVEMBER 7, 1933,

ALSO

Appendix Containing Index of the Messages of the Governor to the Ninetieth General Assembly of Ohio in the Special Sessions.

VOLUME CXV—PART II.

THE F. J. HEER PRINTING CO.
Columbus, Ohio
1934
Bound in the State Bindery

(House Bill No. 134)

AN ACT

Providing for the levy and collection of a tax upon sales of tangible personal property at retail, for the purposes of emergency poor relief, of affording the advantages of a free education to all the youth of the state, of the general revenues of the state, and of affording revenues, in addition to those from general property taxes permitted under constitutional limitations, for the support of local governmental activities; amending sections 6212-49a and 6212-49b of the General Code, relating to the excise tax on the sale of bottled beverages so as to limit the same to the sale of bottled beer for the year 1935; suspending for the year 1935 sections 5543-1 to 5543-20, both inclusive, of the General Code, relating to the excise tax on cosmetics or toilet preparations.

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

Sec. 5546-1. Definitions.

SECTION 1. As used in this act:

"Person" includes individuals, firms, partnerships, associations, joint stock companies, corporations, and combinations of individuals of whatsoever form and character.

"Commission" means the tax commission of Ohio.

"Sale" and "selling" include all transactions whereby 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 granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange or barter, and by any means whatsoever.

"Vendor" means the person by whom the transfer effected or license given by a sale is or is to be made or given; and in case two or more persons shall be 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 for the purposes of this act.

"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.

"Retail sale" and "sale at retail" include all sales excepting those in which the purpose of the consumer is (a) to re-sell the thing transferred in the form in which the same is, or is to be, received by him; or (b) 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 in manufacturing, retailing, processing or refining or in the rendition of a public utility service; or (c) security for the performance of an obligation by the vendor.

"Price" means the aggregate value in money of any thing or things paid or delivered, or promised to be paid or delivered by a consumer to a vendor in the consummation and complete performance of a retail sale without any deduction therefrom on account of the cost of the property sold, cost of materials used, labor or service cost, interest or discount paid, or any other expense whatsoever. The tax collected by the vendor from the consumer under the provisions of this act shall not be considered as a part of the price, but shall be considered as a tax collection for the benefit of the state, and, except for the discount authorized in section 8 of this act, no persons other than the state shall derive any benefit from the collection or payment of such tax.

"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.

Sec. 5546-2. Tax on retail sales; purpose; rates; exceptions.

SECTION 2. For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crisis, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this act, an excise tax is hereby levied on each retail sale in this state of tangible personal property occurring during the period beginning on the first day of January, 1935, and ending on the thirty-first day of December, 1935, with the exceptions hereinafter mentioned and described, as follows:

One cent, if the price is forty cents or less;

Two cents, if the price is more than forty cents and not more than seventy cents;

Three cents, if the price is more than seventy cents and not more than one dollar;

If the price is in excess of one dollar, three cents on each full dollar thereof; and if, in such case, the price is not an even number of dollars, then, in addition to the said tax on each full dollar thereof, one cent, if the price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents if such excess is more than forty cents and not more than seventy cents; and three cents if such excess is over seventy cents.

If the price is less than nine cents, no tax shall be imposed.

The taxes hereby imposed shall apply and be collected when the sale is made, regardless of the time when the price is paid or delivered.

In the case of a sale as herein defined made during said period, the price of which as herein defined consists in whole or in part of rentals for the use of the thing transferred, the taxes hereby imposed shall, as regards such rentals, be measured by the installments thereof falling due within said period only.

The tax hereby levied does not apply to the following sales:

1. When the consumer is the state of Ohio or any of its political subdivisions.

2. When the vendor is a farmer, the thing transferred is the product of his own farm, or of a farm which he operates, and the retail establishment is located on such farm, or when the sale is of feed, seeds, lime or fertilizer.

2a. Sale of fluid milk defined by the milk marketing act for consumption off the premises of the vendor and of bread in loaf form.

2b. The sale of newspapers.

3. Sales of motor vehicle fuel and of liquid fuel upon the receipt, use, distribution or sale of which in this state a tax is imposed by the law of this state.

4. Sales of cigarettes and of brewer's wort and malt, upon the sale of which a tax is imposed by law of this state, so long, respectively, as such law is in force.

5. Sales of beer as defined by section 6212-63 of the General Code, whether in bulk or in bottles, sales of wine, and sales of spirituous liquors by the department of liquor control.

6. Sales of artificial gas by a gas company as defined in section 5416 of the General Code, of natural gas by a natural gas company, as so defined, of electricity by an electric light company, as so defined, of water by a water-works company, as so defined, if in each case the thing sold is delivered to consumers through wires, pipes or conduits; and all sales by any other public utility as defined in section 5415 of the General Code.

7. Casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property.

8. Sales which are not within the taxing power of this state under the constitution of the United States.

Nothing in this act shall be so construed as to impose any tax on the transportation of persons or property.

9. Professional or personal service transactions which involve sales as inconsequential elements, for which no separate charges are made.

10. Tangible personal property sold by charitable and religious organizations, the income of which is used in philanthropic activities.

For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state during the period defined in this section are subject to the tax hereby levied until the contrary is established.

Sec. 5546-3. Collection and payment of tax.

SECTION 3. Excepting as provided in section 5 of this act, the tax hereby imposed shall be paid by the consumer to the vendor in every instance, and it shall be the duty of each vendor to collect from the consumer the full and exact amount of the tax payable in respect of each taxable sale, and to evidence the payment of the tax in each case by

cancelling prepaid tax receipts, equal in face value to the amount thereof, in the manner and at the times provided in this section, to-wit:

(a) If the price is, at or prior to the delivery of possession of the thing sold, to the consumer, paid in currency passed from hand to hand by the consumer or his agent to the vendor or his agent, the vendor or his agent shall:

1. Collect the tax with and at the same time as the price.

2. Immediately cancel in the presence of the buyer by immediately tearing into two parts a prepaid tax receipt or receipts of the proper face value, deliver one part of each such cancelled prepaid tax receipt to the consumer or his agent, and retain the other part thereof.

(b) If the price is otherwise paid or to be paid, the vendor or his agent shall, at or prior to the delivery of possession of the thing sold, to the consumer, cancel or cause to be cancelled by tearing into two parts prepaid tax receipts equal in face value to the amount of the tax imposed by this act. Thereupon and thereby the amount of the tax with respect to such sale, payment of which to the state is evidenced by such cancellation, shall become a legal charge in favor of the vendor and against the consumer, which shall in every case be collected by the vendor, as herein provided, in addition to the price; and at or immediately after such collection, the vendor shall deliver one part of each such cancelled prepaid tax receipt to the consumer and retain the other part thereof.

Sec. 5546-4. Issuance of prepaid tax receipts; specifications.

SECTION 4. Prepaid tax receipts required by this act shall be issued by the commission in such denominations as the commission may deem necessary. They shall be printed on durable paper, be of different design and distinctly different coloring for each of such denominations, and shall bear plainly on their face the denominations represented thereby.

Sec. 5546-5. Powers and duties of commission.

SECTION 5. The commission shall design and procure the prepaid tax receipts herein provided for. The commission shall enforce and administer the provisions of this act, which is hereby declared to be one of the laws which the commission is required to administer within the meaning of sections 1465-9, 1465-12 to 1465-30, inclusive, 1465-32, 1465-34 and 12924-3 of the General Code. It shall have power to adopt and promulgate such rules and regulations as it may deem necessary to carry out the provisions of this act, and without prejudice to the generality of the powers of the commission by virtue of the foregoing provisions, the commission may:

1. Prescribe the form and manner of cancelling prepaid tax receipts consistently with the provisions of this act.

2. Authorize a vendor to prepay the tax levied by this act upon sales of things produced or distributed by such vendor, and waive the collection of the tax from the consumer in the manner otherwise provided in this act; but no such authority shall be granted or exercised excepting upon application to the commission and unless the commission shall, after hearing, advance notice of which must be given by the commission to all

vendors in the same general classification as the applicant, find that the conditions of the applicant's business are such as to render impracticable the collection of the tax in the manner otherwise provided by this act and upon the applicant furnishing bond payable to the state of Ohio in such amount as the commission may determine to be sufficient to secure the prepayment of the taxes levied by this act in the manner desired, with surety to the satisfaction of the treasurer of state, with whom such bond shall be filed; nor shall the authority so granted be exercised nor the vendor or vendors actually selling such products be exempted from the other provisions of this act by virtue thereof unless the person to whom such authority is granted shall print plainly upon the product sold or offered for sale, a statement to the effect that the tax levied by this act has been paid in advance.

Sec. 5546-6. Vendors reimbursed, when and how.

SECTION 6. In the event prepaid purchases are returned to the vendor by the consumer after the tax imposed by this act has been collected or charged to the account of the consumer, the vendor shall be entitled to reimbursement of the amount of the tax so collected or charged by him, either through the cancellation of prepaid tax receipts paid for by the consumer, or through the cancelling of prepaid tax receipts paid for by the vendor and charged to the account of the consumer, in the manner herein provided. Upon receipt of a sworn statement by the vendor as to the gross amount of such refunds, during the period covered by such sworn statement, which period shall not be longer than sixty days, the commission shall issue to the vendor an official credit memorandum equal to the net amount paid by the vendor for such cancelled prepaid tax receipts. Such memorandum shall be accepted by the state treasurer or his agents at full face value, from the vendor to whom it is issued, in the purchase of prepaid tax receipts under the provisions of section 7 of this act.

Sec. 5546-7. Powers and duties of treasurer of state and county treasurers.

SECTION 7. All prepaid tax receipts procured by the commission shall be immediately delivered to the treasurer of state, who shall execute duplicate receipts therefor, showing the number of and aggregate face value of each denomination received by him, and deliver such receipt to the commission and a duplicate thereof to the auditor of state. The treasurer of state shall be accountable for all prepaid tax receipts received and unsold by him. He may appoint agents for the sale of prepaid tax receipts at such places in the state as he may deem expedient, fix their compensation, payable from any appropriation to him for the purpose of administering the provisions of this act, and require of each such bond or other security as he may deem necessary. He shall deliver to each county treasurer such number and denomination of prepaid tax receipts as in his judgment may be required for sale in each county pursuant to this act, and may prescribe such regulations and forms of receipts and reports as he may deem necessary and advisable for the transaction of the business of selling such prepaid tax receipts. On the fifth day of

each month, the treasurer of state shall make a report in duplicate showing all sales of prepaid tax receipts made during the preceding month with the names of the purchasers, the aggregate face value purchased by each, and the office from which sold, and deliver one copy thereof to the commission and the other to the auditor of state. Each county treasurer shall pay on the first business day of each week to the treasurer of state all moneys arising from the sale of prepaid tax receipts by him during the preceding week, together with a report showing all sales, the names of the purchasers and the aggregate face value purchased by each, which the treasurer of state shall include in his monthly report. But such county treasurer shall retain for the use of the general fund of the county an amount equal to one-tenth of one per centum of the proceeds of such sales. All the powers and duties hereby imposed upon the county treasurer shall be deemed and considered to be within the scope of his office as county treasurer for all purposes.

Sec. 5546-8. Sale of prepaid tax receipts; redemption of unused or spoiled tax receipts.

SECTION 8. The treasurer of state, his agents, and the several county treasurers, shall sell prepaid tax receipts only to licensed vendors. All such prepaid tax receipts shall be sold and accounted for at a discount of not to exceed three per centum of the face value thereof, as a commission for handling and cancelling such prepaid tax receipts. The commission shall by regulation, certified to the treasurer of state, fix within the limitations herein prescribed the rate of discount applicable to the sale of prepaid tax receipts to such classes of licensed vendors as it may establish. The treasurer of state shall redeem and pay for any unused or spoiled tax receipts at the net value thereof, on written verified request made by any licensed vendor, his administrators, executors, successors or assigns. Such payments shall be made from an appropriation of the treasurer of state for the purpose of defraying the expenses of administering this act.

Sec. 5546-9. Licensed vendors to purchase receipts from treasurer of state or agents.

SECTION 9. Within five days after the issuance of his license, it shall be the duty of each such licensed vendor to purchase and have on hand at all times prepaid tax receipts in suitable denominations and in amount sufficient to supply the normal requirements of his business. A licensed vendor shall procure prepaid tax receipts only from the treasurer of state, or his agent authorized to sell such receipts, or the treasurer of the county in which he is licensed.

Sec. 5546-9a. Liability of vendor for failure to collect tax and cancel prepaid tax receipts; assessment against vendor; petition for reassessment; levy and sale; appeal.

SECTION 9a. In case any vendor fails to collect the tax herein imposed, or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this act and by the regulations of the com-

mission, he shall be personally liable for such amount as he failed to collect, or for the amount of the prepaid tax receipts which he failed to cancel.

In such case the commission shall have power to make an assessment against such vendor based upon any information within its possession or that shall come into its possession. The commission shall give to the vendor written notice of such assessment, together with written notice of the time and place where the vendor may be heard on a petition by him for reassessment. Such notice may be served upon the vendor personally or by registered mail.

Any amount assessed by the commission under the provisions of this section, together with a penalty of fifteen per centum thereof shall be due and payable from the vendor to the treasurer of state fifteen days after the service upon the vendor of notice of such assessment and when paid shall be considered as revenue arising from the tax imposed by this act.

Any vendor, against whom an assessment is made by the commission under the provisions of this section, may petition for a reassessment thereof. Notice of intention to file such a petition or to appear and be heard shall be given to the commission prior to the time the assessment becomes due and payable. A petition for such a reassessment may be filed with the commission on or before the date designated in the notice of such assessment as the time when the vendor may be heard on a petition by him for reassessment. Each such hearing shall be held at the time and place designated in such notice to the vendor; but the commission shall have power to continue the same from time to time as may be necessary. Each such petition filed with the commission shall set forth specifically and in detail the grounds upon which it is claimed the assessment is erroneous. If no petition for reassessment is filed with the commission, the vendor may nevertheless appear at the hearing and present his objections orally.

All amounts assessed under this section, which are not paid to the treasurer of state by the vendor on the date when the same become due and payable, shall bear interest at the rate of twelve per centum per annum from and after such date until paid.

If any vendor against whom an assessment has been made by the commission, pursuant to this section, shall fail to give due notice of an intention to petition for reassessment, or to file a petition for reassessment or to appear for hearing, the assessment shall be considered final. The commission by its deputy or deputies authorized by it for such purpose, shall forthwith call at the place of business of such person and in case of refusal to pay such assessment and penalty, on demand shall levy on the moneys, goods and chattels or other personal property of such person wherever found in this state. Such levy shall take precedence of all liens, mortgages, conveyances, or encumbrances hereafter taken on such moneys, goods and chattels, or other personal property. No property of any such person liable to pay the tax, penalty and costs shall be exempt from such levy.

The commission shall give like notice of the time and sale of the personal property to be sold under this act as in the case of sale of personal property on execution. All provisions of law applicable to sales of personal property on execution shall be applicable to sales under this act,

except as herein otherwise provided; all moneys collected by the commission shall be paid into the state treasury.

The vendor may appeal from an assessment by the commission to the court of common pleas in the same manner and form as that provided in section 5611-2 of the General Code of Ohio.

Sec. 5546-10. Licenses required; application, when made; fee; "retail establishment".

SECTION 10. No person shall engage in making retail sales as herein defined, as a business, without having a license therefor, excepting that in the case of the dissolution of a partnership by death, the surviving partner or partners may operate under the license of the partnership for a period of sixty days, and the heirs or legal representatives of deceased persons, and receivers and trustees in bankruptcy, appointed by any competent authority, may operate under the license of the person so succeeded in possession by such heir, representative, receiver, or trustee in bankruptcy; and excepting further that two or more persons constituting a single "vendor" as defined by section 1 of this act may operate a single retail establishment under one license, and in such case neither the retirement of one or more such persons from business in such establishment, nor the entrance of one or more thereinto, under an existing arrangement, shall affect the license or require the issuance of a new license. Each applicant for such license shall, on or before the third Monday of December in the year 1934, make out and deliver to the auditor of each county, wherein he desires to engage in such business, upon a blank to be furnished by such auditor for that purpose, a statement showing the name of the applicant, each retail establishment in the county where the applicant's business is to be conducted, the kind or nature of such business and such other information as the commission may reasonably prescribe in the form of statement prescribed by it.

At the time of making such application, the applicant shall pay into the county treasury a license fee in the sum of one dollar for each retail establishment in the county where he proposes to carry on such business. Upon receipt of such application and exhibition of the county treasurer's receipt, showing the payment of such fee or fees, the county auditor shall issue to the applicant a license for each retail establishment designated in the application, authorizing the applicant to engage in business at such retail establishment. This license shall continue valid until surrendered by the vendor or cancelled, for cause, by the commission. The form of such license shall be prescribed by the commission. The fees thus collected shall be credited to the general fund of the county.

In the case of a vendor who has no fixed place of business and sells from one or more vehicles, each such vehicle intended to be used within a county shall constitute a "retail establishment" for the purpose of this section. In the case of a vendor who has no fixed place of business and does not sell from a vehicle the application for license shall nevertheless set forth a place in the county to which any notice or other communication authorized by this act may be sent, and the place so designated shall constitute a "retail establishment" for the purpose of this section.

Sec. 5546-11. List of licensed vendors; duties of county auditor.

SECTION 11. On the fourth Monday in December, 1934, each county auditor shall make in triplicate a list showing the names of all vendors licensed in his county pursuant to this act, and such other information as to each, available from the records in his office, as the commission may prescribe, and shall immediately certify one of such lists to the commission, one to the treasurer of state, and one to the county treasurer of the county. Thereafter, on the first business day of each week, the county auditor shall make and certify like lists showing such information with respect to licenses issued during the preceding week. The commission shall keep an alphabetical index of such licensees so certified to it.

Sec. 5546-12. Records of sales open to inspection of commission.

SECTION 12. Each vendor shall keep such records of sales together with invoices, bills of lading, retained parts of cancelled prepaid tax receipts, and such other pertinent documents, in such form as the commission may by regulation require. Such records and other documents shall be open at any time during business hours to the inspection of the commission and shall be preserved for a period of three years, unless the commission shall in writing consent to their destruction within that period, or by order require that they be kept longer.

Sec. 5546-13. Penalty for issuing or circulating illegal prepaid tax receipts.

SECTION 13. Whoever falsely or fraudulently makes, forges, alters, or counterfeits any prepaid tax receipt prescribed by the commission under the provisions of this act, or knowingly and wilfully utters, publishes, passes, or tenders as true, any such false, altered, forged or counterfeited receipt shall be imprisoned in the penitentiary for a term of not less than one year or more than ten years.

Sec. 5546-14. Failure to secure license a misdemeanor; penalty.

SECTION 14. Whoever engages in the business of selling tangible personal property at retail, or sells tangible personal property at retail incidental to any other regularly conducted business, as such sales are herein defined, on or after the fourth Monday in December, 1934, and to and including the thirty-first day of December, 1935, without having a license therefor, as required by this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars.

Sec. 5546-15. Failure to collect tax, etc., a misdemeanor; penalty.

SECTION 15. Whoever being a vendor, as defined in this act, fails, neglects, or refuses to collect the full and exact tax as required by this act, or fails, neglects, or refuses to comply with the provisions of this act and the rules and regulations of the commission with respect to the cancellation of prepaid tax receipts, or excepting as expressly authorized pursuant to this act, refunds, remits or rebates to a consumer, either directly or

indirectly and by whatsoever means, all or any part of the tax levied by this act, or makes in any form of advertising, verbal or otherwise, any statements which might infer that he is absorbing the tax or paying the tax for the consumer by an adjustment of prices, or at a price including the tax, or in any other manner whatsoever shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars, and upon conviction for a second or other subsequent offense, shall, if a corporation, be fined not less than one hundred dollars nor more than five hundred dollars, or if an individual or a member of a partnership, firm or association, be fined not less than twenty-five dollars nor more than one hundred dollars, or imprisoned in the county jail, or a workhouse, or other like penal or correctional institution not more than sixty days, or both.

Sec. 5546-16. Penalty for other violations.

SECTION 16. Whoever violates any provision of this act or any lawful rule or regulation promulgated by the commission under authority of this act for the violation of which no penalty is provided by law, shall be fined not less than twenty-five dollars nor more than one hundred dollars.

Sec. 5546-17. Revocation of license; procedure.

SECTION 17. Upon notice and hearing the commission may revoke any retail vendor's license for wilful violation of any provision of this act. The commission shall first notify the licensee in writing, specifying the violations charged, and fixing the time, not less than five days after the date of service of such notice, and the place at which such licensee shall appear before the commission to show cause why his license should not be revoked. The commission shall, at the time and place so specified, accord to the licensee a hearing in person and by counsel. The licensee shall be entitled to offer evidence and to compel the attendance of witnesses and the production of books, papers and records. The commission, for the purpose of such hearing, shall have and exercise the powers in it vested by sections 1465-6, 1465-17 and 1465-21 of the General Code, and all the appropriate provisions of said sections and of sections 1465-22, 1465-23, 1465-25, 1465-26 and 1465-27 of the General Code shall apply to the commission, its members and agents and to the court of common pleas for such purpose. A certified copy of the order revoking such license shall be transmitted to the auditor of the county in which the license was issued. An appeal may be taken from the action of the commission in revoking a license to the common pleas court of the county in which the place of business of the licensee is located, by filing a petition therefor with such court within ten days from the date of the commission's order against such commission, officially, as defendant, alleging therein the issuance of such license, its revocation, and praying for a reversal of the official action complained of. Upon service of summons upon any member of said commission, returnable within three days from its date, but otherwise made as in civil actions, said commission shall, within one week from such return day, file an answer, in which it shall allege, by way of defense, the grounds previously assigned in its notice to such licensee, and such other grounds as shall, in the meantime, accrue or be discovered.

All allegations of the answer shall be deemed to stand denied without further pleading and the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of. The hearing upon such appeal shall be entitled to be advanced out of its order on the docket. The judgment of the common pleas court may be reviewed upon proceedings in error in the court of appeals. Such court of common pleas and the court of appeals may suspend any order revoking such license pending the hearing in such courts.

Sec. 5546-18. Distribution of revenue; "local government fund"; "subdivision" and term "essential local governmental purposes" defined.

SECTION 18. The moneys received into the state treasury under the provisions of this act shall be credited to funds therein as follows:

To the county poor relief excise fund, the amount of four million dollars in the year 1935, together with such additional amounts for such year as the general assembly may set apart from such moneys for the use of said fund.

To the general revenue fund, an aggregate amount sufficient to cover any appropriations made by the general assembly for said year to defray the expenses of administering this act, together with such additional amounts for any year as the general assembly may set apart from such moneys for the use of said fund. To the state public school fund to be distributed according to law, sixty per centum of the remainder of such moneys so received. All remaining funds existing after the foregoing deductions shall constitute a fund, hereby created, which shall be known as the "local government fund", the revenues accruing to which shall, when appropriated, be allocated and distributed to and among the treasuries of subdivisions of this state in the manner provided by law, for the purpose of supplementing the local revenues from taxes on property according to value and from other taxes and income available for essential local governmental purposes.

Prior to the first business day of each month one-twelfth of the annual amount required by or pursuant to this section to be credited to each fund in the state treasury herein mentioned, other than the local government fund, shall be credited to each such fund.

As used in this act "subdivision" shall mean any county, municipal corporation, park district or township in this state and the term "essential local governmental purposes" includes all functions which any subdivision is required by general law to exercise or discharge, including like functions which are exercised under a charter adopted pursuant to the constitution of this state.

Sec. 5546-19. Allocation of local government fund in 1935.

SECTION 19. In the year 1935 the local government fund shall be allocated among the local subdivisions in this state in the following manner and subject to the following conditions:

On the first business day of each month the auditor of state shall draw a voucher and warrant payable to the county treasurer of each county for

an amount equal to that proportion of the total amount standing to the credit of the local government fund, after the amounts required by this act to be credited to other funds have been so credited, which is represented by the ratio which the average of the real, public utility and tangible personal property tax duplicates of the municipal corporations or parts thereof in the county during the previous five years, bears to the average of the aggregate real, public utility and tangible personal property tax duplicates of all the municipal corporations in the state during the previous five years, respectively.

Moneys received into the treasury of a county in the year 1935 from the local government fund in the state treasury shall be credited to the undivided local government fund in the treasury of the county. On or before the tenth day of each month, the county treasurer shall distribute and pay the undivided local government fund in the county treasury to the subdivisions therein in the respective amounts allowed by the budget commission to each.

Sec. 5546-20. Duties of county budget commission; certification of tax commission; duties of county auditors and county treasurers.

SECTION 20. Within ten days after this act shall take effect, the budget commission of each county shall complete its work with respect to tax levies and tax budgets for the year 1935 as required by section 5625-25 of the General Code, including the making of such revisions as may be necessary on account of the distribution to school districts of the additional amount credited to the state public school fund pursuant to this and other acts of this present session of the general assembly, or of the approval of the proposition of levying a tax by the electors of any subdivision or subdivisions in a county, and shall certify its action as therein required; excepting that unless prior to the effective date of this act, the certification of such action to the taxing authority of each subdivision or taxing unit has been made in the form required by section 5625-26 of the General Code, such certification shall omit the matters and things referred to in said last named section, which such matters and things shall in any event be included and attached to a supplemental certification which the budget commission shall make to the taxing authority of each subdivision forthwith upon the completion of its work at its special meeting in the year 1935, herein required.

Within ten days after this act shall take effect, the tax commission of Ohio shall cause to be made and shall certify to the county auditor of each county an estimate of the amount of the local government fund to be allocated to the county in the year 1935. Immediately upon receiving the commission's certificate, each county auditor shall convene the budget commission of his county in special session for the purpose of reviewing its work of determining tax rates pursuant to the first paragraph of this section if such work has been theretofore completed without such revision, and of determining the amounts to be distributed in the year 1935 from the local government fund in the county treasury. Notice of the time and place of such meeting shall be given by mail to the fiscal officer of each subdivision in whole or in part within the county.

The county auditor shall lay before the budget commission, when so convened, the certificate of the tax commission, the annual tax budgets and estimates and the record showing the action of the budget commission in its last preceding regular session. The budget commission, after affording to each subdivision an opportunity to be heard, and considering all the facts and information laid before it by the county auditor, shall determine the amount needed by each subdivision for current operating expenses for the year 1935, in addition to revenues available from all other sources, in order to enable each to maintain its respective essential local governmental purposes as defined in this act for said year.

The budget commission shall thereupon apportion the estimated amount of the undivided local government fund of the county to and among the several subdivisions in which need for additional revenues has been found in proportion to the amount of the needs of each as so determined. On the basis of such apportionment, the county auditor shall compute the percentage share of each such subdivision in the undivided local government fund and certify such percentage shares to the county treasurer, who shall be governed thereby in making distribution of the moneys in the undivided local government fund in the year 1935, pursuant to this act.

All moneys received into the treasury of a subdivision in the year 1935 from the undivided local government fund in a county treasury shall be paid into the general fund and used for the current operating expenses of the subdivision, and shall not be appropriated or expended, by transfer or otherwise, for any other purpose.

If any county auditor, or county treasurer, fails to maintain the records required by this act, or by the regulations issued by the commission or the treasurer of state, pursuant to this act, the funds allocated to that county shall be withheld until such time as the county auditor or county treasurer, or both shall have complied with the provisions of this act and the regulations issued pursuant thereto.

Sec. 5546-21. Appeal.

SECTION 21. The action of the budget commission in the year 1935, under the preceding section of this act, may be appealed to the tax commission of Ohio in the manner and with the effect provided in section 5625-28 of the General Code.

Appropriations.

SECTION 22. The sums hereinafter set forth for the purposes specified are hereby set apart for the use of the general revenue fund out of the moneys received into the state treasury under the provisions of this act and appropriated. The sums hereinafter named shall not be expended to pay liabilities incurred subsequent to June 30, 1935.

Appropriations herein made shall be and remain in full force and effect for a period of two years, commencing with the dates on which such appropriations shall take effect, for the purpose of drawing money from the state treasury in payment of liabilities lawfully incurred hereunder, and at the expiration of such period of two years, and not before, the

unincumbered balances of the moneys hereby appropriated shall lapse into the general revenue fund.

DEPARTMENT OF FINANCE, DIVISION OF TAX COMMISSION OF OHIO

Personal service	$375,000.00
Maintenance	250,000.00

AUDITOR OF STATE

Personal service	$30,000.00
Supplies and equipment	8,000.00

TREASURER OF STATE

Personal service	$75,000.00
Supplies and equipment	30,000.00
Refunds	250,000.00

ATTORNEY GENERAL

Personal service	$7,500.00

STATE RELIEF COMMISSION

State emergency relief fund	$6,000,000.00

DEPARTMENT OF PUBLIC WELFARE, DIVISION OF AID FOR THE AGED

Pensions	$6,000,000.00

Such appropriation may be expended for direct relief and for work relief as defined in amended senate bill No. 4, passed March 31, 1932 and approved April 5, 1932, as amended by house bill No. 7, passed August 23, 1933 and approved August 25, 1933, and as further amended by house bill No. 39 passed February 16, 1934 and approved February 21, 1934.

SECTION 23. Sections 6212-49a, 6212-49b of the General Code are hereby amended to read as follows:

Definitions.

Sec. 6212-49a. As used in sections 6212-49a to 6212-49t, both inclusive, of the General Code.

"Beverages" *** *means* beer as defined by section 6212-63 of the General Code as amended, and *after December 31, 1935, shall include* also all beverages whatsoever excepting milk and cream and proprietary medicines; and excepting also all intoxicating liquor.

"Commission" means the tax commission of Ohio.

"Person" includes firms and corporations.

"Wholesale dealer" includes only those persons who sell bottled beverages to retail dealers or for purposes of resale only.

"Retail dealer" includes every person other than wholesale dealer or a manufacturer engaged in the business of selling bottled beverages in this state, irrespective of quantity or amount or number of sales thereof.

"Sales" includes exchange, barter, gift, offer for sale and distribution and excludes transactions in interstate or foreign commerce.

Tax on beverages in sealed bottles; purpose; rate; exception.

Sec. 6212-49b. In addition to the tax on the sale or distribution of beer, imposed by section 6212-49 of the General Code of Ohio, and for the purpose of providing revenue for emergency poor relief and of the carrying out of the other purposes and provisions of the act entitled "An act to authorize the issue of bonds by counties and cities and the expenditure of public money for the relief of the poor and unemployed, and the investment of public funds in such bonds, to levy an excise tax on certain public utilities, and to declare an emergency," passed March 31, 1932, and approved April 5, 1932, known as Amended Senate Bill No. 4, and to defray the expenses of administering sections 6212-49a to 6212-49t, both inclusive, of the General Code as hereinafter provided, a tax is hereby levied upon the sale within this state of beverages in sealed bottles, at the rate of one-half cent on each six ounces of liquid content or fractional part thereof. Only one sale of the same article shall be used in computing the amount of tax due hereunder. The tax hereby imposed *after December 31, 1935,* shall not apply to the sale or distribution of beverages (other than beer) in sealed bottles retailing for five cents or less.

Sec. 5546-22. Repeal; effect of amendments or suspension of certain sections.

SECTION 24. That existing sections 6212-49a and 6212-49b of the General Code, are hereby repealed, and sections 5543-1 to 5543-20, both inclusive, 6212-49q, 6212-49r, 6212-49s and 6212-49t of the General Code are hereby suspended January 1, 1935, until and including December 31, 1935. Said amendments or suspensions shall not affect the right to refund for unused stamps purchased under any of said sections which right shall extend to refunds on account of stamps affixed to articles unsold at the end of business on December 31, 1935; and the moneys appropriated to the treasurer of state under section 22 of this act for the purpose of making refunds may be expended for the purpose of making refunds authorized by this section.

Sec. 5546-23. Saving clause.

SECTION 25. If any provision of this act shall be held unconstitutional, such holding shall not affect any of the other provisions of this

act, not inseparably connected in meaning and effect with such part so held unconstitutional.

FRANK CAVE,
Speaker of the House of Representatives.

CHARLES SAWYER,
President of the Senate.

Passed December 6, 1934.
Approved December 13, 1934.

GEORGE WHITE,
Governor.

The sectional numbers on the margin hereof are designated as provided by law.

JOHN W. BRICKER,
Attorney General.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 14th day of December, A. D. 1934.

GEORGE S. MYERS,
Secretary of State.

File No. 65.

(House Bill No. 43)

AN ACT

To increase the rates of excise taxation imposed on the gross receipts and gross earnings of certain public utilities, and to apply the increased revenues resulting therefrom to the general fund of counties for county statutory relief and welfare purposes and for such purposes to amend sections 5474, 5475, 5483, 5485, 5486, 5487 and 5491 of the General Code and to enact supplemental section 5487-1 of the General Code.

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

SECTION 1. That sections 5474, 5475, 5483, 5485, 5486, 5487 and 5491 of the General Code are hereby amended and supplemental section 5487-1 enacted to read as follows:

Contents of statement.

Sec. 5474. In the case of all such public utilities except railroad, street, suburban and interurban railroad companies and express, telegraph and telephone companies such statement shall also contain the entire gross receipts of the company, *** actually received *** from whatever source derived, for business done within this state for the year next preceding the first day of May, including the company's proportion of gross receipts for business done by it within this state in connection with other companies,

EXHIBIT 19

THE STATE OF OHIO

LEGISLATIVE ACTS

PASSED

AND

JOINT RESOLUTIONS

ADOPTED

BY THE

NINETY-FIRST GENERAL ASSEMBLY OF OHIO

At the First Special Session

BEGUN AND HELD IN THE CITY OF COLUMBUS, OHIO,
SEPTEMBER 18, 1935, AND ENDING DECEMBER 28, 1936,

AND

TITLE AND TEXT OF CONSTITUTIONAL AMENDMENTS ADOPTED
BY VOTE OF THE ELECTORS OF OHIO AT THE GENERAL
ELECTION HELD NOVEMBER 3, 1936.

VOLUME CXVI—PART II

THE F. J. HEER PRINTING CO.
Columbus, Ohio
1935-36

(House Bill No. 694)

AN ACT

To extend the period of the excise tax on retail sales and for that purpose to amend sections 5546-1, 5546-2, 5546-3, 5546-6, 5546-8, 5546-9, 5546-9a, 5546-10, 5546-12, 5546-14, 5546-16, 5546-17, 5546-18, 5546-20, 5546-22. To repeal existing section 5546-12a, and to enact supplemental sections to be known as sections 5546-9b, 5546-9c, 5546-12a, 5546-12b, and 5546-13b of the General Code, and to make appropriations of the proceeds of said tax for the years 1937 and 1938.

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

SECTION 1. That sections 5546-1, 5546-2, 5546-3, 5546-6, 5546-8, 5546-9, 5546-9a, 5546-10, 5546-12, 5546-14, 5546-16, 5546-17, 5546-18, 5546-20, 5546-22, of the General Code are hereby amended and supplemental sections to be known as sections 5546-9b, 5546-9c, 5546-12a, 5546-12b, and 5546-13b, are hereby enacted; said amended and supplemental sections to read as follows:

Definitions.

Sec. 5546-1. As used in this act:

"Person" includes individuals, firms, partnerships, associations, joint stock companies, corporations, and combinations of individuals of whatsoever form and character.

"Commission" means the tax commission of Ohio.

"Sale" and "selling" include all transactions whereby 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 granted, for a consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange or barter, and by any means whatsoever ***; *and includes 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 or fabrication work; and includes 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.* 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 *** shall, if the consideration for such incorporation *** is agreed upon, charged or paid separately from the consideration for the performance of the other obligations of such construction contract, constitute a sale of such tangible personal property for the purpose of this act.

"Vendor" means the person by whom the transfer effected or license given by a sale is or is to be made or given; and in case two or more persons shall be 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 for the purpose of this act.

"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.

"Retail sale" and "sales at retail" include all sales excepting those in which the purpose of the consumer is (a) to resell the thing transferred in the form in which the same is, or is to be, received by him; or (b) 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 for sale by manufacturing, processing, refining, mining, *production of crude oil and natural gas,* farming, horticulture, or floriculture, or directly in making retail sales or directly in the rendition of a public utility service; *except that the sales tax levied herein shall be collected upon all meals, drinks and food for human consumption sold upon Pullman and railroad coaches;* or (c) security for the performance of an obligation by the vendor; (d) or to use or consume the thing directly in industrial cleaning of tangible personal property*; or (e) to resell, hold, use or consume the thing transferred as evidence of a contract of insurance.*

"Business" includes any activity engaged in by any person or caused to be engaged in by him with the object of gain, benefit, or advantage, either direct or indirect.

"Engaging in business" means commencing, conducting or continuing in business, as well as liquidating a business when the liquidator thereof holds himself out to the public as conducting such business. However, making a casual or isolated sale is not "engaging in business".

"Price" means the aggregate value in money of any thing or things paid or delivered, or promised to be paid or delivered by a consumer to a vendor in the consummation and complete performance of a retail sale without any deduction therefrom 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 whatsoever. *"Price" shall not include the consideration received for labor or services used in installing, applying, remodeling or repairing the property sold if the consideration for such services is separately stated from the consideration received for the tangible personal property transferred in the retail sale. "Price" shall be deemed to be the amount received exclusive of the tax hereby imposed provided the vendor shall establish to the satisfaction of the commission that the tax was added to the price.*

The tax collected by the vendor from the consumer under the provisions of this act shall not be considered as a part of the price, but

shall be considered as a tax collection for the benefit of the state, and except for the discount authorized in section *** *5546-8 of the General Code,* no persons other than the state shall derive any benefit from the collection or payment of such tax.

"Receipts" means the total amount of the prices of the sales of vendors, provided, however, that cash discounts allowed and taken on sales at the time they are consummated shall not be included, and receipts shall not include the sale price of property returned by consumers when the full sale price thereof is refunded either in cash or by credit.

"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.

"Prepaid tax receipts", whenever used in sections 5546-1 to *** *5546-21,* both inclusive, of the General Code, shall, unless the context otherwise indicates, mean prepaid tax receipts prescribed by section 5546-4 of the General Code of Ohio, and prepaid sales tax cards which shall be prescribed under rules and regulations of the tax commission of Ohio. The tax commission of Ohio shall prescribe the manner of cancelling such cards, and in prescribing the use of such prepaid sales tax cards, shall so design and prescribe the form of such cards that they can be used only in the establishment or establishments of the vendor issuing the same.

Tax on retail sales; purpose; rates; exceptions.

Sec. 5546-2. For the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crisis, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this act, an excise tax is hereby levied on each retail sale made in this state of tangible personal property *** on *and after* the first day of January, 1935 ***, with the exceptions hereinafter mentioned and described, as follows:

One cent, if the price is forty cents or less;

Two cents, if the price is more than forty cents and not more than seventy cents;

Three cents, if the price is more than seventy cents and not more than one dollar;

If the price is in excess of one dollar, three cents on each full dollar thereof; and if, in such case, the price is not an even number of dollars, then, in addition to the said tax on each full dollar thereof, one cent, if the price exceeds an even number of dollars by more than eight cents, but not more than forty cents; two cents if such excess is more than forty cents and not more than seventy cents; and three cents if such excess is over seventy cents.

If the price is less than nine cents, no tax shall be imposed.

The taxes hereby imposed shall apply and be collected when the sale is made, regardless of the time when the price is paid or delivered.

In the case of a sale as herein defined, *** the price of which as herein defined consists in whole or in part of rentals for the use of the thing transferred, the taxes hereby imposed shall, as regards such rentals, be measured by the installments thereof falling due *** *on and after January 1, 1935.*

The tax hereby levied does not apply to the following sales:

1. When the consumer is the state of Ohio, or any of its political subdivisions.

2. *Sale of food for human consumption off the premises where sold.*

The term food as used in this section shall include: cereals and cereal products; milk and milk products including ice cream; meat and meat products; fish and fish products; eggs and egg products; vegetables and vegetable products; fruits, fruit products and pure fruit juices, condiments; sugar and sugar products, other than candy and confectionery; coffee and coffee substitutes; tea; cocoa and cocoa products, other than candy and confectionery.

Food shall not include spirituous or malt liquors; soft drinks; and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith other than coffee, tea and cocoa; root beer and root beer extracts; malt and malt extracts; mineral oils, cod liver oil, halibut liver oil; medicines, including tonics, vitamin preparations and other products sold primarily for their medicinal properties; water, including mineral bottled and carbonated waters and ice.

*** 2a. *When the sale is of feed and seeds.*

2b. The sale of newspapers and of magazine subscriptions shipped by second class mail.

3. Sales of motor vehicle fuel and of liquid fuel upon the receipt, use, distribution or sale of which in this state a tax is imposed by the law of this state.

4. Sales of cigarettes and of brewer's wort and malt, upon the sale of which a tax is imposed by law of this state, so long, respectively, as such law is in force.

5. Sales of beer as defined by section 6212-63 of the General Code, whether in bulk or in bottles, sales of wine, and sales of spirituous liquors by the department of liquor control.

6. Sales of artificial gas by a gas company as defined in section 5416 of the General Code, of natural gas by a natural gas company, as so defined, of electricity by an electric light company, as so defined, of water by a waterworks company, as so defined, if in each case the thing sold is delivered to consumers through wires, pipes or conduits; and all

sales by any other public utility as defined in section 5415 of the General Code.

7. Casual and isolated sales by a vendor who is not engaged in the business of selling tangible personal property.

8. Sales which are not within the taxing power of this state under the constitution of the United States.

Nothing in this act shall be so construed as to impose any tax on the transportation of persons or property.

9. Professional, *insurance* or personal service transactions which involve sales as inconsequential elements, for which no separate charges are made.

10. Tangible personal property sold to charitable and religious organizations.

11. Nitroglycerine or explosives used in the shooting or explosion of an oil or gas well or coal mine.

11a. *Sales of food sold to students only in a cafeteria, dormitory, fraternity or sorority maintained in a private, public or parochial school, college or university.*

12. Sales of *** *tangible personal property* purchased by residents of other states to be used outside of state of Ohio.

For the purpose of the proper administration of this act and to prevent the evasion of the tax hereby levied, it shall be presumed that all sales made in this state *** are subject to the tax hereby levied until the contrary is established.

Payment of tax; certificate required, when.

Sec. 5546-3. Excepting as provided in section 5546-5 of the General Code, the tax *** imposed *by section 5546-2 of the General Code* shall be paid by the consumer to the vendor in every instance, and it shall be the duty of each vendor to collect from the consumer the full and exact amount of the tax payable in respect of each taxable sale, and to evidence the payment of the tax in each case by cancelling prepaid tax receipts, equal in face value to the amount thereof, in the manner and at the times provided in this section, to-wit:

(a) If the price is, at or prior to the delivery of possession of the thing sold to the consumer, paid in currency passed from hand to hand by the consumer or his agent to the vendor or his agent, the vendor or his agent shall:

1. Collect the tax with and at the same time as the price.

2. Immediately cancel in the presence of the buyer by immediately tearing into two parts a prepaid tax receipt or receipts of the proper face value, deliver one part of each such cancelled prepaid tax receipt to the consumer or his agent, and retain the other part thereof.

(b) If the price is otherwise paid or to be paid, the vendor or his agent shall, at or prior to the delivery of possession of the thing sold to the consumer, cancel or cause to be cancelled by tearing into two parts prepaid tax receipts equal in face value to the amount of the tax imposed by this act. Thereupon and thereby the amount of the tax with respect to such sale, payment of which to the state is evidenced by such cancellation, shall become a legal charge in favor of the vendor and against the consumer, which shall in every case be collected by the vendor, as herein provided, in addition to the price; and at or immediately after such collection, the vendor shall deliver one part of each such cancelled prepaid tax receipt to the consumer and retain the other part thereof.

In case the tax does not apply to a sale, the consumer must furnish to the vendor and the vendor must obtain from the consumer a certificate in proper form, indicating that the sale is not legally subject to the tax herein imposed. The certificate herein required shall be in such form as the commission shall by regulation prescribe, and in case no certificate is furnished or obtained prior to the time the sale is consummated, the tax shall apply.

However, no certificates need be obtained or furnished where the item of tangible personal property sold is never subject to the tax imposed regardless of use.

Vendors reimbursed, when and how.

Sec. 5546-6. In the event prepaid purchases are returned to the vendor by the consumer after the tax imposed by *** *section 5546-2 of the General Code* has been collected or charged to the account of the consumer, the vendor shall be entitled to reimbursement of the amount of the tax so collected or charged by him, either through the cancellation of prepaid tax receipts paid for by the consumer, or through the cancelling of prepaid tax receipts paid for by the vendor and charged to the account of the consumer, in the manner herein provided. Upon receipt of a sworn statement by the vendor as to the gross amount of such refunds, during the period covered by such sworn statement, which period shall not be longer than sixty days, the commission shall issue to the vendor an official credit memorandum equal to the net amount paid by the vendor for such cancelled prepaid tax receipts. Such memorandum shall be accepted by the state treasurer or his agents at full face value, from the vendor to whom it is issued, in the purchase of prepaid tax receipts under the provisions of section *** *5546-7 of the General Code.*

The applications for refunds made pursuant to this section must be made within ninety days after the prepaid purchases have been returned by the consumer.

Sale of prepaid tax receipts; redemption; prepaid sales tax receipts.

Sec. 5546-8. The treasurer of state, his agents, and the several county treasurers, shall sell prepaid tax receipts only to licensed vendors. All such prepaid tax receipts shall be sold and accounted for at a discount of not to exceed three per centum of the face value thereof, as a

commission for handling and cancelling such prepaid tax receipts. The commission shall by regulation, certified to the treasurer of state, fix within the limitations herein prescribed the rate of discount applicable to the sale of prepaid tax receipts to such classes of licensed vendors as it may establish. The treasurer of state shall redeem and pay for any unused or spoiled tax receipts at the net value thereof, *** *and* he shall refund *to vendors* the amount of *** *taxes illegally or erroneously paid or* *** paid on any illegal or erroneous assessment *** *where the vendor has not reimbursed himself from the consumer. When such illegal or erroneous payment or assessment was not paid to a vendor but was paid directly to the treasurer of state, or an agent of the treasurer of state, by the consumer, the treasurer of state shall make refund to the consumer. In all cases an* *** application shall be filed with the tax commission on the form prescribed by it *** *and must be filed within a period of ninety days from the date the tax receipts are spoiled, or from the date it is ascertained that the assessment or payment was illegal or erroneous.* On filing of such application the tax commission of Ohio shall determine the amount of refund due and shall certify such amount to the auditor of state. The auditor of state shall thereupon draw a warrant for such certified amount on the treasurer of state to the person claiming such refund. For the purpose of paying such refund the treasurer of state shall place ten thousand dollars collected in a special fund to be known as the sales tax rotary fund; and thereafter as required by the depletion thereof he shall place to the credit of said rotary fund an amount sufficient to make the total of said fund at the time of each such credit amount to ten thousand dollars.

All prepaid sales tax cards shall be sold and accounted for in the same manner and at the same discount as prepaid tax receipts, but there shall be added to the price thereof the actual cost of such cards to the state as such cost shall be certified to the treasurer of state from time to time by the commission; and all money received from such sales, including such added amounts, shall be considered as revenues arising from the tax imposed by this act.

Licensed vendors to purchase receipts from treasurer of state or agents.

Sec. 5546-9. *** It shall be the duty of each *** vendor *making taxable sales* to purchase and have on hand at all times prepaid tax receipts in suitable denominations and in amount sufficient to supply the normal requirements of his business. A licensed vendor shall procure prepaid tax receipts only from the treasurer of state, or his agent authorized to sell such receipts, or the treasurer of the county in which he is licensed.

Liability of vendor; liability of consumer; assessment; petition for reassessment; appeal; judgment.

Sec. 5546-9a. In case any vendor fails to collect the tax *** *imposed by section 5546-2 of the General Code,* or having collected the tax, fails to cancel the prepaid tax receipts in the manner prescribed by this

act and by the regulations of the commission, he shall be personally liable for such amount as he failed to collect, or for the amount of prepaid tax receipts which he failed to cancel.

In case any consumer refuses to pay to the vendor the tax *** *imposed by section 5546-2 of the General Code,* or in the case of a sale exempt from the application of the tax refuses to sign and present to the vendor a proper certificate indicating the sale is not subject to the tax *** *therein* imposed, or signs or presents to the vendor a false certificate, or after signing and presenting a proper certificate uses the items purchased in such manner that the sale would be subject to the tax, he shall personally be liable for the amount of tax applicable to the transaction or transactions.

In such cases the commission shall have power to make an assessment against such vendor or consumer, based upon any information within its possession, or that shall come into its possession. The commission shall give to the vendor or consumer, written notice of such assessment. Such notice may be served upon the vendor or consumer personally or by registered mail.

The commission shall first issue assessments against the vendor, unless it be shown that the consumer refused to pay the tax after demand by the vendor, or the commission. An assessment issued against the vendor shall not be considered an election of remedies, nor a bar to an assessment against the consumer for the tax applicable to the same transaction, unless payment in full is made by the vendor.

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The commission shall have like power to make an assessment against any vendor who fails to file a return required by section 5546-12b of the General Code or fails to remit the proper amount of tax due under section 5546-12a of the General Code. Notice of such assessment shall be made in the manner prescribed above.

All assessments as made by the commission after hearing shall become due and payable within three days after notice of the finding made at the hearing has been served upon the party assessed either personally or by registered mail.

A penalty of fifteen per centum shall be added to the amount assessed immediately upon the assessment becoming due and payable.

Unless the vendor or consumer, to whom said notice of assessment is directed, shall, within fifteen days after service thereof, either personally or by registered mail, file a petition in writing, verified under oath by said vendor, consumer, or his duly authorized agent, having knowledge of the facts, setting forth with definiteness and particularity the items of said assessment objected to, together with the reason for such objections, said assessment shall become and be deemed conclusive and the amount thereof shall be due and payable, from the vendor or consumer so assessed, to the treasurer of state. In every case where a petition for reassessment, as above described, shall be filed, the commission shall assign a time and place for the hearing of same and shall notify the petitioner thereof by registered

mail, but the commission shall have the power to continue the same from time to time as may be necessary.

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The vendor or consumer may appeal from an assessment **21** *after it is due and payable* to the court of common pleas in the same manner and form as that provided in section 5611-2 of the General Code of Ohio.

After the expiration of the period within which the person assessed may appeal to the court of common pleas in the manner prescribed in section 5611-2 of the General Code of Ohio, a certified copy of the entry of the commission making the assessment final may be filed in the office of the clerk of courts in the county in which the vendor's or consumer's place of business is located or the county in which the party assessed resides.

The county clerk, immediately upon the filing of such entry, shall enter a judgment for the people of the state of Ohio against the vendor or consumer in the amount shown on the entry. The judgment may be filed by the county clerk in a loose leaf book entitled "Special judgments for state retail sales tax."

From the date of the filing of the entry in the county clerk of court's office, the assessment, which includes taxes and penalty, shall bear the same rate of interest as other judgments and shall have the same force and effect as a judgment. Execution shall issue upon such judgment upon request of the commission and all provisions of law applicable to sales on execution shall be applicable to sales made under such judgments except as herein otherwise provided.

All moneys collected by the commission under this section shall be paid to the state treasurer and when paid, shall be considered as revenue arising from the taxes imposed by this act.

Final return when business sold, etc.; liability of purchaser.

Sec. 5546-9b. If any person liable for the taxes levied in this act shall sell his business or stock of merchandise, or quit his business, the taxes and interest or penalty imposed by this act on sales made prior to that time shall become due and payable immediately and such person shall make a final return within fifteen days after the date of selling or quitting business. His successor, if any, shall withhold sufficient of the purchase money to cover the amount of such taxes and interest or penalties due and unpaid until such time as the former owner shall produce a receipt from the commission showing that the taxes and interest or penalties have been paid or a certificate indicating no taxes are due. If the purchaser of the business or stock of goods fails to withhold purchase money, as above provided, he shall be personally liable for the payment of the taxes, interest and penalties accrued and unpaid on account of the operation of the business by the former owner.

Immediate return and payment of tax demanded, when; exception.

Sec. 5546-9c. If the commission finds that a vendor or consumer liable for tax under any provisions of this act, is about to depart from

Note:—The figures "21" in the third line on this page appear in this manner in the enrolled bill. [Editor.]

the state, or to remove his property therefrom, or to conceal himself or his property therein, or to do any other act tending to prejudice or to render wholly or partly ineffectual proceedings to collect such tax, unless such proceedings be brought without delay, or if the commission believes that the collection of the amount due from any vendor or consumer will be jeopardized by delay, it shall cause notice of such finding to be given such vendor or consumer together with the demand for an immediate return and immediate payment of such tax. Thereupon such tax shall become immediately due and payable. If such vendor or consumer (1) is not in default in making returns or paying any tax prescribed by this act, and (2) furnishes evidence satisfactory to the commission under regulations to be prescribed by the commission that he will duly return and pay the tax due which the commission's finding relates, then such tax shall not be payable prior to the time otherwise fixed for payment.

License required; application, when made; fee; "retail establishment".

Sec. 5546-10. No person shall, *** engage in making retail sales as herein defined, as a business, without having a license therefor, excepting that in the case of the dissolution of a partnership by death, the surviving partner or partners may operate under the license of the partnership for a period of sixty days, and the heirs or legal representatives of deceased persons, and receivers and trustees in bankruptcy, appointed by any competent authority, may operate under the license of the person so succeeded in possession by such heir, representative, receiver, or trustee in bankruptcy; and excepting further that two or more persons constituting a single "vendor" as defined by section 5546-1 of the General Code may operate a single retail establishment under one license, and in such case neither the retirement of one or more such persons from business in such establishment, nor the entrance of one or more thereinto, under an existing arrangement, shall affect the license or require the issuance of a new license. Each applicant for such license shall, on or before the third Monday of December in the year 1934, make out and deliver to the auditor of each county, wherein he desires to engage in such business, upon a blank to be furnished by such auditor for that purpose, a statement showing the name of the applicant, each retail establishment in the county where the applicant's business is to be conducted, the kind or nature of such business and such other information as the commission may reasonably prescribe in the form of statement prescribed by it.

At the time of making such application, the applicant shall pay into the county treasury a license fee in the sum of one dollar for each retail establishment in the county where he proposes to carry on such business. Upon receipt of such application and exhibition of the county treasurer's receipt, showing the payment of such fee or fees, the county auditor shall issue to the applicant a license for each retail establishment designated in the application, authorizing the applicant to engage in business at such retail establishment. This license shall continue valid until surrendered by the vendor or cancelled, for cause, by the commission. The form of

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such license shall be prescribed by the commission. The fees thus collected shall be credited to the general fund of the county.

In the case of a vendor who has no fixed place of business and sells from one or more vehicles, each such vehicle intended to be used within a county shall constitute a "retail establishment" for the purpose of this section. In the case of a vendor who has no fixed place of business and does not sell from a vehicle the application for license shall nevertheless set forth a place in the county to which any notice or other communication authorized by this act may be sent, and the place so designated shall constitute a "retail establishment" for the purpose of this section.

In the case of a vendor who is a disabled or unemployed soldier, sailor or marine having no fixed place of business and no employees doing business in more than one county, only one license shall be required, which shall be issued in the county in which he usually resides upon payment of the fee required by law accompanied by evidence of an honorable discharge from the service and either a licensed physician's certificate of disability or a statement from the soldiers' relief organization of the county that he is unemployed. In each additional county in which he does business he shall register with the county treasurer upon forms to be provided by the treasurer of state.

Records of sales open to inspection of the commission; quarterly return.

Sec. 5546-12. Each vendor shall keep complete and accurate records of sales of taxable property, together with a record of the tax collected thereon, which shall in every instance be the amount due under the provisions of this act, and shall keep all invoices, bills of lading, retained parts of cancelled prepaid tax receipts and such other pertinent documents, in such form as the commission may by regulation require. Such records and other documents shall be open at any time, during business hours, to the inspection of the commission and shall be preserved for a period of three years, unless the commission shall, in writing, consent to their destruction within that period or by order require that they be kept longer.

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Levy of tax upon the privilege of engaging in the business of making retail sales; purpose; rate; determination of tax.

Sec. 5546-12a. In addition to the tax levied in section 5546-2 of the General Code and for the purpose of providing revenue with which to meet the needs of the state for poor relief in the existing economic crisis, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, and for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of admin-

istering this act, beginning January 1, 1937, there is hereby levied upon the privilege of engaging in the business of making retail sales, an excise tax of three per centum of the receipts derived from all such retail sales, excepting those to which the excise tax imposed by section 5546-2 of the General Code is made inapplicable by subparagraphs 1 to 12, inclusive, of said section. The tax imposed by this section shall be determined by deducting from the sum representing three per centum of the receipts from such retail sales the amount of tax paid to the state by means of cancelling prepaid tax receipts in accordance with the provisions of section 5546-3 of the General Code. This section shall not be so construed or applied as to affect any duty of the vendor under sections 5546-1 to 5546-17, both inclusive, of the General Code, nor the liability of any consumer to pay any tax imposed by section 5546-2 of the General Code.

Return filed by vendor, when; contents; remittance.

Sec. 5546-12b. Each vendor making sales subject to the tax levied in section 5546-2 of the General Code shall on or before the 15th day of the month following the close of each quarterly period, the first of such quarterly periods being the period commencing January 1, 1937 and ending March 31, 1937, make and file a return for the preceding quarterly period in such form as may be prescribed by the commission showing the receipts from taxable sales, the amount of tax due from the vendor to the state for the period covered by such return, the amount of tax collected by the vendor and such other information as the commission may deem necessary for the proper administration of this act. The vendor shall deliver the return together with a remittance of the amount of the tax due under section 5546-12a of the General Code, if any, to the commission. In case any vendor has collected in excess of three per cent of his receipts from sales which are taxable under section 5546-2 of the General Code as tax from consumers and failed to cancel tax receipts in the proper amount, such excess shall be remitted along with the remittance of the amount of tax due under section 5546-12a of the General Code. The commission, if it deems it necessary in order to insure the payment of the taxes imposed by this act, may require returns and payments to be made for other than quarterly periods. The returns shall be signed by the vendor or his duly authorized agent and need not be verified by oath.

Failure to file report or filing false or fraudulent report a misdemeanor; penalty.

Sec. 5546-13b. Whoever fails to file any report required to be filed by the provisions of this act, or whoever files or causes to be filed any false or fraudulent report or statement, or whoever aids or abets another in the filing of any false or fraudulent report or statement shall be guilty of a misdemeanor and shall, upon conviction, be fined not less than one hundred dollars or more than one thousand dollars, or imprisoned in the county jail or a workhouse or other like penal or correctional institution not more than sixty days or both.

Failure to secure license a misdemeanor; penalty.

Sec. 5546-14. Whoever engages in the business of selling tangible personal property at retail, or sells tangible personal property at retail incidental to any other regularly conducted business, as such sales are herein defined, on or after the fourth Monday in December, 1934 *** without having a license therefor, as required by this act, shall be deemed guilty of a misdemeanor and upon conviction thereof shall be fined not less than twenty-five dollars nor more than one hundred dollars.

Penalty for other violations.

Sec. 5546-16. Whoever violates any provisions of *** *sections 5546-1 to 5546-21, both inclusive, of the General Code,* or any lawful rule or regulation promulgated by the commission under authority of this act for the violation of which no penalty is provided by law, shall be fined not less than twenty-five dollars nor more than one hundred dollars.

Revocation of license; procedure.

Sec. 5546-17. Upon notice and hearing the commission may revoke any retail vendor's license for wilful violation of any provision of *** *sections 5546-1 to 5546-21, both inclusive, of the General Code,* or any act relating to the collection of a sales tax, use or consumption tax, or any act imposing a duty upon a vendor in connection with the collection of excise taxes from consumers. The commission shall first notify the licensee in writing, specifying the violations charged, and fixing the time, not less than five days after the date of service of such notice, and the place at which such licensee shall appear before the commission to show cause why his license should not be revoked. The commission shall, at the time and place so specified, accord to the licensee a hearing in person and by counsel. The licensee shall be entitled to offer evidence and to compel the attendance of witnesses and the production of books, papers and records. The commission, for the purpose of such hearing, shall have and exercise the powers in it vested by sections 1465-6, 1465-17 and 1465-21 of the General Code, and all the appropriate provisions of said sections and of sections 1465-22, 1465-23, 1465-25, 1465-26 and 1465-27 of the General Code shall apply to the commission, its members and agents and to the court of common pleas for such purpose. A certified copy of the order revoking such license shall be transmitted to the auditor of the county in which the license was issued. An appeal may be taken from the action of the commission in revoking a license to the common pleas court of the county in which the place of business of the licensee is located, by filing a petition therefor with such court within ten days from the date of the commission's order against such commission, officially, as defendant, alleging therein the issuance of such license, its revocation, and praying for a reversal of the official action complained of. Upon service of summons upon any member of said commission, returnable within three days from its date, but otherwise made as in civil actions, said commission shall, within one week from such return day, file an answer, in which it shall allege, by way of defense, the grounds

previously assigned in its notice to such licensee, and such other grounds as shall, in the meantime, accrue or be discovered.

All allegations of the answer shall be deemed to stand denied without further pleading and the burden shall rest upon the plaintiff to disprove the grounds assigned and specified in the official action complained of. The hearing upon such appeal shall be entitled to be advanced out of its order on the docket. The judgment of the common pleas court may be reviewed upon proceedings in error in the court of appeals. Such court of common pleas and the court of appeals may suspend any order revoking such license pending the hearing in such courts.

Distribution of revenue; "local government fund"; "subdivision" and term "essential local governmental purposes" defined.

Sec. 5546-18. The moneys received into the state treasury under the provisions of this act shall be credited to funds therein as follows:

To the county poor relief excise fund, the amount of *** *four* million dollars in *** the *** *year 1937*, and the amount of *** *two* million *seven hundred fifty thousand* dollars in the year *** *1938*, together with such additional amounts for any such year as the general assembly may set apart from such moneys for the use of said fund. *In addition to the foregoing there is hereby appropriated six million dollars in the year 1937 and six million dollars in the year 1938 for poor relief, to be expended in said years according to law.*

To the general revenue fund, an aggregate amount sufficient to cover any appropriations made by the general assembly for any of said years to defray the expenses of administering this act, together with such additional amounts for any year as the general assembly may set apart from such moneys for the use of said fund. To the state public school fund *to be distributed according to law sixty per centum of the remainder of such monies so received during the years 1937 and 1938.*

All *** *the residue of said* funds existing after the foregoing deductions shall constitute a fund, hereby created, which shall be known as the "local government fund", the revenues accruing to which *** *during the years 1937 and 1938 are hereby* appropriated to be allocated and distributed to and among the treasuries of subdivisions of this state in the manner provided by law, for the purpose of supplementing the local revenues from taxes on property according to value and from other taxes and income available for essential local governmental purposes.

Prior to the first business day of each month one-twelfth of the annual amount required by or pursuant to this section to be credited to each fund in the state treasury herein mentioned, other than the local government fund, shall be credited to each such fund.

As used in this act "subdivision" shall mean any county, municipal corporation, park district or township in this state, and the term "essential local governmental purposes" includes all functions which any subdivision is required by general law to exercise or discharge, including like functions

which are exercised under a charter adopted pursuant to the constitution of this state.

County budget commission, duties; certification of tax commission; apportionment to subdivision; public officials required to maintain records.

Sec. 5546-20. Within ten days after this amendatory act shall take effect, the budget commission of each county shall complete its work with respect to tax levies and tax budgets for the year *** *1937 and thereafter for the year 1938* as required by section 5625-25 of the General Code, including the making of such revisions as may be necessary ***, and shall certify its action as therein required; excepting that unless prior to the effective date of this amendatory act, the certification of such action to the taxing authority of each subdivision or taxing unit has been made in the form required by section 5625-26 of the General Code, such certification shall omit the matters and things referred to in said last named section, which such matters and things shall in any event be included and attached to a supplemental certification which the budget commission shall make to the taxing authority of each subdivision forthwith upon the completion of its work at its special meeting in the year *** *1937*, herein required.

Within ten days after this amendatory act shall take effect, the tax commission of Ohio shall cause to be made and shall certify to the county auditor of each county an estimate of the amount of the local government fund to be allocated to the county in the year *** *1937 and on or before December 1, 1937, shall make a like certificate for the year 1938.* Immediately upon receiving the commission's certificate, each county auditor shall convene the budget commission of his county in special session for the purpose of reviewing its work of determining tax rates pursuant to the first paragraph of this section if such work has been theretofore completed without such revision, and of determining the amounts to be distributed in the *years* *** *1937* and 1938 from the local government fund in the county treasury. Notice of the time and place of such meeting shall be given by mail to the fiscal officer of each subdivision in whole or in part within the county.

The county auditor shall lay before the budget commission, when so convened, the certificate of the tax commission, the annual tax budgets and estimates and the record showing the action of the budget commission in its last preceding regular session. The budget commission, after affording to each subdivision an opportunity to be heard, and considering all the facts and information laid before it by the county auditor, shall determine the amount needed by each subdivision for current operating expenses for the *respective years* *** *1937 and 1938* in addition to revenues available from all other sources, in order to enable each to maintain its respective essential local governmental purposes as defined in this act for said *years.*

The budget commission shall thereupon apportion the estimated amount of the undivided local government fund of the county to and

among the several subdivisions in which need for additional revenues has been found in proportion to the amount of the needs of each as so determined provided that in counties having a population of less than one hundred thousand, *not less than* ten per cent shall be distributed to the townships therein.

On the basis of such apportionment, the county auditor shall compute the percentage share of each such subdivision in the undivided local government fund and certify such percentage shares to the county treasurer, who shall be governed thereby in making distribution of the moneys in the undivided local government fund in the *years *** 1937 and 1938,* pursuant to this act. The amendment of this section shall not affect the duty of the county treasurer in making distribution of moneys in the undivided local government fund in the year **** 1936.*

All moneys received into the treasury of a subdivision from the undivided local government fund in a county treasury shall be paid into the general fund and used for the current operating expenses of the subdivision, and shall not be appropriated or expended, by transfer or otherwise, for any other purpose.

Provided, however, in the case of a municipal corporation maintaining a municipal university, such municipal university, when the board of directors so request the city council, shall participate in the moneys apportioned to such municipal corporation from the local government fund such amount as requested by the board of directors, provided such sum does not exceed nine per cent of total amount paid to said municipal corporation under this act. Provided, however, that this shall not apply to municipalities with a population of over 400,000.

If any public official fails to maintain the records required by this act, or by the regulations issued by the commission or the treasurer of state, pursuant to this act, or fails to comply with the provisions of any act relating to the enforcement of this act, the funds allocated to that county shall be withheld until such time as the public official or officials shall have complied with the provisions of this act or such other act and the regulations issued pursuant thereto.

Repeal; effect.

Sec. 5546-22. That existing sections 6212-49a, **** 6212-49b, **** 5543-1 to 5543-20, both inclusive, 6212-49q, 6212-49r, 6212-49s and 6212-49t of the General Code are hereby **** repealed. The repealing of said sections* shall not affect the right to refund for unused stamps purchased under any of said sections which right shall extend to refunds on account of stamps affixed to articles unsold at the end of business on **** January 1,* 1937; and the moneys appropriated to the treasurer of state for the purpose of making refunds may be expended for the purpose of making refunds authorized by this section.

Repeal.

SECTION 2. That existing sections 5546-1, 5546-2, 5546-3, section 5546-6, 5546-8, 5546-9, 5546-9a, 5546-10, 5546-12, 5546-12a, 5546-14,

5546-16, 5546-17, 5546-18, 5546-20, and 5546-22 of the General Code are hereby repealed.

Appropriations.

SECTION 3. The sums hereinafter set forth for the purposes hereinafter specified are hereby set apart for the use of the general revenue fund out of the moneys received into the state treasury under the provisions of sections 5546-1 to 5546-20 of the General Code, both inclusive, and appropriated. The sums hereinafter named shall not be expended to pay liabilities incurred subsequent to December 31, 1938.

The appropriations herein made shall be and remain in full force and effect for a period of two years, commencing with the dates on which such appropriations shall take effect, for the purpose of drawing money from the state treasury in payment of liabilities lawfully incurred hereunder and at the expiration of such period of two years, and not before, the unincumbered balances of the moneys hereby appropriated shall lapse into the general revenue fund.

The following sums are appropriated for each of the years 1937 and 1938:

DEPARTMENT OF FINANCE, DIVISION OF TAX COMMISSION OF OHIO

	1937	*1938*
Personal service	$650,000.00	$650,000.00
Maintenance	350,000.00	350,000.00
Printing	400,000.00	400,000.00

AUDITOR OF STATE

Personal service	$60,000.00	$60,000.00
Supplies and equipment	10,000.00	10,000.00

TREASURER OF STATE

Personal service	$260,000.00	$260,000.00
Supplies and equipment	65,000.00	65,000.00
Refunds	100,000.00	100,000.00

ATTORNEY GENERAL

Personal service	7,500.00	7,500.00

The appropriations to the department of finance, division of tax commission of Ohio, are hereby appropriated to and authorized to be ex-

pended by said commission for any and all the purposes for which any of said appropriations are made, to wit, for personal service, maintenance and printing, it being the intent and purpose of this act to consolidate all of the amounts into a single appropriation for all of the stated purposes.

Sec. 5546-24a. Intent and purpose of act.

SECTION 4. The intent and purpose of this act includes the extension of the existing tax on retail sales levied by and pursuant to sections 5546-1 to 5546-24, both inclusive, of the General Code, and all the provisions of said sections of the General Code are hereby so extended in effect excepting as affected by the amendments herein made.

Sec. 5546-24b. Effective date.

SECTION 5. That this act shall go into effect January 1, 1937.

Sec. 5546-24c. Constitutionality.

SECTION 6. If any provision of this act shall be held unconstitutional, such holding shall not affect any of the other provisions of this act, not inseparably connected in meaning and effect with such part so held unconstitutional.

J. FREER BITTINGER,
Speaker of the House of Representatives.

HAROLD G. MOSIER,
President of the Senate.

Passed December 22, 1936.

Approved December 30, 1936.

MARTIN L. DAVEY,
Governor.

The sectional numbers on the margin hereof are designated as provided by law.

JOHN W. BRICKER,
Attorney General.

Filed in the office of the Secretary of State at Columbus, Ohio, on the 4th day of January A. D. 1937.

WILLIAM J. KENNEDY,
Secretary of State.

File No. 110.

EXHIBIT 20

IN THE COURT OF COMMON PLEAS OF FRANKLIN COUNTY, OHIO

CIVIL DIVISION

CAMERON COCA-COLA BOTTLING CO., ET AL	:	
PLAINTIFFS	:	
vs.	:	Case No. 93CVH02-729
ROGER W. TRACY, TAX COMMISSIONER, ET AL	:	JUDGE JOHN A. CONNOR
DEFENDANTS	:	

RECEIVED
AUG 3 - 1993
Attorney General's Office
Taxation Section

D E C I S I O N

Rendered this 28th day of July, 1993.

CONNOR, J.

This cause is before the Court for a decision upon the merits of the claims set forth in Plaintiffs' Verified Complaint. This matter has been submitted to the Court on the respective briefs of all parties.

Plaintiffs allege that Ohio's Beverage Tax Statute (hereinafter the "beverage tax"), Ohio Revised Code Chapter 5753: 1) violates the equal protection clauses of both the Ohio and United States Constitutions; 2) conflicts with the commerce clause of the United States Constitution; 3) violates the "one-subject rule" of the Ohio Constitution; and 4) conflicts with the Ohio Constitution's prohibition against the taxation of "food for human consumption off the premises where sold." Each of the arguments shall be addressed individually below.

STANDARD

The burden of proof required to be met by Plaintiffs is that the invalidity of the tax must be shown beyond a reasonable doubt. See State, ex rel. Poe, v. Jones (1894), 51 Ohio St. 492 citing Sinking Fund Cases, 99 U.S. 700; State, ex rel. Dickman, v. Defenbacher (1955), 164 Ohio St. 142; and Rocky River v. State Emp. Relations Bd. (1989), 43 Ohio St. 3d 1.

Furthermore, legislative enactments are presumed to be constitutional and any doubt as to the constitutionality of the statute must be resolved in favor of its validity. See generally R.C. 1.47 and State ex rel. Doerfler v. Price (1930), 101 Ohio St. 50. In order to declare a statute unconstitutional, the court must be convinced, beyond a reasonable doubt, that the legislation and Constitution are "clearly incompatible." See Rocky River, supra.

However, although deference should be given where the General Assembly has defined a word used in the Constitution, construction regarding the language of the Constitution is within the province of the court.

Chapter 5753

A review of the more pertinent portions of the Ohio Beverage Tax statute is necessary for resolution of the issues before us. Chapter 5753 imposes a tax on beverages and post-mix syrup. Specifically, R.C. 5753.02 states:

(A) For the purpose of providing revenue for the use of the general fund, an excise tax is hereby levied as follows:

(1) On the sale of beverage in containers, one-twelfth cent per ounce of liquid content, or fractional part thereof;

(2) On the sale of each container of post-mix syrup, sixty-four cents per gallon or fractional part thereof.[1]

R.C. 5753.01(A) defines "Beverage" to include:

any non-alcoholic, carbonated liquid intended for human consumption...but does not include food as defined in division (B) of section 5739.02 of the Revised Code.

R.C. 5753.01(B) defines "Post-syrup mix" as:

a concentrated liquid mixture of basic ingredients used in making, mixing, or compounding a beverage by the addition of water at the point of delivery to the consumer.

Finally, R.C. 5753.04 provides:

(A) Each wholesale distributor is liable for the tax imposed by section 5753.02 of the Revised Code on all beverage and post-mix syrup sold by him to retail dealers in this state.

(B) Each wholesale distributor who uses any beverage or post-mix syrup in his own operation in this state as a retail dealer is liable for the tax on such beverage or post-mix syrup transported by him to the site of the retail sale.

(C) Each retail dealer who acquires beverage or post-mix syrup from a person

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[1]The Court notes that H.B. 281 has recently been passed in which the language - "or fractional part thereof" - has been stricken and is therefore, no longer a part of R.C. 5753.02.

> who is not registered with the tax commissioner as a wholesale distributor pursuant to section 5753.12 of the Revised Code is liable for the tax imposed by section 5753.02 of the Revised Code on such beverage or syrup acquired for retail sale in this state to the same extent and in the same amount as the tax imposed on wholesale distributors.

THE EQUAL PROTECTION CLAUSES

Plaintiffs argue the beverage tax is violative of the equal protection clauses found in the Ohio and United States Constitutions for two reasons. First, Plaintiffs submit the tax irrationally imposes different rates of taxation. More specifically, Plaintiffs assert that because the statute levies a sixty-four cent tax on a gallon or "factional part thereof," a wholesaler's tax bill will differ depending solely on the type of container he uses to distribute a product.[2]

Plaintiffs also claim the tax draws an unconstitutional distinction between products subject to taxation and those immune from it. Specifically, Plaintiffs contend that "liquids with the exact same ingredients, mixed in the exact same proportions, are treated differently -- on the sole basis of whether the water has been carbonated or not."

Defendants counter that a classification does not violate either of the equal protection clauses, even if it is discriminatory, as long as it is not arbitrary.

"The test used in determining whether a statute is

[2]As noted above, this portion of the statute has been stricken pursuant to H.B. 281. See footnote 1.

constitutional under the Equal Protection Clause depends upon whether a fundamental interest or suspect class is involved. 'Under the equal protection clause, in the absence of state action impinging on a fundamental interest or involving a suspect class, a rational basis analysis is normally used. Where the traditional rational basis test is used great deference is paid to the state, the only requirements being to show that the differential treatment is rationally related to some legitimate state interest.'" Conley v. Shearer (1992), 64 Ohio St. 3d 284, 289 citing State ex rel. Heller v. Miller (1980), 61 Ohio St. 2d 6, 11.

Furthermore, in Madden v. Kentucky, 309 U.S. 83 (1940), the United States Supreme Court discussed classifications formulated for the purpose of imposing a tax. The Court stated:

> The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. This Court fifty years ago concluded that "the Fourteenth Amendment was not intended to compel the State to adopt an iron rule of equal taxation, "and the passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies...Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes...

309 U.S. at 87, 88.

Upon careful review of the arguments, relevant case law and constitutional provisions, the Court finds that the tax imposed pursuant to R.C. 5753.01 et seq. is not violative of either Art. I, Sec. 2, Ohio Const. or the Fourteenth Amendment, Sec. 1 of the United States Constitution.

THE COMMERCE CLAUSE

Plaintiffs argue the beverage tax violates Art. I, Sec. 8, cl. 3, of the United States Constitution. In order to pass constitutional muster under this section, a state tax must fulfill four requirements: 1) it must be applied to "an activity with a substantial nexus with the taxing state"; 2) it must be "fairly apportioned"; 3) it must not "discriminate against interstate commerce"; and 4) it must be "fairly related to the services provided to the State." Complete Auto Transit, Inc. v. Brady, 430 U.S. 274 (1977).

Plaintiffs contend the tax violates the first requirement enumerated above because a wholesaler must pay taxes on each sale to the retailer, regardless of whether the retailer sells some, all, or none of the goods in Ohio.

Defendants counter a substantial nexus undeniably exists in that the tax is levied on distribution of goods in Ohio and is not a tax on the sale or distribution of goods in other states.

Although this Court is unable to say no "substantial nexus" could have been found as R.C. 5753.02 is written, the

recently passed H.B. 281 adds a new section which is directly on point. The new R.C. 5753.06(B) (the former R.C. 5753.06(B) has become R.C. 5753.06(C)) provides in part:

> Where the tax imposed by section 5753.02 of the Revised Code has been paid on beverages or post-mix syrup and those beverages or post-mix syrup are sold by a retail or wholesale dealer to a retailer for the purpose of resale outside this state, the seller in this state is entitled to a refund of the amount of tax actually paid...

The Court has thoroughly reviewed the arguments of the parties and applicable law. Based upon this review, the Court finds R.C. 5753.01 et seq. is not violative of the Commerce Clause of the United States Constitution, Art. I, Sec. 8, cl. 3.

SINGLE-SUBJECT RULE

Plaintiffs contend the beverage tax violates Art. II, Sec. 15(D) of the Ohio Constitution which provides "No Bill shall contain more than one subject, which shall be clearly expressed in its title..."

Plaintiffs argue that Am. Sub. H.B. 904 contains legislation on a diverse range of subjects, most of which are not even remotely related. Indeed, Plaintiffs maintain that the diverse topics have no meaningful rationale and that the bill illustrates the joinder of unpopular measures with popular ones to ensure the bill's passage (i.e., logrolling).

Defendants disagree that Am. Sub. H.B. 904 violates the

single-subject provision of the Constitution. Instead, Defendants argue that it is merely an appropriations bill that contains various taxing provisions to fund operations set forth elsewhere in the legislation. As such, it involves a single, broad subject that contains numerous topics.

The purpose of the one-subject rule is to attack logrolling by disallowing unnatural combinations of provisions in bills. State ex rel. Dix v. Celeste (1984), 11 Ohio St. 3d 141. Logrolling is the practice of several minorities combining several proposals into different provisions of a single bill in order to consolidate their votes so that a majority is obtained where no single minority proposal could have obtained majority approval. Id. at 142-143. Limiting each bill to a single subject creates unity and disallows provisions not germane to the subject of the bill. Id. at 143.

"[T]he one-subject rule is not directed at plurality of topics but at disunity in the subject." Id. at 146. If a bill combines provisions for the purpose of bringing greater order and cohesion to the law or for coordinating an improvement of the law's substance, the provisions have not been combined for the purpose of logrolling. Id. at 145.

Generally, the one-subject rule is directory in nature. However, the Dix court held, "while it is within the discretion of the courts to rely upon the judgment of the General Assembly as to a bill's compliance of the

Constitution, a manifestly gross and fraudulent violation of this rule will cause an enactment to be invalidated." Id. at syllabus.

Furthermore, a caveat issued by the Ohio Supreme Court in Pim v. Nicholson (1856), 6 Ohio St. 176 was reemphasized in Dix. Essentially, the caveat takes the form of a presumption that no such manifestly gross and fraudulent violation will ever occur. Pim, 6 Ohio St. at 180: Dix, 11 Ohio St. 3d at 145. The purpose of the caveat is to emphasize the Supreme Court's aim of judicial non-interference in the legislative process so that every presumption in favor of validity is indulged. Hoover v. Bd. of Franklin Cty. Commrs. (1985), 19 Ohio St. 3d 1.

A review of the provisions contained in Am. Sub. H.B. 904 is necessary. The very first subject that the bill deals with is R.C. 121.15. This provision previously provided that each department of State shall maintain a central office in Columbus. However, by virtue of Am. Sub. H.B. No. 904, that law was changed to provide that each department, EXCEPT THE DEPARTMENT OF AGRICULTURE, shall maintain a central office in Columbus. Section 121.15 further was changed to provide that:

> The Director of Agriculture shall maintain a central office at a location in the state that the Director finds necessary for the official performance of the Department of Agriculture functions.

This matter had to do with the subject of the location of state department offices and whereinbefore all state

department offices had to be located in Columbus, now all state department offices have to be located in Columbus except for the Department of Agriculture.

The bill does not discuss the topic of state departments any further than this change.

The next amendments contained in Am. Sub. H.B. 904 regard R.C. 129.55, R.C. 129.63, R.C. 129.73, R.C. 1555.12, R.C. 5528.36, and R.C. 5703.052.

Basically, with respect to these sections, the bill merely deletes the provision that the excise tax collected pursuant to R.C. 5727.40 can be used for certain purposes. R.C. 5727.40 is deleted from those sections.

Furthermore, R.C. 5727.40, the excise tax on railroads, was later repealed in this bill. Therefore, in addition to repealing the excise tax on railroads, the bill deletes R.C. 5727.40 from every section of the Ohio Revised Code wherein it appears.

The next amendment in the bill is an amendment to R.C. 3383.01. Basically, the legislature redefined the term "arts." R.C. 3383.01(A) defines arts as visual, musical, dramatic, graphic, and other arts and includes, but is limited to, architecture, dance, literature, motion pictures, music, painting, photography, sculpture, and theater.

Am. Sub. H.B. No. 904 adds to the definition of "arts" to also include:

> the presentation, in museums or similar indoor or outdoor facilities, of

> principles of science and their development, uses, or application in business, industry or commerce or the history, heritage, development, presentation and uses of the arts as defined above and of transportation.

It also expanded the definition of "manage" or what it means to manage or exercise control over activities relating to the arts by including, "providing for displays, exhibitions, specimens, and models,...and the hiring or contracting for "directors, curators, technical and scientific staff." All of this was added to the definition of "manage."

Additionally, still with respect to R.C. 3383.01, the legislature expanded the definition of Ohio Arts facility to include not only the three theaters in the State Office Tower but also any capital facility in the state as long as the construction of the facility was at some time authorized or funded by the General Assembly pursuant to Division C(3) of R.C. 3383.07 and the state owns or has sufficient real property interest in the facility for the purpose of that capital facility.

The legislature, finally, with respect to R.C. 3383.01, added a new subject matter, "Construction," which by definition includes acquisition, reconstruction, alteration, renovation, remodeling, enlargement, improvement, and related equipping and furnishing.

Still on the same subject matter but a different topic, the legislature in Am. Sub. H.B. No. 904 amended R.C. 3383.07. This section formerly provided that the construction of an

Ohio arts facility shall be performed by the Department of Administrative Services in conformity with Chapter 153. Now that statute mandates a facility with the following language:

> The Department of Administrative Services shall provide for the construction of an Ohio arts facility.

Am. Sub. H.B. No. 904 also adds to R.C. 3383.07(a) a provision that:

> A facility that has an estimated construction cost, excluding the cost of acquisition, of Twenty-five million dollars or more, and that is financed by the Ohio Building Authority, may be constructed by the Ohio Building Authority if the Ohio Building Authority determines that it should provide those services. (Emphasis added)

There are other changes with respect to Ohio Arts facilities in R.C. 3383.07 which the Court shall not address. It appears from this review there is a different subject matter and several topics with respect to Ohio Arts Council, Ohio Arts facilities in general, what constitutes arts, and the building of a new Ohio Arts facility.

The next subject that Am. Sub. H.B. 904 deals with is revenue or taxes. It increases the amount of profits from spirituous liquor that goes into the General Revenue Fund, raises the taxes on beer, wine, mixed beverages and keg or barrel beer. This is accomplished by amending Sections 4301.12, 4301.42, 4301.43, and 4305.01, Revised Code.

Next, Am. Sub. H.B. 904 amends approximately ten sections in Chapter 5111 of the Revised Code, by adding or enacting

approximately seventeen new sections to Chapter 5111 and repealing four sections of Chapter 5111.

Chapter 5111 deals with medical assistance programs, specifically Medicaid. This Court is not about to venture into explaining each and every change caused by the enactment of Am. Sub. H.B. No. 904 with respect to the Medicaid system. Suffice it to say that the amendments, new additions and the repealed statutes are statutory changes that substantially revise the way the Medicaid system will work in Ohio. It appears there is an attempt on the part of the legislature to change the nursing home reimbursement formula from a retrospective to a prospective reimbursement system. However, the changes are many and complex and there is no question in the Court's mind that such complicated and extensive changes should be part of a separate bill.

Another subject matter dealt with by Am. Sub. H.B. 904 is the Department of Rehabilitation and Correction. Basically, it adds a new section to R.C. 5120. It adds R.C. 5120.103, which provides briefly that to the extent funds are available, the Department of Rehabilitation and Correction may award grants to or reimburse governmental entities or private, non-profit organizations for the construction of half-way houses for prisoners who are eligible for release. It also provides for the renovation of existing buildings for use as halfway houses for those released prisoners. It further provides for the awarding of grants to governmental entities or private

non-profit organizations for the renovation of existing half-way houses if the purpose of the renovation is to increase the number of released prisoners that the existing half-way house can accommodate.

There are other provisions in this section which the Court will not address.

The next subject matter Am. Sub. H.B. 904 covers is to amend twenty-seven sections of Chapter 57 of the Revised Code. The bill enacts new sections, specifically R.C. 5743.51 to R.C. 5743.66, as well as R.C. 5753.01 to R.C. 5753.14 and R.C. 5753.99. It also repeals R.C. 5727.34 and 5727.40, the railroad excise tax.

The subject matter of Chapter 57 is Taxation. The topics that are amended are the Department of Taxation, Chapter 5703; Personal Property Taxes, Chapter 5711.01; Gross earnings is deleted from the definition section of Section 5727.01; Public Utilities, Railroads are deleted from public utility companies subject to an annual excise tax by an amendment to Section 5727.30 Revised Code; Section 5727.40 is repealed (this is the excise tax on railroad companies), changes are made and taxes increased with respect to the motor vehicle fuel tax which is part of Chapter 5735, Revised Code; Chapter 5739 is amended to include building maintenance and janitorial service, employment service, employment placement service, exterminating service, physical fitness facility service, and recreation and sports club service, to the items that are

subject to Ohio state sales tax.

Additionally, changes are made to Chapter 5743 which substantially change the cigarette and/or tobacco tax, the persons or entities who are subject to that tax, method of filing timely returns and payment of that tax and giving the Tax Commissioner powers of forfeiture and confiscation. For example, Section 5743.55, which is a new enactment, provides:

> Whenever the tax commissioner discovers any tobacco products, subject to the tax levied under Sections 5743.51, 5743.62 or 5743.63 Revised Code, and upon which the tax has not been paid or the Commissioner has reason to believe that the tax is being avoided, the Commissioner may seize and take possession of the tobacco products which, upon seizure, shall be forfeited to the state. Within a reasonable time after seizure, the Commissioner may sell the forfeited tobacco products, by notice posted on the premises where the seizure is made or by publication in a news-paper of general circulation in the county in which the seizure is made at least five days before the day of sale. The proceeds from this sale shall be considered as revenue arising from the tax. The seizure and sale shall not relieve any person from the fine or imprisonment provided for in violation of Sections 5743.51 to 5743.66 of the Revised Code. The commissioner shall make the sale in the county where it is most convenient and economical, but may order the destruction of the forfeited tobacco products if the quantity or quality of the tobacco products is not sufficient to warrant their sale. (Emphasis added)

Sections such as this, with such absolute powers of confiscation and forfeiture, deserve scrutiny and discussion before they are enacted and therefore should not be inserted

into a bill of the magnitude and complexity of Am. Sub. H.B. 904.

The next topic under taxation is R.C. 5747.02, the tax on income. It adds a new category of taxable income being "more than $200,00.00 and assesses a tax of $11,506.20 plus 7.5% of the amount in excess of $200,000.00. This is a new category.

The next section of Chapter 57 that is affected is R.C. 5753.01 through 5753.99. These are new enactments which create new taxes on beverages and post-mix syrups. This new tax of course is the subject of this cause of action.

The last one-third of Am. Sub. H.B. 904 deals with appropriations.

Attaching an appropriations bill to this Am. Sub. H.B. 904 certainly presents a clear opportunity to do the kinds of things that Art. II, Sec. 15(D) of the Ohio Constitution was meant to prevent. The appropriation bill is complex and comprehensive. It covers every part of the state and probably every legislative district. There is an opportunity for every one to negotiate for the benefit of his or her particular district.

There is certainly nothing wrong with such negotiations and people from their respective districts expect their legislators to protect the interests of the district and to insure local projects, universities, schools, and other programs of great importance to the constituency are adequately funded.

However, when the subject matter of appropriations as extensive as those provided for in Am. Sub. H.B. 904 are attached and included with all of the other provisions of that bill, the opportunity for "logrolling" is substantial and would be almost impossible to avoid.

This Court's review of Am. Sub. H.B. 904 has by no means been exhaustive.

This Court's initial reaction to the multitude of subjects is that they are so unrelated that the bill is necessarily invalidated by the one-subject rule. There is absolutely no connection between these subjects except under the broad heading of an appropriations bill that contains various taxing provisions. A single subject is not clearly expressed in the title of this bill as Art. II, Sec. 15(D) mandates.

However, under recent Supreme Court decisions, a loose connection under a broad heading seems to be enough for the Court to find compliance with the one-subject rule. See Comtech Systems, Inc. v. Limbach (1991), 59 Ohio St. 3d 96. (Am. Sub. H.B. No. 291 did not violate the one-subject rule because it related to funding the operations of programs, agencies, and matters described elsewhere in the bill.)[3] ; State, ex rel. Dix, v. Celeste (1984) 11 Ohio St. 3d 141. (The appropriation provision of Am. Sub. H.B. No. 227 does not

[3]This Court has reviewed Am. Sub. H.B. 291 and it was as complex and diverse in unrelated subject matter as Am. Sub. H.B. 904.

destroy the singleness of the subject; but is an incident to the single subject, reasonably necessary to implement the programs described elsewhere in the bill.)

In light of the decisions in Comtech and Dix and of the presumption in favor of validity, it is difficult to conceive of a bill which would violate the one-subject rule. It would seem that the one-subject rule is virtually unworkable and meaningless unless it is used to sever a portion of a bill containing provisions relating to two distinct subjects, the offending portion of which affects only a small number of persons. See, State, ex rel. Hinkle, v. Franklin Cty. Bd. of Elections (1991), 62 Ohio St. 3d 145; Hoover v. Bd. of Franklin Cty. Commrs. (1985), 19 Ohio St. 3d 1.

A bill, affecting a large number of persons, which contains provisions revising remotely related subjects under the broad heading of an appropriations and taxing bill does not violate the rule even though the revisions are substantial and, in this Court's opinion, belong in a separate bill. This would give the legislature the opportunity to give appropriate time, hearings and consideration before enactment. It would ensure that such legislation would pass on its own merit and finally special interests who were for or against the legislative enactment could be more easily identified and more publicly scrutinized.

However, as much as this Court may disagree with the law, it is not the function of this Court to legislate, rather,

this Court must apply the law as it is written and interpreted by the Supreme Court. Therefore, this Court cannot conclude that Am. Sub. H.B. No. 904 is a manifestly gross and fraudulent violation of the one-subject rule beyond a reasonable doubt. As much as this Court wants to "crawl out on that limb," the decisions of the Supreme Court in Comtech and Dix would dictate that the limb would surely be "sawed off" by the appellate courts.

Accordingly, the Court finds Am. Sub. H.B. 904 does not violate Art. II, Sec. 15(D) of the Ohio Constitution.

ARTICLE XII, SECTION 3(C)

Plaintiffs contend the beverage tax violates Art. XII, Sec. 3(C) of the Ohio Constitution which provides "...no excise tax shall be levied or collected upon the sale or purchase of food for human consumption off the premises where sold." Specifically, Plaintiffs submit the beverage tax is a tax levied on the sale of food because soft drinks, by definition, are "food."

The initial question to be answered is whether soft drinks constitute "food" as it is used in Art. XII, Sec. 3(C). Plaintiffs submit several general sources as support for their position. First, Plaintiffs contend the plain meaning of "food for human consumption" necessarily includes soft drinks given the numerous dictionary definitions and the historical basis of Art. XII, Sec. 3(C).

Secondly, Plaintiffs argue the popular and scientific literature clearly demonstrate "food" was commonly understood to include soft drinks. Lastly, Plaintiffs claim the definitions contained in a myriad of Ohio and Federal laws clearly indicate soft drinks are "food."

Although these sources consistently include soft drinks within the meaning of food, we need not rely on all of these sources. In Andrews v. Tax Comm. of Ohio (1939), 135 Ohio St. 374, the Ohio Supreme Court was faced with the issue of whether candy and confectionery were food within the purview of the Constitution.

In holding both constituted food, the Andrews court took judicial notice that candy and confectionery are food, basing its decision on common knowledge and dictionary definitions. They stated that although considerable testimony of a scientific nature was introduced to prove that candy contained food elements essential to sustain life, that evidence was not necessary in reaching their decision. Id. at 375.

As noted by Plaintiffs, dictionaries published before and after the enactment of Art. XII, Sec. 3(c), uniformly ascribe to the word "food" a primary definition that includes soft drinks. The OXFORD ENGLISH DICTIONARY (2nd ed. 1933) defines food as "[w]hat is taken into the system to maintain life and growth and to supply the waste of tissue." See also, 16 Ohio Words and Phrases (1952) ("The word 'food'... embraces within its meaning anything and everything which human beings eat or

drink to sustain life") and WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY (3rd ed. 1981) ("material consisting of carbohydrates, fats, proteins, and supplementary substances that is taken or absorbed into the body of an animal in order to sustain growth, repair, and all vital processes and to furnish energy for all activity of the organism").

Moreover, it is common knowledge that soft drinks are a staple in almost everyone's diet. Society's reliance on soft drinks is further evidenced by the number of vending machines and other sources offering them for sale.

Defendants claim we must defer to the General Assembly's classification of soft drinks as a non-food item. Specifically, Defendants encourage us to give deference to the legislative definitions found in R.C. 5739.02, the State Sales Tax which excludes soft drinks from the definition of food. Defendants cite R.C. 5739.02 as authority for their position that soft drinks have been taxed for almost 60 years and no challenge has ever been made.

Defendants' argument is unpersuasive. The legislature cannot create constitutionality by acquiescence. Although the legislative exclusion of soft drinks from the definition of food in R.C. 5739.02 remains unchallenged by the Plaintiffs' Complaint in this case, this Court is obviously not convinced that such exclusion could withstand a future constitutional

challenge.[4]

In 1936, the State Sales Tax was first amended to reflect Art. XII, Sec. 3 (then Art. XII, Sec. 12). Section 5546-2 of the General Code provided:

* * *

> The tax hereby levied does not apply to the following sales
>
> * * *
>
> 2. Sale of food for human consumption off of the premises where sold. The term food as used in this section shall include:...sugar and sugar products, other than candy and confectionery;... cocoa and cocoa products, other than candy and confectionery.
>
> Food shall not include spirituous or malt liquors; soft drinks; and sodas and beverages such as are ordinarily dispensed at bars and soda fountains or in connection therewith other than coffee, tea and cocoa; root beer and root beer extracts...

Immediately following this enactment, the exceptions to the tax exemptions were challenged. In 1939, the candy and confectionery exclusions were challenged in Andrews v. Tax Commission of Ohio, supra. In Andrews the court was faced with the issue of "whether candy and confectionery [were] food within the meaning of Section 12 of Article XII of the Constitution" (now Art. XII, Sec. 3(c)). Id. at 374.

The legislature in Section 5546-2, General Code, had

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[4]Pursuant to the language contained in R.C. 5753.01(A), if R.C. 5739.02 was successfully challenged, most, if not all, of Chapter 5753 would necessarily be unconstitutional.

specifically excluded, among other items, candy and confectionery from the definition of food as it was defined in the State Sales Tax Act.

As noted above, the court stated the dictionary definition was common knowledge of which the court could take judicial notice and testimony of a scientific nature was not necessary.

Ultimately the Court concluded that because candy and confectionery, as used in the statute, came within the meaning of "food" as used in the Constitution and that insofar as the statute levied a tax upon candy and confectionery, the tax was invalid since it was in conflict with Art. XII, Sec. 12 of the Constitution.

Therefore, the legislature's definition of food in Section 5546-2 (R.C. 5739.02) has been challenged and held unconstitutional. Consequently, any deference given to a legislative definition is valid only to the extent the definition is consistent with the Constitution.

The Court does agree that some deference should be given in the case sub judice to the definitions promulgated by the legislature. However, it is the opinion of this Court that the more reliable definitions to which we should defer are those promulgated where the primary concern of the legislative body is the consumers' welfare.

For example, in 1884 the Ohio Legislature enacted the State's first food and drug adulteration statute which defined

food to include all articles used as food or drink by man, whether simple, mixed, or compound. (Section 5775, General Code; R.C. 3715.01)

Also, the Supreme Court in Longdrake v. State (1925), 114 N.E. 417, upheld regulations governing the saccharine content of soft drinks which had been propounded by the State Secretary of Agriculture pursuant to his authority to "establish standards of quality, purity, and strength of foods." (Section 1177-72, General Code.)

Because these definitions were promulgated with the consumers' safety in mind, the Court feels they are more dependable and trustworthy than those definitions where the State is simply trying to raise revenue.

The definitions contained in tax statutes merely reflect the sometimes avaricious interests of the legislature. Therefore, it is better we should look to the definitions of food when the legislature is defining it for the total benefit of the public welfare and not to satisfy the sometimes insatiable appetite of government to levy, raise, and collect taxes.

These are strong words indeed, but necessary to demonstrate why this Court does not intend to take the definitions of food out of a taxing statute and instead looks to the pure food and drug laws.

Based upon the foregoing, the Court finds the word "food" as it is used in Art. XII, Sec. 3(c) of the Ohio Constitution

includes soft drinks. However, our determination that soft drinks are food does not end our analysis.

Defendants contend Art. XII, Sec. 3(c) was only adopted to repeal the retail sales taxes imposed on carry out food. Furthermore, the amendment was never intended to prohibit a tax upon the wholesale distribution of food and therefore, even assuming arguendo soft drinks are food, no constitutional violation occurs.

Defendants cite us to Cleveland v. Bd. of Tax Appeals (1950), 15 Ohio St. 97, 103 wherein the Supreme Court stated that in analyzing the purpose of a constitutional amendment the court should determine the "mischiefs sought to be avoided and the remedy intended to be afforded" by the adoption of the amendment.

The Ohio Supreme Court in Castleberry v. Evatt (1946), 147 Ohio St. 30, also discussed the standard to be followed in construing constitutional provisions. It held:

> In the interpretation of an amendment to the Constitution the object of the people in adopting it should be given effect; the polestar in the construction of constitutional, as well as legislative, provisions is the intention of the makers and adopters thereof.

Id. at paragraph 1 of syllabus.

The historical basis of Art. XII, Sec. 3(c) clearly reveals the amendment was aimed at "consumer" purchases. The purpose was to prohibit the levying of the new sales tax upon food purchased by the public at the grocery store. This

country was still coming out of the Great Depression and the idea of a sales tax on consumers' groceries was repugnant to the electorate.

Moreover, notwithstanding the political climate of the 1930's, the plain language states no tax shall be levied on food consumed "off the premises where sold." Plaintiffs encourage us to read the amendment as prohibiting the levying of an excise tax on food, period. However, the amendment must be read as a whole, as it was written. We may not sever the amendment to read no "excise tax" shall be levied on food and simply ignore the phrase "for human consumption off the premises where sold."

A reading of the plain language of the amendment dictates that not all sales of food are to be tax exempt. It is a specific transaction between the retailer and its customer that comes within the proscription of the constitutional provision. In arriving at this conclusion, the Court has not only taken into consideration the "mischiefs sought to be avoided and the remedy intended to be afforded," but also the plain meaning of the language of the amendment which restricts the Court to this singular interpretation.

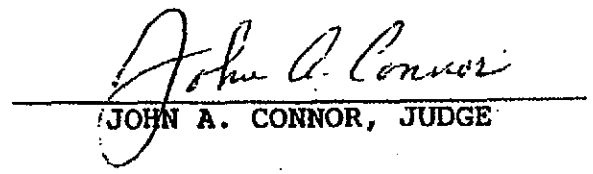
The tax at issue herein is imposed at the wholesale level. Although a retailer may ultimately be charged with the payment of the tax, it still remains a tax on the sale between the wholesaler and retailer. It is not a tax levied between the retailer and a consumer. At the wholesale level, there is

no "human consumption off the premises where sold."

Therefore, the Court finds R.. 5753.02 does not violate Art. XII, Sec. 3(C) of the Ohio Constitution.

Accordingly, the Court finds Am. Sub. H.B. 904 and Chapter 5753 of the Ohio Revised Code enacted pursuant thereto are not violative of either the Ohio or United States Constitutions.

Counsel for Defendants shall submit judgment entry pursuant to court rule.



JOHN A. CONNOR, JUDGE

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