

IN THE SUPREME COURT OF OHIO

ORIGINAL

International Business Machines Corporation  
and IBM Credit Corporation,

Appellants,

v.

Richard A. Levin,  
Tax Commissioner of Ohio,

Appellee.

Supreme Court Case No. 09-1296

Appeal from the  
Ohio Board of Tax Appeals

BTA Case Nos.       2007-Z-1140  
                          2007-Z-1141  
                          2007-Z-1143

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**BRIEF OF APPELLANTS**

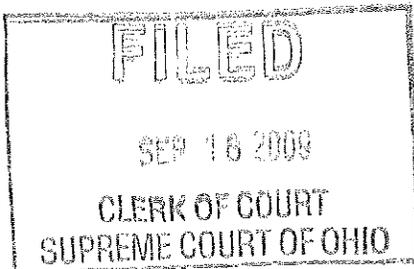
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Richard Cordray  
Attorney General of Ohio  
Sophia Hussain  
Deputy Attorney General  
30 East Broad Street  
Columbus, Ohio 43215  
(614) 466-4320

Attorneys for Appellee  
Tax Commissioner of Ohio

Edward J. Bernert (0025808)  
(Counsel of Record)  
Kelvin M. Lawrence (0082574)  
Baker & Hostetler LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215  
(614) 228-1541  
(614) 462-2616 (Fax)  
[ebernert@bakerlaw.com](mailto:ebernert@bakerlaw.com)  
[klawrence@bakerlaw.com](mailto:klawrence@bakerlaw.com)

Attorneys for Appellants  
International Business Machines  
Corporation and IBM Credit Corporation



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	:	2007-Z-1141
Appellee.	:	2007-Z-1143
	:	

**BRIEF OF APPELLANTS**

**I. Statement of Facts and the Case**

International Business Machines Corporation paid Ohio sales and use taxes on computers and related items during the years 1998 through 2007. IBM Credit Corporation collected Ohio use taxes during the years 1997 through 2006 for computers and related items sold or leased to International Business Machines Corporation. The two companies (collectively “IBM”) applied for and were granted sales and use tax refunds pursuant to R.C. 5739.071 and R.C. 5741.10. (Appendix at APP031-033).

The refunds implemented a statutory incentive permitting refund of 25% of sales and use tax paid for “computers, computer peripherals, software, telecommunications equipment, and similar tangible personal property, primarily used to acquire, process, or store information for use by business customers or to transmit or disseminate such information to such customers”

pursuant to R.C. 5739.071. IBM purchased computers and related items for its Ohio data center and thus qualified for the incentive.

The Tax Commissioner granted the seven refunds. The refunds and the authority for the granting of each refund are displayed below:

**Authority for Refunds: R.C. 5739.071 and R.C. 5741.10**

<b><u>Refund No.</u></b>	<b><u>BTA No.</u></b>	<b><u>Type of Tax</u></b>	<b><u>Amount</u></b>
200201582	2007-Z-1140	Use Tax	\$169,603.26
200204383	2007-Z-1140	Use Tax	\$686,154.98
200800397	2007-Z-1140	Use Tax	\$282,053.07
200202276	2007-Z-1143	Use Tax	\$1,662,150.18
200602109	2007-Z-1143	Use Tax	\$870,825.80
200703202	2007-Z-1143	Use Tax	\$292,944.81

**Authority for Refund: R.C. 5739.071**

<b><u>Refund No.</u></b>	<b><u>BTA No.</u></b>	<b><u>Type of Tax</u></b>	<b><u>Amount</u></b>
200800395	2007-Z-1141	Sales Tax	\$321,005.26

(Appendix at APP031-33).

The Tax Commissioner, however, denied payment of interest on all of IBM's refunds. (Appendix at APP031-33). IBM appealed to the Ohio Board of Tax Appeals ("BTA") solely to seek payment of interest.

At the BTA, the appeals were consolidated, and the hearing was waived. The BTA upheld the denial of interest on the approved refunds. (Appendix at APP018). This proceeding followed as an appeal as of right pursuant to R.C. 5717.04.

## II. Law and Argument

### **A Taxpayer Entitled To A Partial (25%) Refund Of Sales And Use Tax On Purchases Of Certain Computer Equipment Is Entitled To Payment Of Interest On The Refund.**

#### **A. A Refund Granted Pursuant to R.C. 5741.10 is Subject to Interest.**

The General Assembly specifically authorized the payment of interest on refunds of sales and use taxes in R.C. 5739.132:

(B) ...For tax payments due on or after January 1, 1998, interest shall be allowed and paid on **any** refund granted pursuant to section 5739.07 **or 5741.10** of the Revised Code from the date of the overpayment. (Emphasis added.)

The chart on the preceding page shows that six of the seven refunds at issue in this appeal were authorized and granted pursuant to R.C. 5741.10 as well as R.C. 5739.071. The Tax Commissioner's final determinations for the first six refunds listed above state:

This is the final determination of the Tax Commissioner ... for refund of use tax filed pursuant to R.C. 5739.071 **and 5741.10**. (Emphasis added.)

The statute providing interest, R.C. 5739.132, by its express terms authorizes interest on **any** refund granted pursuant to R.C. 5741.10. The six tax refunds were authorized and granted by the Tax Commissioner pursuant to R.C. 5741.10. (Appendix at APP032-33). The BTA, therefore, must be reversed with respect to the first six of the refund applications, which are the subject of BTA Case Nos. 2007-Z-1140 and 2007-Z-1143, based on the unambiguous directive contained in R.C. 5739.132.

#### **B. A Refund Granted Pursuant To R.C. 5739.071 Is Subject To Interest.**

##### **1. Introduction**

One of the seven refunds—Refund No. 200800395, BTA Case No. 2007-Z-1141—was

filed as an application for refund of sales tax pursuant to R.C. 5739.071 alone, and did not rely upon R.C. 5741.10. (Appendix at APP031). For the reasons expressed below, this refund is also subject to interest.

Filing for a refund under R.C. 5741.10, which applies to refunds of use tax, is a sufficient but not necessary basis to qualify for interest. R.C. 5739.071 incorporates by reference R.C. 5739.07, applicable to sales tax refunds, which is also specifically delineated in R.C. 5739.132 as providing for the payment of interest. These statutory cross-references, the relationship between sales and use taxes, and the language employed by the General Assembly to provide for interest on sales and use tax refunds, compel the conclusion that the seventh refund is subject to interest as surely as the other six refunds.

## **2. The Statutory Basis for the Refunds**

The parties agreed as to the amount of the underlying tax refunds to be granted, and the statutory basis for those refunds is not at issue. Nevertheless, a brief discussion of the legal basis for the refunds of tax will assist in showing why interest should be added.

In 1993, the General Assembly created an incentive for companies providing “electronic information services” frequently referred to as “EIS” so that certain computers used in providing EIS, but not computers generally, would qualify for an incentive in the form of a refund of twenty-five percent (25%) of the sales and use tax paid on that equipment.

The operative language of the definition of “EIS” is set forth in R.C. 5739.01(B)(3) as follows:

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

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

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

The Tax Commissioner described some of the applications of the EIS concept in Rule 5703-9-46, Ohio Adm. Code, as follows:

- (3) . . .“Electronic information service” includes such services as providing Internet access, providing access to database information, and providing access to electronic mail systems.

In the present case, IBM purchased the computers and related items for use in its Ohio data center and qualified for the incentive as the Tax Commissioner found.

### **3. The Reason That The EIS Exemption Requires a Refund Procedure**

The tax benefit associated with the purchase of equipment to provide EIS functions as an exemption from sales and use tax, as this Court found in *Key Servs. Corp. v. Zaino* (2002), 95 Ohio St.3d 11, 2002-Ohio-1488, 764 N.E.2d 1015. This exemption is unique among sales and use tax exemptions in that some taxpayers entitled to this particular incentive must file an application for refund to obtain the benefit.

Other exemptions from the sales and use tax are self-executing in the sense that one claiming the incentive obtains the benefit simply by informing the seller (vendor) that the purchaser claims the exemption by providing the seller an exemption certificate. Upon receipt of a properly executed exemption certificate, the seller is permitted to make the sale without the addition of sales or use tax, thus providing the purchaser the immediate benefit of the exemption. If the EIS exemption had functioned like other Ohio sales and use tax exemptions, IBM could have claimed the benefit of the EIS exemption immediately, without filing an application for refund.

The reason the General Assembly required an application for refund to enjoy the exemption arises from another unique feature of the EIS exemption: the taxpayer is entitled to

only a partial (25%) exemption. IBM had to pay \$1.00 of sales tax to be entitled to 25¢ in benefit. All of the other sales and use tax exemptions, most of which are set forth in R.C. 5739.02, are complete exemptions from the tax.

The partial nature of the EIS exemption caused the General Assembly to implement it through a refund statute. The problem is a practical one. A purchaser cannot provide an exemption certificate for a partial exemption. That is, the purchaser cannot instruct the seller to collect tax on only 75% of the purchase price. The consumer must either claim an exemption or pay the tax. See R.C. 5739.03. Likewise, a taxpayer that self-assesses use tax (when the seller does not collect the tax) is in the same situation as the purchaser that pays tax to the seller, and must self-assess one hundred percent (100%) of the tax and then seek a refund of twenty-five percent (25%).<sup>1</sup> Thus, the reason for the use of the refund procedure (i.e., that only a partial exemption was available) does not suggest any basis to conclude that it would be sound policy to permit the legislatively-defined value of the exemption to be diminished by a delay in realizing the benefit of the exemption by the loss of interest, representing the time value of money.

#### **4. The Complementary Nature of Sales and Use Taxes**

As stated above, the seventh refund was not granted pursuant to R.C. 5741.10, but only pursuant to R.C. 5739.071. The reason for this difference is that this seventh refund application sought refund of sales tax, rather than use tax. As such, the seventh application did not rely upon R.C. 5741.10, because that statute applies to refunds of use taxes. A direct correlation, however, exists between sales and use taxes. Therefore, before examining the language used by the General Assembly to implement the payment of interest on sales tax refundable under R.C. 5739.071, the relationship between sales and use taxes makes evident that no distinction should be made between the payment of interest on refunds of sales taxes compared with refunds of use

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<sup>1</sup> A different rule exists for direct pay permittees pursuant to R.C. 5739.071(B).

tax.

The Ohio sales tax is imposed upon the transaction by which tangible personal property is acquired. Some services are taxable but services are not at issue in this appeal. The Ohio sales tax attempts generally to impose the tax upon the ultimate sale at retail for consumption. The Ohio sales tax is “levied on each retail sale made in this state.” R.C. 5739.02 (initial paragraph). The Ohio sales tax is not imposed on an interstate transaction, i.e., when the product is delivered across state lines. Transactions across state lines are subject to use tax at the location of the storage, use or other consumption of the tangible personal property. R.C. 5741.02. The use tax is imposed in order to (1) eliminate the advantage of making purchases outside Ohio, and (2) protect Ohio merchants from competition from out-of-state sellers. *Cooley-Bentz Co. v. Lindley* (1981), 66 Ohio St.2d 54, 419 N.E.2d 1087.

The use tax is complementary to the sales tax and is designed to tax the exercise of any right or power incidental to the use of property in the state. The consumer is not subject to the use tax to the extent the sale is subjected to sales tax. Generally, the use of tangible personal property is subject to use tax if the sale of the thing would be subject to sales tax if it occurred in Ohio. *Celina Mut. Ins. Co. v. Bowers* (1965), 5 Ohio St.2d 12, 34 O.O.2d 7, 213 N.E.2d 175.

In the present case, the payment of interest on the refund of use tax cannot be doubted because R.C. 5739.132 declares that interest is payable on all refunds pursuant to R.C. 5741.10 and all use tax refunds are payable pursuant to R.C. 5741.10. If the refund of sales tax were not subject to interest because the refund is based on R.C. 5739.071 and not R.C. 5741.10, then the effect would be that a taxpayer with an Ohio data center would have a strong incentive to buy outside Ohio. Interest would be available on the refund of out-state purchases (use tax) whereas, refunds for the sales tax paid on computers bought from Ohio vendors could be paid without

interest.

To the contrary, the General Assembly authorized interest on all sales and use tax refunds. The language of the relevant statutes, R.C. 5739.07, R.C. 5739.071, R.C. 5739.132 and R.C. 5741.10, support the payment of interest for all refunds of sales and use tax, including partial refunds of qualifying sales tax paid on computers used primarily for EIS.

#### **5. The Standard of Review**

No facts are in dispute. The issue is solely one of law. The Court consistently addresses legal issues de novo on appeal from the BTA. The standard on review was expressed in *Gahanna-Jefferson Local School Dist. Bd. Of Edn. v. Zaino* (2001), 93 Ohio St.3d 231, 232, 2001-Ohio-1335, 754 N.E.2d 789 as:

When reviewing an appeal from the BTA, we must ascertain whether the BTA's decision is reasonable and lawful. *Columbus City School Dist. Bd. of Edn. v. Zaino* (2001), 90 Ohio St.3d 496, 497, 739 N.E.2d 783, 785. Although we will generally not disturb the BTA's determinations on the weight of evidence and credibility of witnesses, we will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion. See *SFZ Transp., Inc. v. Limbach* (1993), 66 Ohio St.3d 602, 604, 613 N.E.2d 1037, 1039.

#### **6. The Initial Analysis of R.C. 5739.071.**

The starting point for statutory construction was expressed in a recent tax decision by Justice Cupp in *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶19 as follows:

The first rule of statutory construction is to look at the statute's language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms. *Lancaster Colony Corp. v. Limbach* (1988), 37 Ohio St.3d 198, 199, 524 N.E.2d 1389.

When a refund of sales tax is made under R.C. 5739.071, that section, read in isolation, does not explicitly authorize or forbid payment of interest. Nevertheless, the plain meaning of

the statute as to payment of interest can be ascertained because R.C. 5739.071 expressly incorporates and adopts another statute, in this case R.C. 5739.07, which expressly authorizes interest. Because of the cross-reference, R.C. 5739.07 and R.C. 5739.071 are properly read together. *State ex rel. Fritz v. Gongwer* (1926), 114 Ohio St. 642. Division (F) of 5739.07 expressly directs that the payment of interest be made on refunds. Further, R.C. 5739.132 authorizes interest on any refund made pursuant to R.C. 5739.07.

#### **7. Significance of the Cross-Reference in R.C. 5739.071 to R.C. 5739.07**

After R.C. 5739.071 defines the types of purchases that qualify for the EIS exemption and establishes the refund as the means of obtaining the benefit, the refund procedure is described:

Applications for a refund shall be made in the same manner and subject to the same time limitations as provided in sections 5739.07 and 5741.10 of the Revised Code.

The cross-reference is necessary; R.C. 5739.071 is not intended to stand on its own. Sales tax refund procedures are not spelled out in R.C. 5739.071, but are wholly dependent upon R.C. 5739.07 to define how the refund application and approval process proceeds.

The use of the reference statute means that the operative language of the referred-to statute is incorporated into the referring statute as if fully rewritten. This is a well-accepted manner of legislating.

The effectiveness of legislation by reference has been as generally recognized in Ohio that no very specific declaration appears in the reported cases. As far back as the case of *Heirs of Ludlow v. Johnston*, reported in 3 Ohio 553, 17 Am. Dec. 609, it was declared, in referring to legislation by reference:

“For this purpose the law referred to is in effect, incorporated with and becomes a part of the one in which the reference is made, and so long as that statute continues, will remain part of it.

*State ex rel. Fritz v. Gongwer* (1926), 114 Ohio St. 642 at 649-50, 151 N.E. 752.

A cross-reference incorporates and adopts the statute to which reference is made, and a reference to a portion of a statute applies to all subsequent amendments to the referred-to statute, which become part of the referring statute without further legislative action. The General Assembly provided for this method of incorporation in R.C. 1.55:

A reference to any portion of a statute of this state applies to all reenactments or amendments thereof.

A claim, therefore, that the interest provision must be spelled out in R.C. 5739.071 to be effective is misplaced because R.C. 5739.07 and R.C. 5739.071 are read as one, and Division (F) of R.C. 5739.07 expressly authorizes the payment of interest.

Because R.C. 5739.07 is read as part of R.C. 5739.071, the authorization of interest on refunds is plainly set forth in Division (F) of R.C. 5739.07 as it provides:

(F) When a refund is granted under this section, it shall include interest thereon as provided by section 5739.132 of the Revised Code.

The statutory cross-reference in R.C. 5739.071 to R.C. 5739.07 reflects the intention of the General Assembly to incorporate into that section the applicable refund provisions described in R.C. 5739.07, including the payment of interest under Division (F). R.C. 5739.071(A) makes explicit reference to the manner of refunds made pursuant to R.C. 5739.07 and R.C. 5741.10. “Manner” is defined in the *Oxford English Dictionary Online* as follows: “III. Sense relating to the way in which an action is performed. 9.a The way in which something occurs or is performed; a method of action; a mode of procedure; ... b. in (also on and without preposition) like manner: in a similar way, similarly.” Incorporating into one statute the manner of operation described in a second statute, by reference to performing a duty “in the manner of” or “in accordance with” the second statute, shows the intent to include all of the refund procedures,

including payment of interest.

#### **8. The Tax Commissioner Seeks Ambiguity Where None Exists**

The Tax Commissioner's arguments against payment of interest on sales tax refunds, however framed, reduce to the proposition that the absence of a specific reference to interest in R.C. 5739.071 defeats a claim for interest on an EIS refund. The Tax Commissioner argues that IBM cannot rely on R.C. 5739.07(F) and its reference to interest or to R.C. 5739.132 to support payment of interest. These arguments assume that the specific cross-reference of R.C. 5739.07 is ineffective. As set forth above, the cross reference to another statute is well understood to incorporate the provisions of the other statute as if rewritten in the referring statute.

The Tax Commissioner's argument is built on the proposition that the State does not pay interest on refunds unless a statute (or contract) provides for the payment of interest, citing *Cleveland Concession Co. v. Peck* (1954), 161 Ohio St. 31, 117 N.E.2d 429. After the *Cleveland Concession* case, however, the General Assembly overruled this decision, with regard to interest on refunds of sales and use tax, and authorized, by statute, the payment of interest on such refunds after assessment and then, ultimately (on or after January 1, 1998) authorized refund on all sales and use tax refunds. See the various iterations of the refund statute in the Appendix.

The blanket allowance for the payment of interest by the General Assembly with regard to the refund of sales and use taxes in any context has been recognized by this Court. In *Gen. Elec. Co. v. DeCourcy* (1979), 60 Ohio St.2d 68, 397 N.E.2d 397, the taxpayer sought payment of interest on the refund of real property taxes. This Court upheld the denial of interest and specifically noted that unlike the real property tax statute, the sales and use tax statute had been

changed to authorize interest. This Court's observations about the payment of interest on sales and use tax refunds follow:

This intention [by the General Assembly to deny interest on real property tax refunds] is further supported by the fact that, while it has maintained its silence in the area of real estate taxes, the legislature has specifically provided for interest on overpayments of the corporate franchise tax, sales tax and use tax. See R.C. 5733.26, 5739.132(B) and 5741.10, respectively. (Bracketed material added.)

*Gen. Elec. Co. v. DeCourcy* (1979), 60 Ohio St.2d 68 at 70, 397 N.E.2d 397.

The amendments to the sales and use tax law to provide for interest on refunds is the fulfillment of the requirement of *Cleveland Concession* that interest is paid on refunds by the State only when provided by statute or contract.

The Tax Commissioner hinges his argument that refunds for taxes paid on equipment to provide EIS are the *only* refunds of sales and use taxes *not* entitled to interest on the proposition that the EIS statute must be construed narrowly against IBM. A requirement for narrow construction lacks support in this case, but even if true, the narrow construction doctrine does not support the Tax Commissioner's failure to pay interest.

The Tax Commissioner has argued that R.C. 5739.071 is an exemption statute and exemptions are construed narrowly. IBM acknowledges that R.C. 5739.071 provides an exemption, but the scope of the exemption is not at issue. The scope of the exemption was resolved by settlement with the Tax Commissioner. The doctrine of narrow construction of exemptions does not "carry over" to create a rule that statutes providing for interest on exemptions, once granted, must also be construed narrowly. More importantly, because the cross reference to R.C. 5739.07 in R.C. 5739.071 explicitly incorporates the interest provisions of R.C. 5739.07(F) and R.C. 5739.132 into R.C. 5739.071, the authorization to pay interest is

spelled out explicitly in the statute and no application of “narrow construction” requires that this Court ignore the incorporation of another statute plainly set forth.

Moreover, even if the Court were to construe a provision for interest “narrowly,” such a construction is not an invitation to overrule legislative intent. If the refund procedure were to be interpreted strictly, this Court articulated the rule of strict construction in *In re Estate of Morgan* (1962), 173 Ohio St. 89, 93, 180 N.E.2d 146 as follows:

It is well settled in the law that statutes granting exemptions from taxes shall be strictly construed. It is also well settled that, although strict, the construction must be reasonable and not such as will defeat the legislative intent. *In re Bond Hill-Roselawn Hebrew School*, 151 Ohio St. 70\*\*\*; and *In re Estate of Osborn*, 159 Ohio St. 63, \*\*\*. That this represents the general rule in the United States is demonstrated by the following statement found in 85 *Corpus Juris Secundum*, 966, Section 1157:

‘On the other hand, the rule of strict construction must never be applied to exclude the rule of reasonableness, or to render the exempting language so narrow and restricted as to defeat the apparent legislative intent; the statute is to be interpreted in the light of its obvious purpose, and the taxing power should not be extended by limiting the effect of the exemptions given.’

It would be the frustration of legislative intent, not its fulfillment, to deny interest for this single type of sales tax refund.

#### **9. The Doctrine of In Pari Materia Also Supports The Payment of Interest**

The cross-reference among the principal statutes—R.C. 5739.07, R.C. 5739.071, R.C. 5739.132 and R.C. 5741.10—require that they be construed together. A related doctrine is the concept of in pari materia that is applicable in construing tax statutes.

Statutory enactments that address the same general subject matter must be read in pari materia to give them force and effect. *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369, 372; 643 N.E.2d 1129. “Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of persons or things, or have the same purpose or object.”

2B Norman J. Singer, *Statutes and Statutory Construction*, §51:3 (7<sup>th</sup> Ed. 2008). The statutes incorporated into R.C. 5739.071 – R.C. 5739.07 and R.C. 5741.10 – address the refund of sales and use taxes, respectively. Because R.C. 5739.071 provides for sales and use tax refunds and these two statutes also address refunds of these taxes, and especially because R.C. 5739.071 and R.C. 5741.10 specifically reference R.C. 5739.07, these sections and in turn, R.C. 5739.132, must be construed in *pari materia* (together).

In *Knoke v. Lindley* (1982), 70 Ohio St.2d 16, 17; 434 N.E.2d 275, the cigarette use tax statute in question provided that cigarette wholesalers were exempt from paying use tax on cigarettes if they paid sales tax on those cigarettes. The cigarette sales tax statute provided that wholesalers were entitled to a refund of 100% of the sales tax due on “unsalable” cigarettes, while no such provision appeared in the cigarette use tax provision.

Cigarettes were stolen from a wholesaler in *Knoke*, and the wholesaler contended that it was required to pay neither cigarette sales nor cigarette use tax on the stolen cigarettes. The Tax Commissioner insisted that cigarette use tax was owed. The BTA reversed the Tax Commissioner, finding that the cigarette sales and use tax provisions must be read in *pari materia* and, read together, provided an exemption for unsalable cigarettes.

This Court affirmed the BTA. The Court applied the doctrine of *in pari materia* to recognize the spoliation exemption for the cigarette use tax although that exemption was not specifically provided in the case of the cigarette use tax unlike the cigarette sales tax. In *Knoke*, like here, the application of the *in pari materia* doctrine achieved the only reasonable result. The present appeal, moreover, provides an even stronger basis to apply the *in pari materia* doctrine than in *Knoke*. R.C. 5739.071 specifically references R.C. 5739.07 that in turn specifically requires payment of interest — unlike the cigarette use tax provisions in *Knoke* that contained no

such cross-reference. Because no question can exist that use tax refunds, including EIS refunds, are subject to interest, the doctrine of *in pari materia* supports the finding that interest is payable on sales tax refunds.

#### **10. Tax Policy Strongly Supports The Payment of Interest**

The plain meaning of the relevant statutes fully supports payment of interest on EIS refunds. Even if the Court were to find some ambiguity, however, the conclusion expressed in the statutes that interest is payable on all EIS refunds is also the right answer as a matter of sound tax policy. This Court may consider the object to be attained and the consequences in its construction of an ambiguous statute. R.C. 1.49(A) and (E).

The EIS statute provides an incentive for companies to operate data centers and call centers in Ohio. If the receipt of the benefit of the incentive can be unilaterally diminished by the Tax Commissioner by delaying payment of the refund, harmful uncertainty is added to the incentive program. Potential investors need to be able to quantify the potential benefit when weighing in which state to invest. If the taxpayer cannot quantify the refund because the date of receipt of the refund is uncertain and no interest is paid, the benefit of the incentive is impaired and it will diminish the benefit of the incentive to the State of Ohio.

Secondly, if the Tax Commissioner can control the magnitude of the benefit by withholding payment of the refund, the size of the incentive is controlled not by law but by administrative action of the Department of Taxation. A dollar ten years in the future is worth less than a dollar today. If the Tax Commissioner can decide the amount of the actual benefit based on non-statutory criteria, then the Tax Commissioner is usurping the legislative prerogative to define the benefit to be accorded. Nothing in the statutes suggests that the General Assembly intended to confer on the Tax Commissioner the authority to choose the level of

benefit by choosing how long to delay payment.

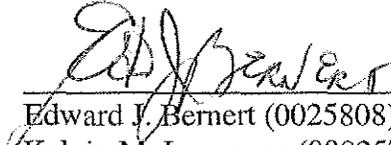
Moreover, a great temptation would exist for taxpayers to pay only 75% of the tax to vendors and for vendors to accept such partial payment if no interest would be paid. IBM did not do that. It is true that such failure to collect the full amount of tax would be subject to assessment but there is little incentive for the Ohio Department of Taxation to assess the tax considering that the taxpayer can pay the tax and then turn around and seek refund. IBM strictly followed the law and should not be placed at a practical disadvantage compared to those taxpayers enjoying the benefit of immediate enjoyment of the exemption through self-help, by being less compliant with the law.

The Tax Commissioner has argued that interest is payable on refunds only when the taxpayer makes a mistake and illegally or erroneously overpays. The concept that a taxpayer that makes a mistake in tax compliance should be preferred to a taxpayer like IBM that carefully followed the statute is wholly without merit. The idea that one seeking an EIS refund is less deserving of interest on a refund compared to other taxpayers that make mistakes can find no support in law or logic.

### III. Conclusion

Interest is properly paid on refunds of sales and use tax, including EIS refunds. The BTA should be reversed.

Respectfully submitted,



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Edward J. Bernert (0025808)

Kelvin M. Lawrence (0082574)

Baker & Hostetler LLP

65 East State Street, Suite 2100

Columbus, Ohio 43215

(614) 228-1541

[ebernert@bakerlaw.com](mailto:ebernert@bakerlaw.com)

[klawrence@bakerlaw.com](mailto:klawrence@bakerlaw.com)

Attorneys for Appellants

International Business Machines

Corporation and IBM Credit Corporation

### CERTIFICATE OF SERVICE

This is to certify that a copy of the foregoing Brief was served upon Sophia Hussain, Taxation Section, Ohio Attorney General's Office, 30 East Broad Street, 25<sup>th</sup> Floor, and Columbus, Ohio 43215 by certified mail this 16<sup>th</sup> day of September, 2009.

  
Kelvin M. Lawrence

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IN THE SUPREME COURT OF OHIO

09-1296

International Business Machines Corporation :  
and IBM Credit Corporation :

Appellants :

v. :

Richard A. Levin :  
Tax Commissioner of Ohio :

Appellee. :

Supreme Court Case No. \_\_\_\_\_

Appeal from the  
Ohio Board of Tax Appeals

BTA Case Nos. 2007-Z-1140  
2007-Z-1141  
2007-Z-1143

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FILED/RECEIVED  
BOARD OF TAX APPEALS

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NOTICE OF APPEAL

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Richard Cordray  
Attorney General of Ohio  
Sophia Hussain  
Deputy Attorney General  
30 East Broad Street  
Columbus, Ohio 43215  
(614) 466-4320

Attorneys for Appellee  
Tax Commissioner of Ohio

Edward J. Bernert (0025808)  
(Counsel of Record)  
Kelvin M. Lawrence (0082574)  
Baker & Hostetler LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215  
(614) 228-1541  
(614) 462-2616 (Fax)  
[ebnert@bakerlaw.com](mailto:ebnert@bakerlaw.com)  
[klawrence@bakerlaw.com](mailto:klawrence@bakerlaw.com)

Attorneys for Appellants  
International Business Machines  
Corporation and IBM Credit Corporation

FILED  
JUL 17 2009  
CLERK OF COURT  
SUPREME COURT OF OHIO

IN THE SUPREME COURT OF OHIO

International Business Machines Corporation and IBM Credit Corporation	:	Supreme Court Case No. _____
	:	
Appellants	:	Appeal from the
	:	Ohio Board of Tax Appeals
v.	:	
	:	BTA Case Nos. 2007-Z-1140
Richard A. Levin	:	2007-Z-1141
Tax Commissioner of Ohio	:	2007-Z-1143
	:	
Appellee.	:	

NOTICE OF APPEAL

International Business Machines Corporation and IBM Credit Corporation, ("Appellants," each an Appellant), hereby give notice of their appeal to the Supreme Court of Ohio from a Decision and Order of the Ohio Board of Tax Appeals ("BTA") journalized in Case Nos. 2007-Z-1140, 2007-Z-1141 and 2007-Z-1143 on June 23, 2009, a true copy of which is attached hereto and incorporated herein by reference as Exhibit A. This appeal is filed as a matter of right pursuant to Revised Code ("R.C.") 5717.04.

Appellants complain of the following errors in the BTA's Decision and Order:

1. The BTA erred in concluding that interest is not payable on refunds issued pursuant to R.C. 5739.071.
2. The BTA erred by failing to find that a refund granted pursuant to R.C. 5739.071 is a refund granted pursuant to R.C. 5739.07 or 5741.10.
3. The BTA erred by failing to find that R.C. 5739.07, 5739.071, 5739.132 and 5741.10 should be read *in pari materia* thus demonstrating a legislative intent to provide interest.
4. The BTA erred by failing to find that cross references in R.C. 5739.07, 5739.071, 5739.132 and 5741.10 constitute an express provision for the payment of interest.

5. The BTA erred by applying a strict construction reading of R.C. 5739.071 with respect to the providing of interest or in the alternative applying a strict construction reading to defeat a finding that the refund of sales or use tax for equipment, software and services used to provide electronic information services to which a taxpayer is entitled is payable with interest.

6. The BTA erred in its application of law by failing to find that the General Assembly intended to incorporate the refund provisions of 5739.07, including R.C. 5739.07(F) and R.C. 5739.132 into R.C. 5739.071.

7. The BTA erred to the extent that it relied upon *Key Servs. Corp. v. Zaino* (2002), 95 Ohio St. 3d 11, to support denial of interest.

8. Because of the errors stated above, Appellants request that the Decision and Order of the Ohio Board of Tax Appeals be reversed and that the Tax Commissioner be ordered to find that R.C. 5739.071, R.C. 5739.07, R.C. 5739.132 and 5741.10 provide for payment of interest to Appellants.

9. Appellants further request such other relief as properly may be accorded by law.

Respectfully submitted,

  
\_\_\_\_\_  
Edward J. Bernert (0025808)  
Kelvin M. Lawrence (0082574)  
Baker & Hostetler LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215  
(614) 228-1541  
[ebarnert@bakerlaw.com](mailto:ebarnert@bakerlaw.com)  
[klawrence@bakerlaw.com](mailto:klawrence@bakerlaw.com)

Attorneys for Appellants  
International Business Machines  
Corporation and IBM Credit Corporation

BEFORE THE BOARD OF TAX APPEALS  
STATE OF OHIO

International Business Machines Corporation	:	
and IBM Credit Corporation	:	Supreme Court Case No. _____
	:	
Appellants	:	Appeal from the
	:	Ohio Board of Tax Appeals
v.	:	
	:	BTA Case Nos.     2007-Z-1140
Richard A. Levin	:	2007-Z-1141
Tax Commissioner of Ohio	:	2007-Z-1143
	:	
Appellee	:	

PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

Demand is hereby made that the Ohio Board of Tax Appeals ("Board") prepare, transmit and file with the Supreme Court of Ohio a certified transcript of the records and proceedings of the Board pertaining to its Order in the above-styled matter, including in said certified transcript, the Board's Order, the original papers in the case or a transcript thereof, all evidence with originals or copies of all exhibits as adduced in said proceeding considered by the Board in making its Order.

  
\_\_\_\_\_  
Edward J. Bernert (0025808)  
Kelvin M. Lawrence (0082574)  
Baker & Hostetler LLP  
65 E. State Street, Suite 2100  
Columbus, Ohio 43215  
(614) 228-1541  
(614) 462-2616 (Fax)  
[ebermert@bakerlaw.com](mailto:ebermert@bakerlaw.com)  
[klawrence@bakerlaw.com](mailto:klawrence@bakerlaw.com)

Attorneys for Appellants  
International Business Machines  
Corporation and IBM Credit Corporation

## CERTIFICATE OF SERVICE

I hereby certify that copies of the foregoing Notice of Appeal and Praecipe were filed with the Ohio Board of Tax Appeals, 30 East Broad Street, 24<sup>th</sup> Floor, Columbus, Ohio 43215, by hand delivery and by certified mail, and were served upon Richard A. Levin, Tax Commissioner of Ohio, 30 East Broad Street, 22<sup>nd</sup> Floor, Columbus, Ohio 43215, and Sophia Hussain, Deputy Attorney General, Taxation Section, Office of the Ohio Attorney General, 30 East Broad Street, 25<sup>th</sup> Floor, Columbus, Ohio 43215 by certified mail return receipt requested this 17<sup>th</sup> day of July, 2009.



---

Edward J. Bernert

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APP005

# EXHIBIT A

## OHIO BOARD OF TAX APPEALS

International Business Machines Corporation and IBM Credit Corporation,	)	CASE NOS. 2007-Z-1140
	)	2007-Z-1141
	)	2007-Z-1143
Appellants,	)	
vs.	)	(SALES AND USE TAX)
	)	
Richard A. Levin, Tax Commissioner of Ohio,	)	DECISION AND ORDER
	)	
Appellee.	)	

### APPEARANCES:

For the Appellants	-	Baker & Hostetler LLP Edward J. Bernert 65 East State Street, Suite 2100 Columbus, Ohio 43215
For the Appellee	-	Richard Cordray Attorney General of Ohio Sophia Hussain Assistant Attorney General 30 East Broad Street, 25 <sup>th</sup> Floor Columbus, Ohio 43215

Entered **JUN 23 2009**

Ms. Margulies, Mr. Johrendt, and Mr. Dunlap concur.

These matters come on to be considered by the Board of Tax Appeals upon three notices of appeal filed with this board on October 15, 2007, by appellants, International Business Machines Corporation and IBM Credit Corporation ("IBM"), from three final determinations of the Tax Commissioner, appellee. Said final determinations were issued on September 13, 2007 and approved certain applications

for refund of sales and use tax filed pursuant to R.C. 5739.071 and 5741.10. Each final determination includes a reference to a "resolution" and an indication that the amount of the refund claim was approved in connection with the resolution. S.T. at 1.<sup>1</sup> Accordingly, the amount of the refunds is not at issue herein. Rather, the sole issue herein is whether the appellants are entitled to interest on such refunds. Each of the final determinations includes the following language or similar language with respect to interest on the refunds:

"[T]he claimant does dispute the denial of interest on the refund claim which is not paid by this resolution. The Commissioner hereby denies any interest because R.C. 5739.071 does not allow the claimant such interest."

In their notices of appeal, the appellants object to the non-payment of interest on the refunds and claim that the denial of interest on the refunds is contrary to R.C. 5739.071, especially when that section is read in *pari materia* with, or by reference to, R.C. 5739.07 and 5739.132. Cf. R.C. 5741.10. The parties waived hearing before this board and submitted their respective arguments in written briefs filed with this board. Accordingly, these matters are submitted to the board upon the notices of appeal, statutory transcripts, and written briefs filed with this board.

By way of background, the appellant, International Business Machines Corporation, paid sales and use taxes for tax years 1998 through 2007 and the appellant, IBM Credit Corporation, collected sales and use taxes for tax years 1997 through 2006. The IBM companies applied for and were granted seven refunds pursuant to R.C. 5739.071, which reads, in its entirety, as follows:

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<sup>1</sup> The statutory transcripts certified to this board by the Tax Commissioner consist only of the final determinations issued by the Tax Commissioner on September 13, 2007.

“(A) The tax commissioner shall refund to a provider of electronic information services twenty-five per cent of the tax it pays pursuant to this chapter or Chapter 5741. of the Revised Code on purchases made on or after July 1, 1993, of computers, computer peripherals, software, telecommunications equipment, and similar tangible personal property, primarily used to acquire, process, or store information for use by business customers or to transmit or disseminate such information to such customers, the services of installing or repairing such property, and agreements to repair or maintain such property. *Applications for a refund shall be made in the same manner and subject to the same time limitations as provided in sections 5739.07 and 5741.10 of the Revised Code.*

“(B) An electronic information service provider that maintains direct payment authority under section 5739.031 of the Revised Code may list on the return and pay tax on seventy-five per cent of the price of equipment, services, and agreements described under division (A) of this section in lieu of seeking a refund as provided in that division.” (Emphasis added.)

As stated above, R.C. 5739.071(A) provides for the refund of 25% of sales and use tax paid on the purchase of property used to provide electronic information services (“EIS”). While the Tax Commissioner granted the refunds under R.C. 5739.071(A), he denied the payment of interest.

The appellants argue that they are entitled to interest on the refunds because R.C. 5739.071(A) specifically references R.C. 5739.07, and subsection (F) of R.C. 5739.07 explicitly requires payment of interest. R.C. 5739.07(F) in turn references R.C. 5729.132, which provides for the payment of interest on all refunds of sales and use tax for purchases made after December 31, 2007.

R.C. 5739.07 reads, in its entirety, as follows:

“(A) When, pursuant to this chapter, a vendor has paid taxes to the treasurer of state or the treasurer of state’s agent, or to the tax commissioner or the commissioner’s agent, the commissioner shall refund to the vendor the amount of taxes paid if the vendor has refunded to the consumer the full amount of taxes the consumer paid illegally or erroneously or if the vendor has illegally or erroneously billed the consumer but has not collected the taxes from the consumer.

“(B) When, pursuant to this chapter, a consumer has paid taxes directly to the treasurer of state or the treasurer of state’s agent, or to the tax commissioner or the commissioner’s agent, and the payment or assessment was illegal or erroneous, the commissioner shall refund to the consumer the full amount of illegal or erroneous taxes paid.

“(C) The commissioner shall refund to the consumer taxes paid illegally or erroneously to a vendor only if:

“(1) The commissioner has not refunded the tax to the vendor and the vendor has not refunded the tax to the consumer; or

“(2) The consumer has received a refund from a manufacturer or other person, other than the vendor, of the full purchase price, but not the tax, paid to the vendor in settlement of a complaint by the consumer about the property or service purchased.

“The commissioner may require the consumer to obtain or the vendor to provide a written statement confirming that the vendor has not refunded the tax to the consumer and has not filed an application for refund of the tax with the commissioner.

“(D) An application for refund shall be filed with the tax commissioner on the form prescribed by the commissioner within four years from the date of the illegal or erroneous payment of the tax, unless the vendor or consumer waives the time limitation under division (A)(3) of section

5739.16 of the Revised Code. If the time limitation is waived, the refund application period shall be extended for the same period as the waiver.

“(E) On the filing of an application for a refund, the 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 that amount to the director of budget and management and the treasurer of state for payment from the tax refund fund created by section 5703.052 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.

“(F) *When a refund is granted under this section, it shall include interest thereon as provided by section 5739.132 of the Revised Code.*” (Emphasis added.)

R.C. 5739.132 reads, in its entirety, as follows:

“(A) If a tax payment originally due under this chapter or Chapter 5741. of the Revised Code on or after January 1, 1998, is not paid on or before the day the tax is required to be paid, interest shall accrue on the unpaid tax at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax was required to be paid until the tax is paid or until the day an assessment is issued under section 5739.13 or 5739.15 of the Revised Code, whichever occurs first. Interest shall be paid in the same manner as the tax, and may be collected by assessment.

“(B) For tax payments due prior to January 1, 1998, interest shall be allowed and paid upon any refund granted in respect to the payment of an illegal or erroneous assessment issued by the department for the tax imposed under this chapter or Chapter 5741. of the Revised Code from the date of the overpayment. *For tax payments due on or after January 1, 1998, interest shall be allowed and paid on any refund granted pursuant to section 5739.07 or 5741.10 of the Revised Code from the date of the overpayment.* The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code.” (Emphasis added.)

R.C. 5741.10 reads, in its entirety, as follows:

“Refunds of taxes paid pursuant to this chapter by a seller or consumer illegally or erroneously shall be made in the same manner as refunds are made to a vendor or consumer under section 5739.07 of the Revised Code.”

The appellants argue that R.C. 5739.071(A) makes explicit reference to the manner of refunds made pursuant to R.C. 5739.07 and 5741.10 and that R.C. 5741.10 requires that use tax refunds be made in the same manner as refunds under R.C. 5739.07. Appellants’ Brief at 3. The appellants further argue that said reference to R.C. 5739.07 and 5741.10 in R.C. 5739.071 substitutes for a repetition of all of the terms of R.C. 5739.07 and 5741.10. *Id.* Also, the appellants argue that the cross-reference reflects the intention of the General Assembly to incorporate into R.C. 5739.071 the applicable refund provisions set forth in R.C. 5739.07, including the payment of interest set forth in R.C. 5739.07(F). *Id.* The appellants’ contention is “[s]tated simply, the provisions of R.C. 5739.07 and R.C. 5739.132 are fully incorporated into R.C. 5739.071 except to the extent inapplicable.” *Id.*

The appellants argue that R.C. 5739.07(F) provides that when a refund is granted under R.C. 5739.07, interest thereon shall be paid as provided by R.C. 5739.132. Because R.C. 5739.132(B) provides for interest on refunds granted under R.C. 5739.07 and 5741.10 and refunds pursuant to R.C. 5739.071 are to be granted in the same manner as R.C. 5739.07 and 5741.10, the appellants contend that the General Assembly expressed the intent that interest be paid on refunds under R.C. 5739.071. Appellant’s Brief at 4. In support of this argument, the appellants explain that

statutory enactments which address the same general subject matter should be read in pari materia to give them force and effect. *United Tel. Co. of Ohio v. Limbach* (1994), 71 Ohio St.3d 369. R.C. 5739.07 and 5741.10 are referenced in R.C. 5739.071 and R.C. 5739.07 and 5741.10 address the refund of sales and use tax, respectively. Because R.C. 5739.071 provides for sales and use tax refunds, R.C. 5739.07 and 5741.10 address sales and use tax refunds, and R.C. 5739.071 and 5741.10 specifically refer to R.C. 5739.07, the appellants contend that these provisions, along with R.C. 5739.132, must be construed in pari materia. Appellant's Brief at 4. Also, the appellants contend that the General Assembly could have expressly prohibited the payment of interest but did not do so.

In summary, the appellants argue that R.C. 5741.10 provides that refunds shall be made in the manner prescribed by R.C. 5739.07, and R.C. 5739.071 provides that refunds shall be made in the manner prescribed by R.C. 5739.07 and 5741.10. By referring to R.C. 5739.07 in both R.C. 5741.10 and 5739.071, the appellants argue that the General Assembly intended for the refunds of sales and use tax to purchasers of EIS products to be treated in a single manner under R.C. 5739.07. Since R.C. 5739.07(F) refers to R.C. 5739.132 and R.C. 5739.132(B) provides for the payment of interest on refunds, the appellants submit that they are entitled to interest on their refund.<sup>2</sup>

In contrast, the appellee Tax Commissioner argues that he granted the refunds applied for under R.C. 5739.071 and in doing so, he applied the plain meaning

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<sup>2</sup> Appellants acknowledge that they are not entitled to interest on payments made prior to January 1, 1998. See R.C. 5739.132(B); Appellants' Reply Brief at footnote 3.

of said statute. The Tax Commissioner contends that the General Assembly has not provided him with the express authority, under R.C. 5739.071 or elsewhere, to pay interest on refunds granted under R.C. 5739.071. The Tax Commissioner argues that in order for a taxpayer to recover interest on a tax refund, the General Assembly must have affirmatively authorized, by statute, such an award of interest. In the instant matters, the Tax Commissioner contends that the taxpayers applied for a refund under R.C. 5739.071 and said statute does not expressly provide for the payment of interest.

Furthermore, the Tax Commissioner argues that the statutes identified by the appellants do not provide for the payment of interest on refunds granted under R.C. 5739.071. The Tax Commissioner explains that R.C. 5739.071 provides for the 25% refund of previously paid taxes on qualifying EIS products, R.C. 5739.07 provides for payment of interest on the “illegal or erroneous payment” of sales or use tax, R.C. 5741.10 provides for the refund of “illegally or erroneously” paid use taxes, and R.C. 5739.132 provides for the rate of interest applicable to refunds granted under R.C. 5739.07 and 5741.10. The Tax Commissioner argues that none of said statutes provide for the payment of interest on refunds granted under R.C. 5739.071.

The Tax Commissioner also argues that under the sales and use tax statutes, the General Assembly has authorized the payment of interest on sales and use tax refunds only where the refund is the result of previous “illegal or erroneous” payments. More specifically, with respect to R.C. 5739.07 and the payment of interest on the “illegal or erroneous payment” of sales or use tax, the Tax Commissioner argues that the refunds at issue herein were not and did not relate to the payment of

“illegal or erroneous” sales or use tax by the appellants but rather were the result of taxes which were lawfully and correctly paid by the appellants.

In response to the appellants' contention that R.C. 5739.071 should be read in pari materia with R.C. 5739.07, the Tax Commissioner argues that the appellants are not entitled to interest even if the statutes are read in pari materia. The Tax Commissioner explains that R.C. 5739.071 incorporates the provisions of R.C. 5739.07 in two limited ways only, how an application for refund is to be made and the applicable statute of limitations. Notwithstanding reading R.C. 5739.071 in pari materia with R.C. 5739.07, the Tax Commissioner argues that express authority from the General Assembly to award interest on refunds granted under R.C. 5739.071 is lacking.<sup>3</sup>

We begin our review by observing that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the

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<sup>3</sup> Subsequent to the filing of the appellants' reply brief with this board, the appellee Tax Commissioner filed a motion for leave to file a surreply or for alternative relief. In his memorandum in support of said motion, the Tax Commissioner argued that a surreply was necessary because the appellants had submitted a "brand-new argument" in their reply brief. Appellee Memorandum in Support of Motion for Leave to File a Surreply at 1. Specifically, the Tax Commissioner argued that the appellants submitted arguments regarding R.C. 5739.132 and 5739.071(B) in their reply brief that were not included in their initial brief and that he has had no previous opportunity to address and refute said newly raised arguments. In the event we deny the Tax Commissioner's motion, he then asks this board to strike the appellants' reply brief. We note that the Tax Commissioner filed with this board his surreply brief. We also note that the appellants filed a response to the Tax Commissioner's motion and surreply. In an effort to consider all of the arguments of the parties in these matters, the Tax Commissioner's motion for leave to file a surreply is hereby granted.

taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

We note that the Supreme Court considered R.C. 5739.071 in *Key Servs. Corp. v. Zaino* (2002), 95 Ohio St.3d 11. While interest on refunds pursuant to R.C. 5739.071 was not at issue, the court's analysis of said statute is nevertheless insightful. The narrow issue before the court in *Key Servs.* was whether a taxpayer who provided EIS to its affiliate qualified as a provider of EIS and was entitled to a refund pursuant to R.C. 5739.071. In its consideration of R.C. 5739.071, the court explained:

"Key [Services] is not seeking the return of an illegal or erroneous payment. The refund provision of R.C. 5739.071 is more analogous to a tax exemption than it is to an illegal or erroneous payment. 'We read exemption statutes strictly \*\*\*.'" (Emphasis added.)

The court explained that the refund provision of R.C. 5739.071 was more akin to a tax exemption than it was to an illegal or erroneous payment. With respect to tax exemption statutes, it is well-established law that such statutes "are to be strictly construed." *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, 409; *Seven Hills Schools v. Kinney* (1986), 28 Ohio St.3d 186. "[E]xemption is in derogation of the rights of all other taxpayers and necessarily shifts a higher burden upon the non-exempt." *Parma Hts. v. Wilkins*, 105 Ohio St.3d 463, ¶10. Accordingly, we find that we must strictly construe R.C. 5739.071, the statute at issue in the instant matters.

Moreover, the Supreme Court has consistently denied the right to receive interest from the state where the statute does not expressly provide for the payment of

interest. See *Gen. Elec. Co. v. DeCourcy* (1979), 60 Ohio St.2d 69; *Chicago Freight Car Leasing Co. v. Limbach* (1992), 62 Ohio St.3d 489; *State ex rel. Cleveland Concession Co. v. Peck* (1954), 161 Ohio St. 31. In *Cleveland Concession*, the court explained as follows:

“The great weight of authority on this question supports the rule established by the Supreme Court of the United States \*\*\* “[i]nterest, when not stipulated for by contract, or authorized by statute, \*\*\* is not to be awarded against a sovereign government, unless its consent to pay interest has been manifested by an act of its [l]egislature, or by a lawful contract of its executive officers.” Id. at 34-35 (quoting *Schlesinger v. State* (1928), 195 Wis. 366, 218).

The court in *Cleveland Concession* held:

“Since a recovery against the state for sales taxes illegally or erroneously assessed and paid can be had only by virtue of the legislative enactment authorizing such recovery, the recovery is limited by the provisions of the statute and cannot be extended beyond those provisions. *Since the enactment in Ohio does not provide for the payment of interest on a refund of such taxes \*\*\* and since there is no provision for the payment of interest on the amount recovered, relator is not entitled to recover such interest.*” Id. at 37. (Emphasis added.)

Thus, in the absence of express statutory language providing for the entitlement to interest on refunds granted pursuant to R.C. 5739.071, we find that such entitlement does not exist. Based upon our review of the statutes at issue herein, we cannot find express statutory language providing for the entitlement to interest on refunds granted pursuant to R.C. 5739.071.

We acknowledge that R.C. 5739.071(A) references R.C. 5739.07 and that R.C. 5739.07(F) provides for the payment of interest. The express language of

R.C. 5739.07(F), however, provides for payment of interest “when a refund is granted under this section.” The refunds at issue herein were not granted under R.C. 5739.07 but rather were granted under R.C. 5739.071. Similarly, R.C. 5739.071(A) references R.C. 5741.10, and R.C. 5741.10 references R.C. 5739.07, and R.C. 5739.07(F) provides for the payment of interest. Again, the express language of R.C. 5739.07(F) provides for the payment of interest “when a refund is granted under this section” and the refunds at issue herein were not granted under R.C. 5739.07. Moreover, the express language of R.C. 5741.10 provides that “[r]efunds of taxes paid pursuant to this chapter by a seller or consumer illegally or erroneously shall be made in the same manner as refunds are made to a vendor or consumer under section 5739.07” and the Supreme Court has found that refunds under R.C. 5739.071 are more analogous to a tax exemption than to illegal or erroneous payments. See *Key Servs.*, supra.

Notwithstanding the references and cross-references noted by the appellants, we cannot find that the references to R.C. 5739.07 and 5741.10 in R.C. 5739.071 substitute for a repetition of all of the terms of R.C. 5739.07 and 5741.10 because that is not what is expressly stated in R.C. 5739.071. We likewise cannot find that the cross-reference reflects the intention of the General Assembly to incorporate into R.C. 5739.071 the applicable refund provisions set forth in R.C. 5739.07, including the payment of interest set forth in R.C. 5739.07(F). If the General Assembly had intended that result, then it would have expressly stated it. Finally, we cannot find that the provisions of R.C. 5739.07 and R.C. 5739.132 are fully

incorporated into R.C. 5739.071 because that is not what the General Assembly expressly stated in R.C. 5739.071.

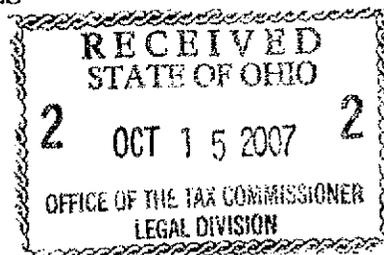
Refund of interest on overpaid taxes is a matter of legislative grace. *Gen. Elec.*, supra; *Brown and Williamson Tobacco, Corp. v. Tracy* (Sept. 6, 1996), BTA No. 1995-M-1008, unreported. It was within the General Assembly's power to identify those statutes which would entitle the claimant to interest. We find that the General Assembly did not identify R.C. 5739.071 as a statute pursuant to which a claimant is entitled to interest.

Thus, considering the statutes and case law, this board finds that the Tax Commissioner correctly denied the appellants' claim for interest on the refunds issued pursuant to R.C. 5739.071. Therefore, it is the decision and order of the Board of Tax Appeals that the final order of the Tax Commissioner must be, and hereby is, affirmed.

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

  
Sally F. Van Meter, Board Secretary

BEFORE THE BOARD OF TAX APPEALS  
STATE OF OHIO



International Business Machines Corporation :  
150 Kettletown Road :  
Southbury, CT 06488-2685 :

Appellants, :

-v- :

Richard A. Levin :  
Tax Commissioner of Ohio :  
30 East Broad Street :  
Columbus, Ohio 43215 :

Appellee. :

BTA Case No. \_\_\_\_\_

Sales and Use

Amount of interest not calculated

2007 OCT 15 PM 4:03

**NOTICE OF APPEAL**

1. Pursuant to Ohio Revised Code (R.C.) 5717.02, International Business Machines Corporation ("Claimant"), hereby give notice of its appeal to the Board of Tax Appeals from the Final Determination in Use Tax Refund Nos. 200201582, 200204383 and 200800397 issued by Richard A. Levin, the Ohio Tax Commissioner, under date of September 13, 2007. A copy of the Final Determination is attached hereto and incorporated herein by reference as Exhibit A.

2. Claimant objects to the non-payment of interest on the refunds.

3. The denial of interest on the refunds is contrary to the provisions of R.C. 5739.071, especially when that section is read in pari materia with, or by reference to, R.C. 5739.07 and 5739.132. Cf. R.C. 5741.10.

4. Because of the errors stated above, Claimant requests that the Tax Commissioner's Final Determination be modified in part insofar as the Final Determination

**HAND DELIVERED**

APP019

denied the payment of interest. Claimant requests an opportunity to present legal arguments to the Board in writing.

5. Claimant further request such other relief as properly may be accorded by law.

Respectfully submitted,

  
\_\_\_\_\_  
Edward J. Bernert  
Att. Reg. No. 0025808  
Baker & Hostetler LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215  
(614) 228-1541

## CERTIFICATE OF SERVICE

A true copy of the Notice of Appeal was served upon Richard A. Levin, the Tax Commissioner of the State of Ohio, by hand delivery to his offices on the 23<sup>rd</sup> Floor of the Rhodes State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 this 15<sup>th</sup> day of October, 2007.

  
\_\_\_\_\_  
Edward J. Bernert

101861636.1



# FINAL DETERMINATION

Date: SEP 13 2007

International Business Machines  
150 Kettletown Rd.  
Southbury, CT 06488-2685

Re: Three Refund Claims  
Use Tax

This is the final determination of the Tax Commissioner on three applications for refund of use tax filed pursuant to R.C. 5739.071 and 5741.10.

In resolution of the amount of tax subject to refund, the refund claims are approved in the following amounts:

Refund Number	Period	Approved Amount
200201582	January 1, 1998 through June 30, 2001	\$169,603.26
200204383	January 1, 2000 through December 31, 2001	\$686,154.98
200800397	January 1, 2004 through June 30, 2007	<u>\$282,053.07</u>
	Total-----	\$1,137,811.31

Per the resolution, the remaining amount of these claims is denied. However, the claimant does dispute the denial of interest on the refund claim which is not paid by this resolution. The Commissioner hereby denies any interest because R. C. 5739.071 does not allow the claimant such interest.

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

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

*Richard A. Levin*  
RICHARD A. LEVIN  
TAX COMMISSIONER

/s/ Richard A. Levin

Richard A. Levin  
Tax Commissioner

**BEFORE THE BOARD OF TAX APPEALS  
STATE OF OHIO**

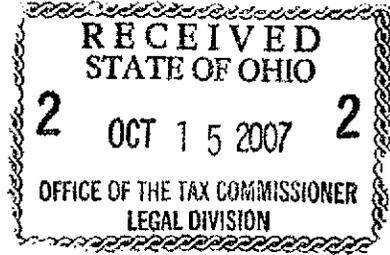
International Business Machines Corporation :  
150 Kettle town Road :  
Southbury, CT 06488-2685 :

Appellants,

-v-

Richard A. Levin :  
Tax Commissioner of Ohio :  
30 East Broad Street :  
Columbus, Ohio 43215 :

Appellee.



BTA Case No. \_\_\_\_\_

Sales and Use

Amount of interest not calculated

200800395  
OCT 15 2007  
RECEIVED

**NOTICE OF APPEAL**

1. Pursuant to Ohio Revised Code (R.C.) 5717.02, International Business Machines Corporation ("Claimant"), hereby give notice of its appeal to the Board of Tax Appeals from the Final Determination in Sales Tax Refund No. 200800395 issued by Richard A. Levin, the Ohio Tax Commissioner, under date of September 13, 2007. A copy of the Final Determination is attached hereto and incorporated herein by reference as Exhibit A.

2. Claimant objects to the non-payment of interest on the refunds.

3. The denial of interest on the refunds is contrary to the provisions of R.C. 5739.071, especially when that section is read in pari materia with, or by reference to, R.C. 5739.07 and 5739.132. Cf. R.C. 5741.10.

4. Because of the errors stated above, Claimant requests that the Tax Commissioner's Final Determination be modified in part insofar as the Final Determination

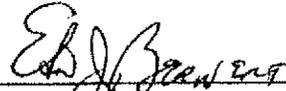
**HAND DELIVERED**

APP023

denied the payment of interest. Claimant requests an opportunity to present legal arguments to the Board in writing.

5. Claimant further request such other relief as properly may be accorded by law.

Respectfully submitted,

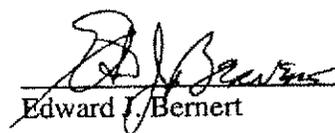


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Edward J. Bernert  
Att. Reg. No. 0025808  
Baker & Hostetler LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215  
(614) 228-1541

## CERTIFICATE OF SERVICE

A true copy of the Notice of Appeal was served upon Richard A. Levin, the Tax Commissioner of the State of Ohio, by hand delivery to his offices on the 23<sup>rd</sup> Floor of the Rhodes State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 this 15<sup>th</sup> day of October, 2007.

  
\_\_\_\_\_  
Edward J. Bernert

101861637.1



# FINAL DETERMINATION

Date: SEP 13 2007

International Business Machines  
150 Kettletown Rd.  
Southbury, CT 06488-2685

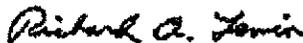
Re: Refund Claim No. 200800395  
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax filed pursuant to R.C. 5739.071.

To resolve this claim, the parties mutually agree that the refund claim is approved in the amount of \$321,005.26. The remainder of the claim is denied. However, the claimant does dispute the denial of interest on the refund claim. The Commissioner hereby denies any interest because R. C. 5739.071 does not allow the claimant such interest.

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

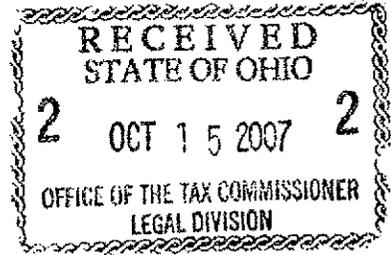
I CERTIFY THAT THIS IS A TRUE AND ACCURATE COPY OF THE FINAL DETERMINATION RECORDED IN THE TAX COMMISSIONER'S JOURNAL

  
RICHARD A. LEVIN  
TAX COMMISSIONER

/s/ Richard A. Levin

Richard A. Levin  
Tax Commissioner

BEFORE THE BOARD OF TAX APPEALS  
STATE OF OHIO



IBM Credit Corporation  
150 Kettle town Road  
Southbury, CT 06488-2685

Appellants,

-v-

Richard A. Levin  
Tax Commissioner of Ohio  
30 East Broad Street  
Columbus, Ohio 43215

Appellee.

BTA Case No. \_\_\_\_\_

Sales and Use

Amount of interest not calculated

2007 OCT 15 PM 4:01  
STATE OF OHIO

**NOTICE OF APPEAL**

1. Pursuant to Ohio Revised Code (R.C.) 5717.02, IBM Credit Corporation ("Claimant"), hereby give notice of its appeal to the Board of Tax Appeals from the Final Determination in Use Tax Refund Nos. 200202276, 200602109 and 200703202 issued by Richard A. Levin, the Ohio Tax Commissioner, under date of September 13, 2007. A copy of the Final Determination is attached hereto and incorporated herein by reference as Exhibit A.

2. Claimant objects to the non-payment of interest on the refunds.

3. The denial of interest on the refunds is contrary to the provisions of R.C. 5739.071, especially when that section is read in pari materia with, or by reference to, R.C. 5739.07 and 5739.132. Cf. R.C. 5741.10.

4. Because of the errors stated above, Claimant requests that the Tax Commissioner's Final Determination be modified in part insofar as the Final Determination

**HAND DELIVERED**

denied the payment of interest. Claimant requests an opportunity to present legal arguments to the Board in writing.

5. Claimant further request such other relief as properly may be accorded by law.

Respectfully submitted,

  
\_\_\_\_\_  
Edward J. Bernert  
Att. Reg. No. 0025808  
Baker & Hostetler LLP  
65 East State Street, Suite 2100  
Columbus, Ohio 43215  
(614) 228-1541

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A true copy of the Notice of Appeal was served upon Richard A. Levin, the Tax Commissioner of the State of Ohio, by hand delivery to his offices on the 23<sup>rd</sup> Floor of the Rhodes State Office Tower, 30 East Broad Street, Columbus, Ohio 43215 this 15<sup>th</sup> day of October, 2007.

  
\_\_\_\_\_  
Edward J. Bernert

101837068.1



# FINAL DETERMINATION

Date: SEP 13 2007

IBM Credit Corporation  
150 Kettletown Rd.  
Southbury, CT 06488-2685

Re: Three Refund Claims  
Use Tax

This is the final determination of the Tax Commissioner on three applications for refund of use tax filed pursuant to R.C. 5739.071 and 5741.10.

In resolution of the amount of tax subject to refund, the refund claims are approved in the following amounts:

Refund Number	Period	Approved Amount
200202276	October 1, 1997 through September 30, 2001	\$1,662,150.18
200602109	October 1, 2001 through October 31, 2005	\$870,825.80
200703202	July 1, 2002 through November 30, 2006	<u>\$292,944.81</u>
	Total-----	\$2,825,920.79

Per the resolution, the remaining amount of these claims is denied. However, the claimant does dispute the denial of interest on the refund claim which is not paid by this resolution. The Commissioner hereby denies any interest because R. C. 5739.071 does not allow the claimant such interest.

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

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

*Richard A. Levin*  
RICHARD A. LEVIN  
TAX COMMISSIONER

/s/ Richard A. Levin

Richard A. Levin  
Tax Commissioner



# FINAL DETERMINATION

Date: SEP 13 2007

International Business Machines  
150 Kettletown Rd.  
Southbury, CT 06488-2685

Re: Refund Claim No. 200800395  
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund of sales tax filed pursuant to R.C. 5739.071.

To resolve this claim, the parties mutually agree that the refund claim is approved in the amount of \$321,005.26. The remainder of the claim is denied. However, the claimant does dispute the denial of interest on the refund claim. The Commissioner hereby denies any interest because R. C. 5739.071 does not allow the claimant such interest.

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

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

A handwritten signature in cursive script that reads 'Richard A. Levin'.

RICHARD A. LEVIN  
TAX COMMISSIONER

/s/ Richard A. Levin

Richard A. Levin  
Tax Commissioner



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Date: SEP 13 2007

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*Richard A. Levin*

RICHARD A. LEVIN  
TAX COMMISSIONER

/s/ Richard A. Levin

Richard A. Levin  
Tax Commissioner



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Date: SEP 13 2007

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Re: Three Refund Claims  
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*Richard A. Levin*  
RICHARD A. LEVIN  
TAX COMMISSIONER

/s/ Richard A. Levin

Richard A. Levin  
Tax Commissioner

**§ 1.49 Court considerations as a legislative intent.**

If a statute is ambiguous, the court, in determining the intention of the legislature, may consider among other matters:

- (A) The object sought to be attained;
- (B) The circumstances under which the statute was enacted;
- (C) The legislative history;
- (D) The common law or former statutory provisions, including laws upon the same or similar subjects;
- (E) The consequences of a particular construction;
- (F) The administrative construction of the statute.

**HISTORY: 134 v H 607. EFF 1-3-74.**

**§ 1.55 Intent of reference.**

A reference to any portion of a statute of this state applies to all reenactments or amendments thereof.

**HISTORY:** 194 v H 607. Eff 1-3-72.

**Research Aids**

Effect of subsequent repeal or amendment of adopted statute:

**O-Jur3d:** Stat §§ 35, 277

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

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

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

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

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

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

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

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

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

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

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

**HISTORY:** GC § 5611-2; 107 v 350; 116 v 104(123); § 2; 118 v 344(355); 119 v 34(49); Bureau of Code Revision, 10-1-53; 125 v 250 (EFF 10-2-53); 135 v S 174 (EFF 12-4-73); 137 v H 634 (EFF 8-15-77); 140 v H 260 (EFF 9-27-83); 142 v H 231, EFF 10-5-87.

**CHAPTER 5739: SALES TAX**

**§ 5739.01 Definitions.**

As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, soci-

eties, corporations, the state and its political subdivisions, and combinations of individuals of any form.

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

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

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

(3) All transactions by which:

(a) An item of tangible personal property is or is to be repaired, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code;

(b) An item of tangible personal property is or is to be installed, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code or property that is or is to be incorporated into and will become a part of a production, transmission, transportation, or distribution system for the delivery of a public utility service;

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

(d) Until August 1, 2003, industrial laundry cleaning services are or are to be provided and, on and after August 1, 2003, laundry and dry cleaning services are or are to be provided;

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

(f) Telecommunications service, including prepaid calling service, prepaid wireless calling service, or ancillary service, is or is to be provided, but not including coin-operated telephone service;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(u) Electronic publishing service is or is to be provided to a consumer for use in business, except that such transactions occurring between members of an affiliated group, as defined in division (B)(3)(e) of this section, are not sales.

For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, generated under constitutional limitations, and from other sources, for the support of local governmental functions.

**§ 5739.02 Levy of sales tax; purpose; rate; exemptions.**

and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

(5) The tax shall be collected as provided in section 5739.023 [5739.02.5] of the Revised Code. The rate of the tax shall be five and one-half per cent. The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

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

A lease with a renewal clause and a termination penalty or similar provision that applies if the renewal clause is not exercised is presumed to be a sham transaction. In such a case, the tax shall be calculated and paid on the basis of the entire length of the lease period, including any renewal periods, until the termination penalty or similar provision no longer applies. The taxpayer shall bear the burden, by a preponderance of the evidence, that the transaction or series of transactions is not a sham transaction.

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

(4) In the case of a sale of a physical fitness facility service or recreation and sports club service, the price of which consists in whole or in part of a membership for the receipt of the benefit of the service, the tax applicable to the sale shall be measured by the installments thereof.

B) The tax does not apply to the following:

(1) Sales to the state or any of its political subdivisions, or to any other state or its political subdivisions if the laws of that state exempt from taxation sales made to this state and its political subdivisions;

(2) Sales of food for human consumption off the premises where sold;

(3) 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;

(4) Sales of newspapers and of magazine subscriptions and sales or transfers of magazines distributed as controlled circulation publications;

(5) The furnishing, preparing, or serving of meals without charge by an employer to an employee provided the employer records the meals as part compensation for services performed or work done;

(6) Sales of motor fuel upon receipt, use, distribution, or sale of which in this state a tax is imposed by the law of this state, but this exemption shall not apply to the sale of motor fuel on which a refund of the tax is allowable under division (A) of section 5735.14 of the Revised Code; and the tax commissioner may deduct the amount of tax levied by this section applicable to the price of motor fuel when granting a refund of motor fuel tax pursuant to division (A) of section 5735.14 of the Revised Code and shall cause the amount deducted to be paid into the general revenue fund of this state;

(7) Sales of natural gas by a natural gas company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through pipes or conduits, and all sales of communications services by a telegraph company; all terms as defined in section 5727.01 of the Revised Code, and sales of electricity delivered through wires;

(8) Casual sales by a person, or auctioneer employed directly by the person to conduct such sales, except as to such sales of motor vehicles, watercraft or outboard motors required to be titled under section 1548.06 of the Revised Code, watercraft documented with the United States coast guard, snowmobiles, and all-purpose vehicles as defined in section 4519.01 of the Revised Code;

(9)(a) Sales of services or tangible personal property, other than motor vehicles, mobile homes, and manufactured homes, by churches, organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, or nonprofit organizations operated exclusively for charitable purposes as defined in division (B)(12) of this section, provided that the number of days on which such tangible personal property or services, other than items never subject to the tax, are sold does not exceed six in any calendar year, except as otherwise provided in division (B)(9)(b) of this section. If the number of days on which such sales are made exceeds six in any calendar year, the church or organization shall be considered to be engaged in business and all subsequent sales by it shall be subject to the tax. In counting the number of days, all sales by groups within a church or within an organization shall be considered to be sales of that church or organization.

(b) The limitation on the number of days on which tax-exempt sales may be made by a church or organization under division (B)(9)(a) of this section does not apply to sales made by student clubs and other groups of students of a primary or secondary school, or a parent-teacher association, booster group, or similar organization that raises money to support or fund curricular or extracurricular activities of a primary or secondary school.

(c) Division (B)(9)(a) and (b) of this section do not apply to sales by a noncommercial educational radio or television broadcasting station.

(10) Sales not within the taxing power of this state under the Constitution of the United States;

(11) Except for transactions that are sales under division (B)(3)(c) of section 5739.01 of the Revised Code, the transportation of persons or property, unless the transportation is by a private investigation and security service;

(12) Sales of tangible personal property or services to churches, to organizations exempt from taxation under

section 501(c)(3) of the Internal Revenue Code of 1986, and to any other nonprofit organizations operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation; sales to offices administering one or more homes for the aged or one or more hospital facilities exempt under section 140.08 of the Revised Code; and sales to organizations described in division (D) of section 5709.12 of the Revised Code.

"Charitable purposes" means the relief of poverty; the improvement of health through the alleviation of illness, disease, or injury; the operation of an organization exclusively for the provision of professional, laundry, printing, and purchasing services to hospitals or charitable institutions; the operation of a home for the aged, as defined in section 5701.13 of the Revised Code; the operation of a radio or television broadcasting station that is licensed by the federal communications commission as a noncommercial educational radio or television station; the operation of a nonprofit animal adoption service or a county humane society; the promotion of education by an institution of learning that maintains a faculty of qualified instructors, teaches regular continuous courses of study, and confers a recognized diploma upon completion of a specific curriculum; the operation of a parent-teacher association, booster group, or similar organization primarily engaged in the promotion and support of the curricular or extracurricular activities of a primary or secondary school; the operation of a community or area center in which presentations in music, dramatics, the arts, and related fields are made in order to foster public interest and education therein; the production of performances in music, dramatics, and the arts; or the promotion of education by an organization engaged in carrying on research in, or the dissemination of, scientific and technological knowledge and information primarily for the public.

Nothing in this division shall be deemed to exempt sales to any organization for use in the operation or carrying on of a trade or business, or sales to a home for the aged for use in the operation of independent living facilities as defined in division (A) of section 5709.12 of the Revised Code.

(13) Building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract with this state or a political subdivision of this state, or with the United States government or any of its agencies; building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property that are accepted for ownership by this state or any of its political subdivisions, or by the United States government or any of its agencies at the time of completion of the structures or improvements; building and construction materials sold to construction contractors for incorporation into a horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock; building materials and services sold to a construction contractor for incorporation into a house of public worship or religious education, or a building used exclusively for charitable purposes under a construction contract with an organization whose purpose is as described in division

(B)(12) of this section; building materials and services sold to a construction contractor for incorporation into a building under a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes; building and construction materials sold for incorporation into the original construction of a sports facility under section 307.696 [307.69.6] of the Revised Code; and building and construction materials and services sold to a construction contractor for incorporation into real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state;

(14) Sales of ships or vessels or rail rolling stock used or to be used principally in interstate or foreign commerce, and repairs, alterations, fuel, and lubricants for such ships or vessels or rail rolling stock;

(15) Sales to persons primarily engaged in any of the activities mentioned in division (B)(42)(a) or (g) of this section, to persons engaged in making retail sales, or to persons who purchase for sale from a manufacturer tangible personal property that was produced by the manufacturer in accordance with specific designs provided by the purchaser, of packages, including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail. "Packages" includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, but does not include motor vehicles or bulk tanks, trailers, or similar devices attached to motor vehicles. "Packaging" means placing in a package. Division (B)(15) of this section does not apply to persons engaged in highway transportation for hire.

(16) Sales of food to persons using food stamp benefits to purchase the food. As used in this division, "food" has the same meaning as in the "Food Stamp Act of 1977," 91 Stat. 958, 7 U.S.C. 2012, as amended, and federal regulations adopted pursuant to that act.

(17) Sales to persons engaged in farming, agriculture, horticulture, or floriculture, of tangible personal property for use or consumption directly in the production by farming, agriculture, horticulture, or floriculture of other tangible personal property for use or consumption directly in the production of tangible personal property for sale by farming, agriculture, horticulture, or floriculture; or material and parts for incorporation into any such tangible personal property for use or consumption in production; and of tangible personal property for such use or consumption in the conditioning or holding of products produced by and for such use, consumption, or sale by persons engaged in farming, agriculture, horticulture, or floriculture, except where such property is incorporated into real property;

(18) Sales of drugs for a human being that may be dispensed only pursuant to a prescription; insulin as recognized in the official United States pharmacopoeia; urine and blood testing materials when used by diabetics

or persons with hypoglycemia to test for glucose or acetone; hypodermic syringes and needles when used by diabetics; for insulin injections; epinephrin albumin purchased for use in the treatment of persons with medical disease; hospital beds when purchased by hospitals, nursing homes, or other medical facilities; and medical oxygen and medical oxygen-dispensing equipment when purchased by hospitals, nursing homes, or other medical facilities.

(19) Sales of prosthetic devices, durable medical equipment for home use, or mobility enhancing equipment, when made pursuant to a prescription and when such devices or equipment are for use by a human being.

(20) Sales of emergency and fire protection vehicles and equipment to nonprofit organizations for use solely in providing fire protection and emergency services, including trauma care and emergency medical services, for political subdivisions of the state.

(21) Sales of tangible personal property manufactured in this state, if sold by the manufacturer in this state to a retailer for use in the retail business of the retailer outside of this state and if possession is taken from the manufacturer by the purchaser within this state for the sole purpose of immediately removing the same from this state in a vehicle owned by the purchaser.

(22) Sales of services provided by the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities, or by governmental entities of the state or any of its political subdivisions, agencies, instrumentalities, institutions, or authorities.

(23) Sales of motor vehicles to nonresidents of this state under the circumstances described in division (B) of section 5739.029 [5739.02.9] of the Revised Code.

(24) Sales to persons engaged in the preparation of eggs for sale of tangible personal property used or consumed directly in such preparation, including such tangible personal property used for cleaning, sanitizing, preserving, grading, sorting, and classifying by size; packages, including material and parts for packages, and machinery, equipment, and material for use in packaging eggs for sale; and handling and transportation equipment and parts therefor, except motor vehicles licensed to operate on public highways, used in intraplant or interplant transfers or shipment of eggs in the process of preparation for sale, when the plant or plants within or between which such transfers or shipments occur are operated by the same person. "Packages" includes containers, cases, baskets, flats, fillers, filler flats, cartons, closure materials, labels, and labeling materials, and "packaging" means placing therein.

(25)(a) Sales of water to a consumer for residential use, except the sale of bottled water, distilled water, mineral water, carbonated water, or ice;

(b) Sales of water by a nonprofit corporation engaged exclusively in the treatment, distribution, and sale of water to consumers, if such water is delivered to consumers through pipes or tubing.

(26) Fees charged for inspection or reinspection of motor vehicles under section 3704.14 of the Revised Code.

(27) Sales to persons licensed to conduct a food service operation pursuant to section 3717.43 of the Revised Code, of tangible personal property primarily used directly for the following:

(a) To prepare food for human consumption for sale;

(b) To preserve food that has been or will be prepared for human consumption for sale by the food service operator, not including tangible personal property used to display food for selection by the consumer;

(c) To clean tangible personal property used to prepare or serve food for human consumption for sale.

(28) Sales of animals by nonprofit animal adoption services or county humane societies.

(29) Sales of services to a corporation described in division (A) of section 5709.72 of the Revised Code, and sales of tangible personal property that qualifies for exemption from taxation under section 5709.72 of the Revised Code.

(30) Sales and installation of agricultural land tile, as defined in division (B)(5)(a) of section 5739.01 of the Revised Code.

(31) Sales and erection or installation of portable grain bins, as defined in division (B)(5)(b) of section 5739.01 of the Revised Code.

(32) The sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire, except for packages and packaging used for the transportation of tangible personal property.

(33) Sales to the state headquarters of any veterans' organization in this state that is either incorporated and issued a charter by the congress of the United States or is recognized by the United States veterans administration, for use by the headquarters.

(34) Sales to a telecommunications service vendor, mobile telecommunications service vendor, or satellite broadcasting service vendor of tangible personal property and services used directly and primarily in transmitting, receiving, switching, or recording any interactive, one- or two-way electromagnetic communications, including voice, image, data, and information, through the use of any medium, including, but not limited to, poles, wires, cables, switching equipment, computers, and record storage devices and media, and component parts for the tangible personal property. The exemption provided in this division shall be in lieu of all other exemptions under division (B)(42)(a) of this section to which the vendor may otherwise be entitled, based upon the use of the thing purchased in providing the telecommunications, mobile telecommunications, or satellite broadcasting service.

(35)(a) Sales where the purpose of the consumer is to use or consume the things transferred in making retail sales and consisting of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material that prices and describes tangible personal property offered for retail sale.

(b) Sales to direct marketing vendors of preliminary materials such as photographs, artwork, and typesetting that will be used in printing advertising material; of printed matter that offers free merchandise or chances to win sweepstake prizes and that is mailed to potential customers with advertising material described in division (B)(35)(a) of this section; and of equipment such as telephones, computers, facsimile machines, and similar tangible personal property primarily used to accept orders for direct marketing retail sales.

(c) Sales of automatic food vending machines that preserve food with a shelf life of forty-five days or less by refrigeration and dispense it to the consumer.

For purposes of division (B)(35) of this section, "direct marketing" means the method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility by means of the United States mail, delivery service, or common carrier.

(36) Sales to a person engaged in the business of horticulture or producing livestock of materials to be incorporated into a horticulture structure or livestock structure;

(37) Sales of personal computers, computer monitors, computer keyboards, modems, and other peripheral computer equipment to an individual who is licensed or certified to teach in an elementary or a secondary school in this state for use by that individual in preparation for teaching elementary or secondary school students;

(38) Sales to a professional racing team of any of the following:

(a) Motor racing vehicles;

(b) Repair services for motor racing vehicles;

(c) Items of property that are attached to or incorporated in motor racing vehicles, including engines, chassis, and all other components of the vehicles, and all spare, replacement, and rebuilt parts or components of the vehicles; except not including tires, consumable fluids, paint, and accessories consisting of instrumentation sensors and related items added to the vehicle to collect and transmit data by means of telemetry and other forms of communication.

(39) Sales of used manufactured homes and used mobile homes, as defined in section 5739.0210 [5739.02.10] of the Revised Code, made on or after January 1, 2000;

(40) Sales of tangible personal property and services to a provider of electricity used or consumed directly and primarily in generating, transmitting, or distributing electricity for use by others, including property that is or is to be incorporated into and will become a part of the consumer's production, transmission, or distribution system and that retains its classification as tangible personal property after incorporation; fuel or power used in the production, transmission, or distribution of electricity; and tangible personal property and services used in the repair and maintenance of the production, transmission, or distribution system, including only those motor vehicles as are specially designed and equipped for such use. The exemption provided in this division shall be in lieu of all other exemptions in division (B)(42)(a) of this section to which a provider of electricity may otherwise be entitled based on the use of the tangible personal property or service purchased in generating, transmitting, or distributing electricity.

(41) Sales to a person providing services under division (B)(3)(r) of section 5739.01 of the Revised Code of tangible personal property and services used directly and primarily in providing taxable services under that section.

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

(a) To incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining;

or to use or consume the thing transferred directly in producing tangible personal property for sale by mining, including, without limitation, the extraction from the earth of all substances that are classed geologically as minerals, production of crude oil and natural gas, farming, agriculture, horticulture, or floriculture, or directly in the rendition of a public utility service, except that the sales tax levied by this section shall be collected upon all meals, drinks, and food for human consumption sold when transporting persons. Persons engaged in rendering farming, agricultural, horticultural, or floricultural services, and services in the exploration for, and production of, crude oil and natural gas, for others are deemed engaged directly in farming, agriculture, horticulture, and floriculture, or exploration for, and production of, crude oil and natural gas. This paragraph does not exempt from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

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

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

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

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

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

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

(h) To use the benefit of a warranty, maintenance or service contract, or similar agreement, as described in division (B)(7) of section 5739.01 of the Revised Code, to repair or maintain tangible personal property, if all of the property that is the subject of the warranty, contract, or agreement would not be subject to the tax imposed by this section;

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

(j) To use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility when the inventory is primarily distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing. This division does not apply to motor vehicles registered for operation on the public highways. As used in this division, "affiliated group" has the same meaning as in division (B)(3)(e) of section 5739.01 of the Revised Code and "direct marketing" has the same meaning as in division (B)(35) of this section.

(k) To use or consume the thing transferred to fulfill a contractual obligation incurred by a warrantor pursuant to a warranty provided as a part of the price of the tangible personal property sold or by a vendor of a warranty,

maintenance or service contract, or similar agreement the provision of which is defined as a sale under division (B)(7) of section 5739.01 of the Revised Code;

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

(m) To use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service;

(n) To use or consume the thing transferred in acquiring, formatting, editing, storing, and disseminating data or information by electronic publishing.

As used in division (B)(42) of this section, "thing" includes all transactions included in divisions (B)(3)(a), (b), and (e) of section 5739.01 of the Revised Code.

(43) Sales conducted through a coin operated device that activates vacuum equipment or equipment that dispenses water, whether or not in combination with soap or other cleaning agents or wax, to the consumer for the consumer's use on the premises in washing, cleaning, or waxing a motor vehicle, provided no other personal property or personal service is provided as part of the transaction.

(44) Sales of replacement and modification parts for engines, airframes, instruments, and interiors in, and paint for, aircraft used primarily in a fractional aircraft ownership program, and sales of services for the repair, modification, and maintenance of such aircraft, and machinery, equipment, and supplies primarily used to provide those services.

(45) Sales of telecommunications service that is used directly and primarily to perform the functions of a call center. As used in this division, "call center" means any physical location where telephone calls are placed or received in high volume for the purpose of making sales, marketing, customer service, technical support, or other specialized business activity, and that employs at least fifty individuals that engage in call center activities on a full-time basis, or sufficient individuals to fill fifty full-time equivalent positions.

(46) Sales by a telecommunications service vendor of 900 service to a subscriber. This division does not apply to information services, as defined in division (FF) of section 5739.01 of the Revised Code.

(47) Sales of value-added non-voice data service. This division does not apply to any similar service that is not otherwise a telecommunications service.

(48)(a) Sales of machinery, equipment, and software to a qualified direct selling entity for use in a warehouse or distribution center primarily for storing, transporting, or otherwise handling inventory that is held for sale to independent salespersons who operate as direct sellers and that is held primarily for distribution outside this state;

(b) As used in division (B)(48)(a) of this section:

(i) "Direct seller" means a person selling consumer products to individuals for personal or household use and not from a fixed retail location, including selling such product at in-home product demonstrations, parties, and other one-on-one selling.

(ii) "Qualified direct selling entity" means an entity selling to direct sellers at the time the entity enters into a tax credit agreement with the tax credit authority pursuant to section 122.17 of the Revised Code, provided that the agreement was entered into on or after January 1, 2007.

Neither contingencies relevant to the granting of, nor later developments with respect to, the tax credit shall impair the status of the qualified direct selling entity under division (B)(48) of this section after execution of the tax credit agreement by the tax credit authority.

(c) Division (B)(48) of this section is limited to machinery, equipment, and software first stored, used, or consumed in this state within the period commencing with the effective date of the amendment of this section by the capital appropriations act of the 127th general assembly and ending on the date that is five years after that effective date.

(49) Sales of materials, parts, equipment, or engines used in the repair or maintenance of aircraft or avionics systems of such aircraft, and sales of repair, remodeling, replacement, or maintenance services at a federal aviation administration certified repair station in this state performed on aircraft or on an aircraft's avionics, engine, or component materials or parts. As used in division (B)(49) of this section, "aircraft" means aircraft of more than six thousand pounds maximum certified takeoff weight or used exclusively in general aviation.

(50) Sales of full flight simulators that are used for pilot or flight-crew training, sales of repair or replacement parts or components, and sales of repair or maintenance services for such full flight simulators. "Full flight simulator" means a replica of a specific type, or make, model, and series of aircraft cockpit. It includes the assemblage of equipment and computer programs necessary to represent aircraft operations in ground and flight conditions, a visual system providing an out-of-the-cockpit view, and a system that provides cues at least equivalent to those of a three-degree-of-freedom motion system, and has the full range of capabilities of the systems installed in the device as described in appendices A and B of part 60 of chapter 1 of title 14 of the Code of Federal Regulations.

(C) For the purpose of the proper administration of this chapter, and to prevent the evasion of the tax, it is presumed that all sales made in this state are subject to the tax until the contrary is established.

(D) The levy of this tax on retail sales of recreation and sports club service shall not prevent a municipal corporation from levying any tax on recreation and sports club dues or on any income generated by recreation and sports club dues.

(E) The tax collected by the vendor from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional sales tax pursuant to section 5739.021 [5739.02.1] or 5739.026 [5739.02.6] of the Revised Code and of transit authorities levying an additional sales tax pursuant to section 5739.023 [5739.02.3] of the Revised Code. Except for the discount authorized under section 5739.12 of the Revised Code and the effects of any rounding pursuant to section 5703.055 [5703.05.5] of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection or payment of the tax levied by this section or section 5739.021 [5739.02.1], 5739.023 [5739.02.3], or 5739.026 [5739.02.6] of the Revised Code.

**HISTORY:** GC § 5546-2; 115 v PHL 306, § 2; 116 v 41, § 2; 116 v PHL 69; 116 v PHL 323; 117 v 761; 122 v 912; 124 v 166; Bureau of Code Revision, 10-1-53; 128 v 421 (EFF 7-1-59); 129 v 1301 (EFF 10-16-61); 129 v 1336 (EFF 1-2-62); 130 v 1347 (EFF 1-23-63); 130 v 1351 (EFF 7-26-63); 131 v 1369 (EFF 9-22-65); 131 v 1374 (EFF 11-5-65); 132 v H 519 (EFF 11-30-67); 132 v S 350 (EFF 9-1-67); 132 v

§ 207 (Eff. 5-3-68); 132 v S 174 (Eff. 6-11-68); 134 v S 222 (Eff. 12-10-71); 134 v H 475 (Eff. 12-20-71); 135 v S 241 (Eff. 10-30-73); 135 v H 3 (Eff. 11-21-73); 135 v S 244 (Eff. 6-13-74); 135 v H 1313 (Eff. 9-30-74); 137 v H 261 (Eff. 6-15-78); 137 v H 363 (Eff. 6-28-78); 137 v H 635 (Eff. 9-16-78); 137 v H 9 (Eff. 8-29-78); 138 v H 1 (Eff. 5-16-79); 138 v H 154 (Eff. 8-14-79); 138 v H 335 (Eff. 1-1-80); 138 v H 703 (Eff. 1-16-81); 138 v H 1112 (Eff. 3-23-81); 139 v H 275 (Eff. 8-1-81); 139 v H 1 (Eff. 8-5-81); 139 v H 694 (Eff. 11-15-81); 139 v H 871 (Eff. 12-9-81); 139 v S 330 (Eff. 6-25-82); 140 v S 231 (Eff. 9-20-84); 141 v H 146 (Eff. 9-11-85); 141 v H 300 (Eff. 9-11-85); 141 v H 335 (Eff. 12-11-85); 141 v H 383 (Eff. 2-20-86); 141 v H 300 (Eff. 5-6-86); 141 v H 34 (Eff. 9-17-86); 142 v H 171 (Eff. 7-1-87); 142 v S 21 (Eff. 10-20-87); 142 v S 92 (Eff. 10-20-87); 142 v H 772 (Eff. 6-29-88); 142 v S 386 (Eff. 3-29-88); 142 v H 708 (Eff. 4-10-88); 143 v H 111 (Eff. 7-1-89); 143 v S 156 (Eff. 12-31-89); 143 v H 531 (Eff. 7-1-90); 143 v H 365 (Eff. 4-1-90); 144 v H 298 (Eff. 8-1-91); 144 v S 131 (Eff. 5-15-92); 144 v H 768 (Eff. 1-22-93); 144 v H 904 (Eff. 1-1-93); 144 v S 359 (Eff. 12-22-92); 145 v S 18 (Eff. 9-27-93); 145 v H 207 (Eff. 6-30-93); 145 v H 152 (Eff. 7-1-93); 145 v H 261 (Eff. 7-2-93); 145 v H 163 (Eff. 5-10-94); 145 v H 715 (Eff. 7-22-94); 145 v H 632 (Eff. 7-22-94); 146 v H 249 (Eff. 7-17-95); 146 v H 117 (Eff. 9-29-95); 146 v S 310 (Eff. 6-20-99); 147 v H 210 (Eff. 3-31-97); 147 v H 215 (Eff. 9-29-97); 147 v S 66 (Eff. 7-22-98); 147 v H 770 (Eff. 6-17-98); Eff. 7-22-98, (B)(18), § 33; 147 v S 142 (Eff. 3-30-99); 148 v H 163 (Eff. 3-21-99); 148 v S 3 (Eff. 7-6-99; 10-5-99); 148 v H 223 (Eff. 11-3-99); 148 v H 640 (Eff. 9-14-2000); 148 v H 612 (Eff. 9-29-2000); 148 v H 138 (Eff. 11-3-2000); 149 v H 94 (Eff. 9-5-2001); 149 v H 117 (Eff. 10-8-2001); 149 v S 143 (Eff. 6-21-2002); 149 v S 200 (Eff. 9-6-2002); 149 v H 371 (Eff. 10-11-2002); 150 v H 95, § 1, eff. 6-26-03; 150 v S 37, § 1, eff. 10-21-03; 151 v H 66, § 101.01, eff. 6-30-05, 7-1-05; 152 v H 119, § 101.01, eff. 6-30-07; 152 v H 157, § 1, eff. 12-21-07; 152 v H 502, § 101.01, eff. 6-24-08.

The provisions of § 503.06 of 152 v H 362 read as follows:

SECTION 503.06. The amendment by this act of section 5739.02 of the Revised Code, adding divisions (B)(49) and (50), applies to sales described in those divisions on or after August 1, 2008.

The effective date is set by § 812.30 of 152 v H 562.

The provisions of § 803.09 of 152 v H 119 read as follows:

SECTION 803.09. The amendment or enactment by this act of section 4505.06, division (B)(23) of section 5739.02, section 5739.029, division (C) of section 5739.033, and section 5739.213 of the Revised Code apply to sales described in division (A) of section 5739.029 of the Revised Code on or after August 1, 2007.

The effective date is set by § 918.03 of 152 v H 119.

The effective date is set by § 612.69.06 of 151 v H 66.

The provisions of § 158, H.B. 95 (150 v --), read as follows:

SECTION 158. (A) The amendment by this act of sections 165.09, 902.11, 4981.20, 5703.052, 5739.01, 5739.011, 5739.012, 5739.02, 5739.025, 5739.03, 5739.032, 5739.033 (in Section 1 of this act), 5739.12, 5739.121, 5739.122, 5739.17, 5739.21, 5741.01, 5741.02, and 5741.121 of the Revised Code apply on and after July 1, 2003.

The effective date is set by section 183 of H.B. 95 (150 v --).

#### Effect of amendments

152 v H 562, effective June 24, 2008, in (A)(1), deleted "provided that on an after July 1, 2003, and on or before June 30, 2005, the rate of tax shall be six per cent" from the end of the first sentence and "On and after July 1, 2005" from the beginning of the second sentence; and added (B)(48) through (50).

152 v H 157, effective December 21, 2007, added (B)(42)(n).

152 v H 119, effective June 30, 2007, rewrote (B)(9) and (23).

151 v H 66, effective June 30, 2005, except the amendment to (B)(15) and striking through (B)(35), effective July 1, 2005, inserted "and one-half" in (A)(1); rewrote (B)(15); deleted (B)(35), pertaining to sales of investment metal bullion and investment coins, and redesignated the remaining subdivisions accordingly; added (B)(46) and (47); and corrected internal references.

#### Comment, Legislative Service Commission

Sections 165.09, 902.11, 2915.01, 4505.06, 4981.20, 5739.01, and 5739.02 of the Revised Code are amended by [Am. Sub. H.B.

95 of the 125th General Assembly] and also by Am. Sub. S.B. 37, both of the 125th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment.

**§ 5739.03 Consumer to pay tax; collection; and reporting of tax by vendor; exemption certificates.**

(A) Except as provided in section 5739.05 of the Revised Code, the tax imposed by or pursuant to section 5739.02, 5739.021 [5739.02.1], 5739.023 [5739.02.3], or 5739.026 [5739.02.6] of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale, in the manner and at the times provided as follows:

(1) If the price is, at or prior to the provision of the service or the delivery of possession of the thing sold to the consumer, paid in currency passed from hand to hand by the consumer or the consumer's agent to the vendor or the vendor's agent, the vendor or the vendor's agent shall collect the tax with and at the same time as the price;

(2) If the price is otherwise paid or to be paid, the vendor or the vendor's agent shall, at or prior to the provision of the service or the delivery of possession of the thing sold to the consumer, charge the tax imposed by or pursuant to section 5739.02, 5739.021 [5739.02.1], 5739.023 [5739.02.3], or 5739.026 [5739.02.6] of the Revised Code to the account of the consumer, which amount shall be collected by the vendor from the con-

sumer in addition to the price. Such sale shall be reported on and the amount of the tax applicable thereto shall be remitted with the return for the period in which the sale is made, and the amount of the tax shall become a legal charge in favor of the vendor and against the consumer.

(B)(1)(a) If any sale is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B)(1) to (11) or (28) of section 5739.02 of the Revised Code, the consumer must provide to the vendor, and the vendor must obtain from the consumer, a certificate specifying the reason that the sale is not legally subject to the tax. The certificate shall be in such form, and shall be provided either in a hard copy form or electronic form, as the tax commissioner prescribes.

(b) A vendor that obtains a fully completed exemption certificate from a consumer is relieved of liability for collecting and remitting tax on any sale covered by that certificate. If it is determined the exemption was improperly claimed, the consumer shall be liable for any tax due on that sale under section 5739.02, 5739.021 [5739.02.1], 5739.023 [5739.02.3], or 5739.026 [5739.02.6] or Chapter 5741. of the Revised Code. Relief under this division from liability does not apply to any of the following:

(i) A vendor that fraudulently fails to collect tax;

(ii) A vendor that solicits consumers to participate in the unlawful claim of an exemption;

(iii) A vendor that accepts an exemption certificate from a consumer that claims an exemption based on who purchases or who sells property or a service, when the subject of the transaction sought to be covered by the exemption certificate is actually received by the consumer at a location operated by the vendor in this state, and this state has posted to its web site an exemption certificate form that clearly and affirmatively indicates that the claimed exemption is not available in this state;

(iv) A vendor that accepts an exemption certificate from a consumer who claims a multiple points of use exemption under division (D) of section 5739.033 [5739.03.3] of the Revised Code, if the item purchased is tangible personal property, other than prewritten computer software.

(2) The vendor shall maintain records, including exemption certificates, of all sales on which a consumer has claimed an exemption, and provide them to the tax commissioner on request.

(3) The tax commissioner may establish an identification system whereby the commissioner issues an identification number to a consumer that is exempt from payment of the tax. The consumer must present the number to the vendor, if any sale is claimed to be exempt as provided in this section.

(4) If no certificate is provided or obtained within ninety days after the date on which such sale is consummated, it shall be presumed that the tax applies. Failure to have so provided or obtained a certificate shall not preclude a vendor, within one hundred twenty days after the tax commissioner gives written notice of intent to levy an assessment, from either establishing that the sale is not subject to the tax, or obtaining, in good faith, a fully completed exemption certificate.

(5) Certificates need not be obtained nor provided where the identity of the consumer is such that the transaction is never subject to the tax imposed or where the item of tangible personal property sold or the service

provided is never subject to the tax imposed, regardless of use, or when the sale is in interstate commerce.

(6) If a transaction is claimed to be exempt under division (B)(13) of section 5739.02 of the Revised Code, the contractor shall obtain certification of the claimed exemption from the contractee. This certification shall be in addition to an exemption certificate provided by the contractor to the vendor. A contractee that provides a certification under this division shall be deemed to be the consumer of all items purchased by the contractor under the claim of exemption, if it is subsequently determined that the exemption is not properly claimed. The certification shall be in such form as the tax commissioner prescribes.

(C) As used in this division, "contractee" means a person who seeks to enter or enters into a contract or agreement with a contractor or vendor for the construction of real property or for the sale and installation onto real property of tangible personal property.

Any contractor or vendor may request from any contractee a certification of what portion of the property to be transferred under such contract or agreement is to be incorporated into the realty and what portion will retain its status as tangible personal property after installation is completed. The contractor or vendor shall request the certification by certified mail delivered to the contractee, return receipt requested. Upon receipt of such request and prior to entering into the contract or agreement, the contractee shall provide to the contractor or vendor a certification sufficiently detailed to enable the contractor or vendor to ascertain the resulting classification of all materials purchased or fabricated by the contractor or vendor and transferred to the contractee. This requirement applies to a contractee regardless of whether the contractee holds a direct payment permit under section 5739.031 [5739.02.1] of the Revised Code or provides to the contractor or vendor an exemption certificate as provided under this section.

For the purposes of the taxes levied by this chapter and Chapter 5741. of the Revised Code, the contractor or vendor may in good faith rely on the contractee's certification. Notwithstanding division (B) of section 5739.01 of the Revised Code, if the tax commissioner determines that certain property certified by the contractee as tangible personal property pursuant to this division is, in fact, real property, the contractee shall be considered to be the consumer of all materials so incorporated into that real property and shall be liable for the applicable tax, and the contractor or vendor shall be excused from any liability on those materials.

If a contractee fails to provide such certification upon the request of the contractor or vendor, the contractor or vendor shall comply with the provisions of this chapter and Chapter 5741. of the Revised Code without the certification. If the tax commissioner determines that such compliance has been performed in good faith and that certain property treated as tangible personal property by the contractor or vendor is, in fact, real property, the contractee shall be considered to be the consumer of all materials so incorporated into that real property and shall be liable for the applicable tax, and the construction contractor or vendor shall be excused from any liability on those materials.

This division does not apply to any contract or agreement where the tax commissioner determines as a fact that

a certification under this division was made solely on the decision or advice of the contractor or vendor.

(D) Notwithstanding division (B) of section 5739.01 of the Revised Code, whenever the total rate of tax imposed under this chapter is increased after the date after a construction contract is entered into, the contractee shall reimburse the construction contractor for any additional tax paid on tangible property consumed or services received pursuant to the contract.

(E) A vendor who files a petition for reassessment contesting the assessment of tax on sales for which the vendor obtained no valid exemption certificates and for which the vendor failed to establish that the sales were properly not subject to the tax during the one-hundred-twenty-day period allowed under division (B) of this section, may present to the tax commissioner additional evidence to prove that the sales were properly subject to a claim of exception or exemption. The vendor shall file such evidence within ninety days of the receipt by the vendor of the notice of assessment, except that, upon application and for reasonable cause, the period for submitting such evidence shall be extended thirty days.

The commissioner shall consider such additional evidence in reaching the final determination on the assessment and petition for reassessment.

(F) Whenever a vendor refunds the price, minus any separately stated delivery charge, of an item of tangible personal property on which the tax imposed under this chapter has been paid, the vendor shall also refund the amount of tax paid, minus the amount of tax attributable to the delivery charge.

**HISTORY:** GC § 5546-3; 115 v P.H. 306, § 3; 116 v P.H. 69; 116 v P.H. 323; Bureau of Code Revision, 10-1-53; 125 v 308 (Eff 10-13-53); 126 v 723; 128 v 421 (Eff 7-1-59); 129 v 582(976) (Eff 1-10-61); 129 v 1164 (Eff 1-1-62); 129 v 1336 (Eff 1-2-62); 132 v S 319 (Eff 12-9-67); 132 v S 350 (Eff 9-1-67); 132 v H 919 (Eff 12-12-67); 135 v S 544 (Eff 6-29-74); 139 v H 694 (Eff 11-15-81); 139 v S 550 (Eff 11-26-82); 139 v H 358 (Eff 3-7-83); 139 v H 358, § 3 (Eff 3-7-85); 140 v H 374 (Eff 9-20-84); 140 v H 374, § 3 (Eff 3-7-85); 140 v S 298 (Eff 9-20-84); 140 v S 298, § 3 (Eff 3-7-85); 140 v H 37 (Eff 6-22-84); 140 v H 37, § 3 (Eff 3-7-85); 140 v H 794 (Eff 7-6-84); 140 v H 794, § 3 (Eff 3-7-85); 141 v H 583 (Eff 2-20-86); 148 v H 612 (Eff 9-29-2000); 149 v S 143, Eff 7-1-2003; 150 v H 95, § 1, eff. 7-1-03; 150 v S 37, § 1, eff. 10-21-03; 151 v H 66, § 101.01, eff. 1-1-06; 151 v H 294, § 1, eff. 9-28-06; 152 v H 429, § 1, eff. 7-1-08.

The effective date is set by § 7 of 152 v H 429.

The effective date is set by § 612.27 of 151 v H 66.

The provisions of § 134.14 of H.B. 95 (150 v —) read as follows:

SECTION 134.14. That Section 3 of Am. Sub. S.B. 143 of the 124th General Assembly be amended to read as follows:

"Sec. 3. Sections 5739.03, 5739.12, 5741.02, and 5741.12, and division (1)(7) of section 5741.01 of the Revised Code, as amended by Am. Sub. S.B. 143 of the 124th General Assembly, and sections 306.73, 5703.05, 5739.04, 5739.06, 5741.05, and 5741.08 of the Revised Code, as enacted by Am. Sub. S.B. 143 of the 124th General Assembly, shall take effect July 1, 2003. Sections 5739.021, 5739.023, 5739.026, 5739.031, and 5739.033 of the Revised Code, as amended by Am. Sub. S.B. 143 of the 124th General Assembly, shall take effect January 1, 2004."

Section 5739.03 of the Revised Code is amended by [Am. Sub. H.B. 95 of the 125th General Assembly] and also by Am. Sub. S.B. 143 of the 124th General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment.

**Effect of amendments**

152 v H 429, effective July 1, 2008, rewrote (F).

151 v H 294, effective September 28, 2008, corrected internal references,

151 v H 66, effective January 1, 2008, rewrote (B).

### § 5739.07 Refunds to vendor or consumer.

(A) When, pursuant to this chapter, a vendor has paid taxes to the treasurer of state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner shall refund to the vendor the amount of taxes paid if the vendor has refunded to the consumer the full amount of taxes the consumer paid illegally or erroneously or if the vendor has illegally or erroneously billed the consumer but has not collected the taxes from the consumer.

(B) When, pursuant to this chapter, a consumer has paid taxes directly to the treasurer of state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, and the payment or assessment was illegal or erroneous, the commissioner shall refund to the consumer the full amount of illegal or erroneous taxes paid.

(C) The commissioner shall refund to the consumer taxes paid illegally or erroneously to a vendor only if:

(1) The commissioner has not refunded the tax to the vendor and the vendor has not refunded the tax to the consumer; or

(2) The consumer has received a refund from a manufacturer or other person, other than the vendor, of the full purchase price, but not the tax, paid to the vendor in settlement of a complaint by the consumer about the property or service purchased.

The commissioner may require the consumer to obtain or the vendor to provide a written statement confirming that the vendor has not refunded the tax to the consumer and has not filed an application for refund of the tax with the commissioner.

(D) An application for refund shall be filed with the tax commissioner on the form prescribed by the commissioner within four years from the date of the illegal or erroneous payment of the tax, unless the vendor or consumer waives the time limitation under division (A)(3) of section 5739.16 of the Revised Code. If the time limitation is waived, the refund application period shall be extended for the same period as the waiver.

(E) On the filing of an application for a refund, the 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 that amount to the director of budget and management and the treasurer of state for payment from the tax refund fund created by 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.

(F) When a refund is granted under this section, it shall include interest thereon as provided by section 5739.132 [5739.13.2] of the Revised Code.

**HISTORY:** 149 v S 200, Eff 9-8-2002.

Analogous to former RC § 5739.07 (GC § 5548-8; 115 v P111, 306, § 3; 116 v 77; 118 v 186; 116 v P111, 69; 116 v P111, 323; 124 v 147; Bureau of Code Revision, 10-1-53; 125 v 440; 128 v 421; 129 v 1164; 131 v 1379; 132 v H 919; 135 v H 201; 135 v H 258; 135 v S 544; 136 v H 1; 137 v S 221; 139 v H 1; 141 v H 201; 141 v H 583; 142 v H 274; 144 v S 358; 147 v H 213; 149 v H 94), repealed 149 v S 200, § 2, eff 9-8-2002.

#### Cross-References to Related Sections

Penalties, RC § 5739.99.

Interest on unpaid tax or refund, RC § 5739.13.2.

Partial refund for providers of electronic information services,

RC § 5739.07.1.

Postmark as evidence of timely filing of tax refund application,

RC § 5703.05.3.

**[§ 5739.07.1] § 5739.071 Partial refund for providers of electronic information services.**

(A) The tax commissioner shall refund to a provider of electronic information services twenty-five per cent of the tax it pays pursuant to this chapter or Chapter 5741, of the Revised Code on purchases made on or after July 1, 1993, of computers, computer peripherals, software, telecommunications equipment, and similar tangible personal property, primarily used to acquire, process, or store information for use by business customers or to transmit or disseminate such information to such customers, the services of installing or repairing such property, and agreements to repair or maintain such property. Applications for a refund shall be made in the same manner and subject to the same time limitations as provided in sections 5739.07 and 5741.10 of the Revised Code.

(B) An electronic information service provider that maintains direct payment authority under section 5739.031 [5739.03.1] of the Revised Code may list on the return and pay tax on seventy-five per cent of the price of equipment, services, and agreements described under division (A) of this section in lieu of seeking a refund as provided in that division.

**HISTORY:** 145 v H 152, Eff 7-1-93.

**Not analogous to former RC § 5739.07.1 (129 v 1164; 130 v 1356), repealed 136 v H 1, § 2, eff 6-13-75.**

**[§ 5739.13.2] § 5739.132 Interest on unpaid tax or refund.**

(A) If a tax payment originally due under this chapter or Chapter 5741, of the Revised Code on or after January 1, 1998, is not paid on or before the day the tax is required to be paid, interest shall accrue on the unpaid tax at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax was required to be paid until the tax is paid or until the day an assessment is issued under section 5739.13 or 5739.15 of the Revised Code, whichever occurs first. Interest shall be paid in the same manner as the tax, and may be collected by assessment.

(B) For tax payments due prior to January 1, 1998, interest shall be allowed and paid upon any refund granted in respect to the payment of an illegal or erroneous assessment issued by the department for the tax imposed under this chapter or Chapter 5741, of the Revised Code from the date of the overpayment. For tax payments due on or after January 1, 1998, interest shall be allowed and paid on any refund granted pursuant to section 5739.07 or 5741.10 of the Revised Code from the date of the overpayment. The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code.

**HISTORY:** 135 v. H 258 (EFF 7-22-74); 139 v. S 530 (EFF 6-25-82); 147 v. H 215, EFF 9-29-97.

The effective date is set by section 222 of HB 215.

**§ 5741.02 Levy of tax; rate; exemptions.**

(A)(1) For the use of the general revenue fund of the state, an excise tax is hereby levied on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided. The tax shall be collected as provided in section 5739.023 [5739.02.5] of the Revised Code, provided that on and after July 1, 2003, and on or before June 30, 2005, the rate of the tax shall be six per cent. On and after July

1, 2005, the rate of the tax shall be five and one-half per cent.

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

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

(B) Each consumer, storing, using, or otherwise consuming in this state tangible personal property or realizing in this state the benefit of any service provided, shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state; provided, that the consumer shall be relieved from further liability for the tax if the tax has been paid to a seller in accordance with section 5741.04 of the Revised Code or prepaid by the seller in accordance with section 5741.06 of the Revised Code.

(C) The tax does not apply to the storage, use, or consumption in this state of the following described tangible personal property or services, nor to the storage, use, or consumption or benefit in this state of tangible personal property or services purchased under the following described circumstances:

(1) When the sale of property or service in this state is subject to the excise tax imposed by sections 5739.01 to 5739.31 of the Revised Code, provided said tax has been paid;

(2) Except as provided in division (D) of this section, tangible personal property or services, the acquisition of which, if made in Ohio, would be a sale not subject to the tax imposed by sections 5739.01 to 5739.31 of the Revised Code;

(3) Property or services, the storage, use, or other consumption of or benefit from which this state is prohibited from taxing by the Constitution of the United States, laws of the United States, or the Constitution of this state. This exemption shall not exempt from the application of the tax imposed by this section the storage, use, or consumption of tangible personal property that was purchased in interstate commerce, but that has come to rest

in this state, provided that fuel to be used or transported in carrying on interstate commerce that is stopped within this state pending transfer from one conveyance to another is exempt from the excise tax imposed by this section and section 5739.02 of the Revised Code;

(4) Transient use of tangible personal property in this state by a nonresident tourist or vacationer, or a nonbusiness use within this state by a nonresident of this state, if the property so used was purchased outside this state for use outside this state and is not required to be registered or licensed under the laws of this state;

(5) Tangible personal property or services rendered, upon which taxes have been paid to another jurisdiction to the extent of the amount of the tax paid to such other jurisdiction. Where the amount of the tax imposed by this section and imposed pursuant to section 5741.021 [5741.02.1], 5741.022 [5741.02.2], or 5741.023 [5741.02.3] of the Revised Code exceeds the amount paid to another jurisdiction, the difference shall be allocated between the tax imposed by this section and any tax imposed by a county or a transit authority pursuant to section 5741.021 [5741.02.1], 5741.022 [5741.02.2], or 5741.023 [5741.02.3] of the Revised Code, in proportion to the respective rates of such taxes.

As used in this subdivision, "taxes paid to another jurisdiction" means the total amount of retail sales or use tax or similar tax based upon the sale, purchase, or use of tangible personal property or services rendered legally, levied by and paid to another state or political subdivision thereof, or to the District of Columbia, where the payment of such tax does not entitle the taxpayer to any refund or credit for such payment.

(6) The transfer of a used manufactured home or used mobile home, as defined by section 5739.0210 [5739.02.10] of the Revised Code, made on or after January 1, 2000;

(7) Drugs that are or are intended to be distributed free of charge to a practitioner licensed to prescribe, dispense, and administer drugs to a human being in the course of a professional practice and that by law may be dispensed only by or upon the order of such a practitioner.

(8) Computer equipment and related software leased from a lessor located outside this state and initially received in this state on behalf of the consumer by a third party that will retain possession of such property for not more than ninety days and that will, within that ninety-day period, deliver such property to the consumer at a location outside this state. Division (C)(8) of this section does not provide exemption from taxation for any otherwise taxable charges associated with such property while it is in this state or for any subsequent storage, use, or consumption of such property in this state by or on behalf of the consumer.

(9) Tangible personal property held for sale by a person but not for that person's own use and donated by that person, without charge or other compensation, to either of the following:

(a) A nonprofit organization operated exclusively for charitable purposes in this state, no part of the net income of which inures to the benefit of any private shareholder or individual and no substantial part of the activities of which consists of carrying on propaganda or otherwise attempting to influence legislation; or

(b) This state or any political subdivision of this state, but only if donated for exclusively public purposes.

For the purposes of division (C)(10) of this section, "charitable purposes" has the same meaning as in division (B)(12) of section 5739.02 of the Revised Code.

(D) The tax applies to the storage, use, or other consumption in this state of tangible personal property or services, the acquisition of which at the time of sale was exempted under division (E) of section 5739.01 of the Revised Code from the tax imposed by section 5739.02 of the Revised Code, but which has subsequently been temporarily or permanently stored, used, or otherwise consumed in a taxable manner.

(E)(1)(a) If any transaction is claimed to be exempt under division (E) of section 5739.01 of the Revised Code or under section 5739.02 of the Revised Code, with the exception of divisions (B)(1) to (11) or (28) of section 5739.02 of the Revised Code, the consumer shall provide to the seller, and the seller shall obtain from the consumer, a certificate specifying the reason that the transaction is not subject to the tax. The certificate shall be in such form, and shall be provided either in a hard copy form or electronic form, as the tax commissioner prescribes.

(b) A seller that obtains a fully completed exemption certificate from a consumer is relieved of liability for collecting and remitting tax on any sale covered by that certificate. If it is determined the exemption was improperly claimed, the consumer shall be liable for any tax due on that sale under this chapter. Relief under this division from liability does not apply to any of the following:

(i) A seller that fraudulently fails to collect tax;

(ii) A seller that solicits consumers to participate in the unlawful claim of an exemption;

(iii) A seller that accepts an exemption certificate from a consumer that claims an exemption based on who purchases or who sells property or a service, when the subject of the transaction sought to be covered by the exemption certificate is actually received by the consumer at a location operated by the seller in this state, and this state has posted to its web site an exemption certificate form that clearly and affirmatively indicates that the claimed exemption is not available in this state;

(iv) A seller that accepts an exemption certificate from a consumer who claims a multiple points of use exemption under division (D) of section 5739.033 [5739.03.3] of the Revised Code, if the item purchased is tangible personal property, other than prewritten computer software.

(2) The seller shall maintain records, including exemption certificates, of all sales on which a consumer has claimed an exemption, and provide them to the tax commissioner on request.

(3) If no certificate is provided or obtained within ninety days after the date on which the transaction is consummated, it shall be presumed that the tax applies. Failure to have so provided or obtained a certificate shall not preclude a seller, within one hundred twenty days after the tax commissioner gives written notice of intent to levy an assessment, from either establishing that the transaction is not subject to the tax, or obtaining, in good faith, a fully completed exemption certificate.

(4) If a transaction is claimed to be exempt under division (B)(13) of section 5739.02 of the Revised Code, the contractor shall obtain certification of the claimed exemption from the contractee. This certification shall be in addition to an exemption certificate provided by the contractor to the seller. A contractee that provides a certification under this division shall be deemed to be the

consumer of all items purchased by the contractor under the claim of exemption, if it is subsequently determined that the exemption is not properly claimed. The certification shall be in such form as the tax commissioner prescribes.

(F) A seller who files a petition for reassessment contesting the assessment of tax on transactions for which the seller obtained no valid exemption certificates, and for which the seller failed to establish that the transactions were not subject to the tax during the one-hundred-twenty-day period allowed under division (E) of this section, may present to the tax commissioner additional evidence to prove that the transactions were exempt. The seller shall file such evidence within ninety days of the receipt by the seller of the notice of assessment, except that, upon application and for reasonable cause, the tax commissioner may extend the period for submitting such evidence thirty days.

(G) For the purpose of the proper administration of sections 5741.01 to 5741.22 of the Revised Code, and to prevent the evasion of the tax hereby levied, it shall be presumed that any use, storage, or other consumption of tangible personal property in this state is subject to the tax until the contrary is established.

(H) The tax collected by the seller from the consumer under this chapter is not part of the price, but is a tax collection for the benefit of the state, and of counties levying an additional use tax pursuant to section 5741.021 [5741.02.1] or 5741.023 [5741.02.3] of the Revised Code and of transit authorities levying an additional use tax pursuant to section 5741.022 [5741.02.2] of the Revised Code. Except for the discount authorized under section 5741.12 of the Revised Code and the effects of any rounding pursuant to section 5703.055 [5703.05.5] of the Revised Code, no person other than the state or such a county or transit authority shall derive any benefit from the collection of such tax.

**HISTORY:** GC § 5546-26; 116 v P.H. 101, § 2; 116 v P.H. 346; 118 v 46; 122 v 909; Bureau of Code Revision, 10-1-53; 128 v 421(437) (Eff. 7-1-59); 129 v 1164(1177) (Eff. 1-1-62); 132 v S 350 (Eff. 9-1-67); 134 v H 439 (Eff. 12-10-71); 135 v S 544 (Eff. 6-29-74); 139 v H 694 (Eff. 11-15-81); 141 v H 583 (Eff. 2-20-86); 144 v H 298 (Eff. 8-1-91); 147 v S 142 (Eff. 3-30-99); 148 v H 163 (Eff. 3-31-99); 148 v H 612, § 1 (Eff. 9-29-2000); 148 v H 283 (Eff. 7-1-2001); 148 v H 612, § 3 (Eff. 7-1-2001); 149 v S 143, Eff. 7-1-2003; 150 v S 47, § 1, eff. 6-12-03; 150 v S 47, § 3, eff. 7-1-03; 150 v H 98, § 1, eff. 6-26-03; 150 v S 37, § 1, eff. 10-21-03; 151 v H 66, § 101.01, eff. 6-30-05, 1-1-06; 151 v S 269, § 1, eff. 9-21-06; 151 v S 269, § 1, eff. 9-21-06; 151 v H 294, § 1, eff. 9-28-06; 152 v H 119, § 101.01, eff. 6-30-07.

The effective date is set by § 818.03 of 152 v H 119.

The provisions of § 824.03 of 152 v H 119 read in part as follows:

SECTION 824.03. The General Assembly, applying the principle stated in division (B) of section 1.52 of the Revised Code that amendments are to be harmonized if reasonably capable of simultaneous operation, finds that the following sections, presented in this act as composites of the sections as amended by the acts indicated, are the resulting versions of the sections in effect prior to the effective date of the sections as presented in this act:

Section 5741.02 of the Revised Code as amended by both Sub. H.B. 294 and Am. Sub. S.B. 269 of the 126th General Assembly.

The finding in this section takes effect at the same time as the section referenced in the finding takes effect.

The effective date is set by § 612.69.12 of 151 v H 66.

The effective date is set by section 5 of S.B. 47 (150 v —).

The provisions of § 10 of S.B. 47 (150 v —) read as follows:

SECTION 10. The amendments to sections 5739.021, 5739.023, and 5739.026 of the Revised Code by Am. Sub. S.B. 143 of the 124th General Assembly apply to levies proposed by a resolution adopted on or after January 1, 2004, and do not apply to levies proposed by a resolution adopted before that date.

The provisions of § 11 of S.B. 47 (150 v —) read as follows:

SECTION 11. Sections 6, 7, 8, and 9 of this act intend to delay the scheduled July 1, 2003, effective date of sections 5739.021, 5739.023, 5739.026, 5739.031, and 5739.033 of the Revised Code until January 1, 2004.

The provisions of § 12 of S.B. 47 (150 v —) read as follows:

SECTION 12. This act is hereby declared to be an emergency measure necessary for the immediate preservation of the public peace, health, and safety. The reasons for such necessity are that active duty military personnel may face real economic hardships while serving their country and urgently need the financial relief provided by the real property and manufactured home tax extensions authorized by this act. Therefore, this act shall go into immediate effect.

The provisions of § 134.14 of H.B. 95 (150 v —) read as follows:

SECTION 134.14. That Section 3 of Am. Sub. S.B. 143 of the 124th General Assembly be amended to read as follows:

"Sec. 3. Sections 5739.03, 5739.12, 5741.02, and 5741.12, and division (1)(7) of section 5741.01 of the Revised Code, as amended by Am. Sub. S.B. 143 of the 124th General Assembly, and sections 306.73, 5703.65, 5739.04, 5739.06, 5741.05, and 5741.08 of the Revised Code, as enacted by Am. Sub. S.B. 143 of the 124th General Assembly, shall take effect July 1, 2003. Sections 5739.021, 5739.023, 5739.026, 5739.031, and 5739.033 of the Revised Code, as amended by Am. Sub. S.B. 143 of the 124th General Assembly, shall take effect January 1, 2004."

The provisions of § 158, H.B. 95 (150 v —), read as follows:

SECTION 158. (A) The amendment by this act of sections 165.09, 902.11, 4981.20, 5703.052, 5739.01, 5739.011, 5739.012, 5739.02, 5739.025, 5739.03, 5739.032, 5739.033 (in Section 1 of this act), 5739.12, 5739.121, 5739.122, 5739.17, 5739.21, 5741.01, 5741.02, and 5741.121 of the Revised Code apply on and after July 1, 2003.

#### Effect of amendments

152 v H 119, effective June 30, 2007, deleted (C)(9), pertaining to cigarettes that have a wholesale value of three hundred dollars or less, and redesignated the remaining subdivisions accordingly.

151 v H 294, effective September 28, 2006, corrected internal references and made minor stylistic changes.

151 v S 269, effective September 21, 2006, added (C)(10); and made minor stylistic changes.

151 v H 66, effective June 30, 2005, except the amendments to (E), effective January 1, 2006, inserted "and one-half" in (A)(1); added (C)(9); and rewrote (E).

**§ 5741.10 Refunds.**

Refunds of taxes paid pursuant to this chapter by a seller or consumer illegally or erroneously shall be made in the same manner as refunds are made to a vendor or consumer under section 5739.07 of the Revised Code.

**HISTORY:** 149 v S 200. Eff 9-6-2002.

Analogous to former RC § 5741.10 (CC § 5546-32; 116 v PtII, 101, § 8; 116 v PtII, 346; Bureau of Code Revision, 10-1-53; 125 v 440; 127 v 150; 129 v 1164(1179); 131 v 1386; 132 v H 919; 135 v H 261; 135 v H 258; 135 v S 544; 136 v H 1; 137 v S 221; 141 v H 201; 141 v H 583; 144 v S 358; 147 v H 215; 149 v H 94), repealed 149 v S 200, § 2, eff 9-6-2002.

**§ 5739.07 Refunds to vendor or consumer.**

(A) The tax commissioner shall refund to vendors the amount of taxes paid illegally or erroneously or paid on any illegal or erroneous assessment if the vendor has not been reimbursed from the consumer. When the illegal or erroneous payment or assessment was not paid to a vendor but was paid by the consumer directly to the treasurer of state or an agent of the treasurer of state, the tax commissioner shall refund to the consumer. When a refund is granted for payment of an illegal or erroneous assessment issued by the department, the refund shall include interest as provided by section 5739.132 [5739.13.2] of the Revised Code.

(B) The tax commissioner may make a refund to the consumer of taxes paid illegally or erroneously if the tax has not been refunded to the vendor and any of the following circumstances apply:

(1) The consumer is unable to receive a refund from the vendor because the vendor has ceased business;

(2) The vendor is unable to issue a refund because of bankruptcy or similar financial condition;

(3) The consumer receives a refund of the full price paid to the vendor from a manufacturer or other person, other than the vendor, as a settlement for a complaint by the consumer about the property or service purchased.

(C) Applications for refund shall be filed with the tax commissioner, on the form prescribed by the tax commissioner, within four years from the date of the illegal or erroneous payment of the tax, unless the vendor or consumer waives the time limitation under division (A)(3) of section 5739.16 of the Revised Code. If the time limitation is waived, the four-year refund limitation shall be extended for the same period of time as the waiver. On the filing of an application for refund, the commissioner shall determine the amount of refund due and certify that amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 [5703.05.2] of the Revised Code.

**HISTORY:** CC § 5846-8; 118 v PUL 308, § 8; 116 v 77; 116 v 498; 116 v PUL 69; 116 v PUL 323; 124 v 147; Bureau of Code Revision, 10-1-53; 125 v 440 (EFF 10-18-53); 128 v 421 (EFF 7-1-59); 129 v 1184 (EFF 1-1-63); 131 v 1379 (EFF 11-9-65); 133 v H 919 (EFF 12-12-67); 135 v H 201 (EFF 8-13-74); 135 v H 258 (EFF 7-22-74); 135 v S 344 (EFF 8-29-74); 136 v H 1 (EFF 8-13-75); 137 v S 281 (EFF 11-23-77); 139 v H 1 (EFF 8-5-81); 141 v H 201 (EFF 7-1-85); 141 v H 383 (EFF 2-20-86); 142 v H 274 (EFF 7-20-87); 144 v S 358 (EFF 1-15-93); 147 v H 815 (EFF 9-29-97).

The effective date is set by section 222 of HB 215.

**[§ 5739.07.1] § 5739.071 Partial refund for providers of electronic information services.**

(A) The tax commissioner shall refund to a provider of electronic information services twenty-five per cent of the tax it pays pursuant to this chapter or Chapter 5741, of the Revised Code on purchases made on or after July 1, 1993, of computers, computer peripherals, software, telecommunications equipment, and similar tangible personal property, primarily used to acquire, process, or store information for use by business customers or to transmit or disseminate such information to such customers, the services of installing or repairing such property, and agreements to repair or maintain such property. Applications for a refund shall be made in the same manner and subject to the same time limita-

tions as provided in sections 5739.07 and 5741.10 of the Revised Code.

(B) An electronic information service provider that maintains direct payment authority under section 5739.031 [5739.03.1] of the Revised Code may list on the return and pay tax on seventy-five per cent of the price of equipment, services, and agreements described under division (A) of this section in lieu of seeking a refund as provided in that division.

**HISTORY:** 145 v H 152. Eff 7-1-93.

*Not analogous to former RC § 5739.07.1 (129 v 1164; 130 v 1356), repealed 138 v H 1, § 2, eff 6-13-75.*

**[§ 5739.13.2] § 5739.132 Interest on unpaid tax or refund.**

(A) If a tax payment originally due under this chapter or Chapter 5741. of the Revised Code on or after January 1, 1998, is not paid on or before the day the tax is required to be paid, interest shall accrue on the unpaid tax at the rate per annum prescribed by section 5703.47 of the Revised Code from the day the tax was required to be paid until the tax is paid or until the day an assessment is issued under section 5739.13 or 5739.15 of the Revised Code, whichever occurs first. Interest shall be paid in the same manner as the tax, and may be collected by assessment.

(B) For tax payments due prior to January 1, 1998, interest shall be allowed and paid upon any refund granted in respect to the payment of an illegal or erroneous assessment issued by the department for the tax imposed under this chapter or Chapter 5741. of the Revised Code from the date of the overpayment. For tax payments due on or after January 1, 1998, interest shall be allowed and paid on any refund granted pursuant to section 5739.07 or 5741.10 of the Revised Code from the date of the overpayment. The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code.

**HISTORY:** 135 v H 259 (EF 7-22-74); 139 v S 530 (EF 6-25-83); 147 v H 215. EF 2-29-87.

The effective date is set by section 222 of HB 215.

See provisions, § 213 of HB 215 (147 v —) following RC § 5728.09.

**§ 5741.10 Refund to seller or consumer.**

The tax commissioner shall refund to sellers the amount of tax levied pursuant to section 5741.02, 5741.021 [5741.02.1], 5741.022 [5741.02.2], or 5741.023 [5741.02.3] of the Revised Code paid on any illegal or erroneous payment or assessment, where the seller has reimbursed the consumer. When such payment or assessment was not paid to a seller, but was paid directly to the treasurer of state, or the treasurer of state's agent, by the consumer, the treasurer of state shall make refund to the consumer. When such a refund is granted, it shall include interest thereon as provided by section 5739.132 [5739.13.2] of the Revised Code. Applications for refund shall be filed with the tax commissioner, on the form prescribed by the commissioner, within four years from the date of the illegal or erroneous payment of the tax except where the vendor or consumer waives the time limitation under division (C) of section 5741.16 of the Revised Code, in which case the four-year refund limitation shall be extended for the same period of time as the waiver. On filing such application, the commissioner shall determine the amount of refund due and shall certify such amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 [5703.05.2] of the Revised Code.

**HISTORY:** GC § 5646-32; 116 v P.H. 101, § 6; 116 v P.H. 346; *Bureau of Code Revision*, 10-1-53; 125 v 440 (EFF 10-18-53); 127 v 150 (EFF 9-7-57); 129 v 1164(1170) (EFF 1-1-62); 131 v 1386 (EFF 11-9-63); 132 v H 919 (EFF 12-12-67); 135 v H 261 (EFF 6-13-74); 135 v H 258 (EFF 7-22-74); 135 v S 344 (EFF 6-29-74); 136 v H 1 (EFF 6-13-75); 137 v S 221 (EFF 11-23-77); 141 v H 201 (EFF 7-1-85); 141 v H 583 (EFF 2-20-86); 144 v S 358 (EFF 1-15-93); 147 v H 215. EFF 6-30-97.

See provisions, § 213 of HB 215 (147 v —) following RC § 5729.09.

**§ 5739.07 Refund by tax commissioner; local tax refund fund created.**

The tax commissioner shall refund to vendors the amount of taxes paid illegally or erroneously or paid on any illegal or erroneous assessment where the vendor has not reimbursed himself from the consumer. When the illegal or erroneous payment or assessment was not paid to a vendor but was paid by the consumer directly to the treasurer of state, or his agent, he shall refund to the consumer. When a refund is granted for payment of an illegal or erroneous assessment issued by the department, the refund shall include interest as provided by section 5739.132 [5739.13.2] of the Revised Code. Applications for refund shall be filed with the tax commissioner, on the form prescribed by him, within four years from the date of the illegal or erroneous payment of the tax except where the vendor or consumer waives the time limitation under division (A)(3) of section 5739.16 of the Revised Code, in which case the four-year refund limitation shall be extended for the same period of time as the waiver. On the filing of an application for refund the commissioner shall determine the amount of refund due and certify that amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 [5703.05.2] of the Revised Code.

**HISTORY:** CC § 5546-8; 115 v PII, 306, § 8; 116 v 77; 116 v 486; 116 v PII, 69; 116 v PII, 323; 124 v 147; Bureau of Code Revision, 10-1-53; 125 v 440 (EFF 10-16-53); 126 v 421 (EFF 7-1-59); 129 v 1164 (EFF 1-1-62); 131 v 1379 (EFF 11-9-65); 132 v H 919 (EFF 12-12-67); 135 v H 261 (EFF 6-13-74); 135 v H 258 (EFF 7-22-74); 135 v S 544 (EFF 6-29-74); 136 v H 1 (EFF 6-13-75); 137 v S 221 (EFF 11-23-77); 139 v H 1 (EFF 8-5-81); 141 v H 201 (EFF 7-1-85); 141 v H 583 (EFF 2-20-86); 142 v H 274 (EFF 7-20-87); 144 v S 358. EFF 1-15-83.

**[§ 5739.07.1] § 5739.071 Partial refund for providers of electronic information services.**

(A) The tax commissioner shall refund to a provider of electronic information services twenty-five per cent of the tax it pays pursuant to this chapter or Chapter 5741, of the Revised Code on purchases made on or after July 1, 1993, of computers, computer peripherals, software, telecommunications equipment, and similar tangible personal property, primarily used to acquire, process, or store information for use by business customers or to transmit or disseminate such information to such customers, the services of installing or repairing such property, and agreements to repair or maintain such property. Applications for a refund shall be made in the same manner and subject to the same time limitations as provided in sections 5739.07 and 5741.10 of the Revised Code.

(B) An electronic information service provider that maintains direct payment authority under section 5739.031 [5739.03.1] of the Revised Code may list on the return and pay tax on seventy-five per cent of the price of equipment, services, and agreements described under division (A) of this section in lieu of seeking a refund as provided in that division.

**HISTORY:** 145 v H 152, ED 7-1-93.

*Not analogous to former RC § 5739.07.1 (129 v 1164; 130 v 1356), repealed 136 v H 1, § 2, eff 6-13-75.*

**[§ 5739.13.2] § 5739.132** Interest on unpaid tax; interest on refund for illegal or erroneous assessment.

(A) If the tax imposed by this chapter or Chapter 5741. of the Revised Code or any portion of such tax, as determined by the tax commissioner, is not paid on or before the thirtieth day after service of the notice of assessment as provided by section 5739.13 of the Revised Code, such unpaid amount of tax shall bear interest as of the thirty-first day after service of the notice of assessment to the date of payment. The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code. Such interest may be collected by assessment in the manner provided in section 5739.13 of the Revised Code. All interest collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by this chapter or Chapter 5741. of the Revised Code.

(B) Interest shall be allowed and paid upon any refund granted in respect to the payment of an illegal or erroneous assessment issued by the department for the tax imposed under this chapter or Chapter 5741. of the Revised Code from the date of the overpayment. The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code.

HISTORY: 135 v H 258 (Eff 7-22-74); 139 v S 330. Eff 6-25-82.

**§ 5741.10 Refund by tax commissioner.**

The tax commissioner shall refund to sellers the amount of tax levied pursuant to section 5741.02, 5741.021 [5741.02.1], 5741.022 [5741.02.2], or 5741.023 [5741.02.3] of the Revised Code paid on any illegal or erroneous payment or assessment, where the seller has reimbursed the consumer. When such payment or assessment was not paid to a seller, but was paid directly to the treasurer of state, or his agent, by the consumer, the treasurer of state shall make refund to the consumer. When such refund is granted for payment of an illegal or erroneous assessment issued by the tax commissioner, such refund shall include interest thereon as provided by section 5739.132 [5739.13.2] of the Revised Code. Applications for refund shall be filed with the tax commissioner, on the form prescribed by him, within four years from the date of the illegal or erroneous payment of the tax except where the vendor or consumer waives the time limitation under division (C) of section 5741.16 of the Revised Code, in which case the four-year refund limitation shall be extended for the same period of time as the waiver. On filing such application, the commissioner shall determine the amount of refund due and shall certify such amount to the director of

budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 [5703.05.2] of the Revised Code.

**HISTORY:** GC § 5546-32; 116 v P.H. 101, § 6; 116 v P.H. 346; Bureau of Code Revision, 10-1-53; 125 v 440 (Eff 10-16-53); 127 v 150 (Eff 9-7-57); 129 v 1164(1179) (Eff 1-1-62); 131 v 1386 (Eff 11-9-65); 132 v H 919 (Eff 12-12-67); 135 v H 261 (Eff 6-13-74); 135 v H 258 (Eff 7-22-74); 135 v S 544 (Eff 6-29-74); 136 v H 1 (Eff 6-13-75); 137 v S 221 (Eff 11-23-77); 141 v H 201 (Eff 7-1-85); 141 v H 583 (Eff 2-20-86); 144 v S 358. Eff 1-15-93.

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

(2) "Computer services" means:

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

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

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

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

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

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

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

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

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

(7) "Business" means the ongoing conduct of commercial, manufacturing, mining, agriculture, professional, service, or similar enterprise, whether or not the person or persons conducting such enterprise are for-profit or nonprofit entities and includes any activity engaged in by any person with the object of gain, benefit or advantage, either direct or indirect. Business does not include the activity of an individual in managing and investing the individual's own funds.

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

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

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

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

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

(b) The true object of the transaction is the receipt of personal or professional services to which the automatic data processing,

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

(A) As used in this rule:

(1) "Automatic data processing" means:

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

computer services, or electronic information services are merely incidental or supplemental if:

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

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

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

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

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

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

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

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

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

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

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

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

RC 119.032 rule review date(s) Exempt

### Cross References

RC 5703.05, Powers, duties, and functions of tax commissioner  
 RC 5739.01, Definitions  
 RC 5739.02, Levy of tax; purpose; rate; exemptions  
 RC 5739.071, Refunds to electronic information service providers  
 RC 5739.17, Retail sales license; application; fee; what constitutes retail establishment; transient and limited vendors  
 RC 5741.02, Levy of tax; rate; exemptions  
 RC 5741.17, Registration of sellers with tax commissioner

**Printed Version of  
Amended Substitute House Bill Number 215**

**Legislative Clerk's Notation**

Pursuant to H.J.R. No. 13 adopted by the House of Representatives on June 18, 1997 and the Senate on June 19, 1997, Am. Sub. H.B. No. 215 was hand enrolled as an emergency procedure in accordance with section 101.53 of the Revised Code. Said Act was signed by the Governor on June 30, 1997, and filed with the Secretary of State on June 30, 1997.

A printed version of Am. Sub. H.B. No. 215 was later prepared for the purpose of preparing session laws and public distribution. Under section 1.53 of the Revised Code, the version of the Act enrolled by hand prevails in the event of any conflict between it and the printed version.

It should also be noted that although the Governor's veto message of June 30, 1997, indicates that the Governor intended to veto language in Section 4301.43 found on pages 547 and 548 of the enrolled bill, due to an apparent error, this language was not boxed out and the Governor's signature and veto stamp does not appear on the section.



Attest:

Frederick E. Mills  
Legislative Clerk  
Ohio House of Representatives

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**Am. Sub. H. B. No. 215**  
**122nd General Assembly**

**Note:** Boxed section numbers indicate veto by Governor Voinovich  
**Note:** An asterisk (\*) after boxed section numbers indicate only a portion of that section was vetoed

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5733.066	850	5743.081	930	5747.45	994
5733.067	850	5743.082	932	5747.451	995
5733.068	852	5743.52	933	5747.452	999
5733.069	853	5743.56	934	5747.453	1000
5733.0611	859	5747.01	935	5747.98	1000
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Sec. 5739.07. (A) The tax commissioner shall refund to vendors the amount of taxes paid illegally or erroneously or paid on any illegal or erroneous assessment ~~where~~ IF the vendor has not BEEN reimbursed himself from the consumer. When the illegal or erroneous payment or assessment was not paid to a vendor but was paid by the consumer directly to the treasurer of state, ~~or his~~ AN agent OF THE TREASURER OF STATE, ~~he~~ THE TAX COMMISSIONER shall refund to the consumer. When a refund is granted for payment of an illegal or erroneous assessment issued by the department, the refund shall include interest as provided by section 5739.132 of the Revised Code. ~~Applications~~

(B) THE TAX COMMISSIONER MAY MAKE A REFUND TO THE CONSUMER OF TAXES PAID ILLEGALLY OR ERRONEOUSLY IF THE TAX HAS NOT BEEN REFUNDED TO THE VENDOR AND ANY OF THE FOLLOWING CIRCUMSTANCES APPLY:

(1) THE CONSUMER IS UNABLE TO RECEIVE A REFUND FROM THE VENDOR BECAUSE THE VENDOR HAS CEASED BUSINESS;

(2) THE VENDOR IS UNABLE TO ISSUE A REFUND BECAUSE OF BANKRUPTCY OR SIMILAR FINANCIAL CONDITION;

(3) THE CONSUMER RECEIVES A REFUND OF THE FULL PRICE PAID TO THE VENDOR FROM A MANUFACTURER OR OTHER PERSON, OTHER THAN THE VENDOR, AS A SETTLEMENT FOR A COMPLAINT BY THE CONSUMER ABOUT THE PROPERTY OR SERVICE PURCHASED.

(C) APPLICATIONS for refund shall be filed with the tax commissioner, on the form prescribed by ~~him~~ THE TAX COMMISSIONER, within four years from the date of the illegal or erroneous payment of the tax ~~except where~~, UNLESS the vendor or consumer waives the time limitation under division (A)(3) of section 5739.16 of the Revised Code, ~~in which case~~. IF THE TIME LIMITATION IS WAIVED, the four-year refund limitation shall be extended for the same period of time as the waiver. On the filing of an application for refund, the commissioner shall determine the amount of refund due and certify that amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code.

**Sec. 5739.132. (A) IF A TAX PAYMENT ORIGINALLY DUE UNDER THIS CHAPTER OR CHAPTER 5741. OF THE REVISED CODE ON OR AFTER JANUARY 1, 1998, IS NOT PAID ON OR BEFORE THE DAY THE TAX IS REQUIRED TO BE PAID, INTEREST SHALL ACCRUE ON THE UNPAID TAX AT THE RATE PER ANNUM PRESCRIBED BY SECTION 5703.47 OF THE REVISED CODE FROM THE DAY THE TAX WAS REQUIRED TO BE PAID UNTIL THE TAX IS PAID OR UNTIL THE DAY AN ASSESSMENT IS ISSUED UNDER SECTION 5739.13 OR 5739.15 OF THE REVISED CODE, WHICHEVER OCCURS FIRST. INTEREST SHALL BE PAID IN THE SAME MANNER AS THE TAX, AND MAY BE COLLECTED BY ASSESSMENT.**

~~If the tax imposed by this chapter or Chapter 5741. of the Revised Code or any portion of such tax, as determined by the tax commissioner, is not paid on or before the thirtieth day after service of the notice of assessment as provided by section 5730.13 of the Revised Code, such unpaid amount of tax shall bear interest as of the thirty-first day after service of the notice of assessment to the date of payment. The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code. Such interest may be collected by assessment in the manner provided in section 5730.13 of the Revised Code. All interest collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by this chapter or Chapter 5741. of the Revised Code.~~

**(B) Interest FOR TAX PAYMENTS DUE PRIOR TO JANUARY 1, 1998, INTEREST shall be allowed and paid upon any refund granted in respect to the payment of an illegal or erroneous assessment issued by the department for the tax imposed under this chapter or Chapter 5741. of the Revised Code from the date of the overpayment. FOR TAX PAYMENTS DUE ON OR AFTER JANUARY 1, 1998, INTEREST SHALL BE ALLOWED AND PAID ON ANY REFUND GRANTED PURSUANT TO SECTION 5739.07 OR 5741.10 OF THE REVISED CODE FROM THE DATE OF THE OVERPAYMENT. The interest shall be computed at the rate per annum prescribed by section 5703.47 of the Revised Code.**

Sec. 5741.10. The tax commissioner shall refund to sellers the amount of tax levied pursuant to section 5741.02, 5741.021, 5741.022, or 5741.023 of the Revised Code paid on any illegal or erroneous payment or assessment, where the seller has reimbursed the consumer. When such payment or assessment was not paid to a seller, but was paid directly to the treasurer of state, or ~~his~~ THE TREASURER OF STATE'S agent, by the consumer, the treasurer of state shall make refund to the consumer. When such A refund is granted ~~for payment of an illegal or erroneous assessment issued by the tax commissioner, such refund,~~ IT shall include interest thereon as provided by section 5739.132 of the Revised Code. Applications for refund shall be filed with the tax commissioner, on the form prescribed by ~~him~~ THE COMMISSIONER, within four years from the date of the illegal or erroneous payment of the tax except where the vendor or consumer waives the time limitation under division (C) of section 5741.16 of the Revised Code, in which case the four-year refund limitation shall be extended for the same period of time as the waiver. On filing such application, the commissioner shall determine the amount of refund due and shall certify such amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code.

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

*Robert M. Shapiro*

Director, Legislative Service Commission

Filed in the office of the Secretary of State at Columbus, Ohio, on the 30<sup>th</sup> day of June, A. D. 1997.

*Bob Taft*

Secretary of State.

File No. 37 Effective Date June 30, 1997. However in accordance with Sec. 222 through 232 of the Act certain codified and uncodified sections of Laws contained in the Act are effective September 29, 1997.

\* The following also have been designated in the left-hand margin as proper section numbers:

- 67.08
- 99.02
- 120

*Robert M. Shapiro*

Director, Legislative Service Commission

Am. Sub. H.B. 215  
122nd General Assembly

Section 102.02 of the Revised Code is amended by this act and also by Sub. H.B. 269 of the 122nd General Assembly. Section 121.04 of the Revised Code is amended by this act and also by Am. Sub. S.B. 87 of the 122nd General Assembly. Section 121.08 of the Revised Code is amended by this act and also by Am. Sub. H.B. 210 of the 122nd General Assembly. Sections 125.13, 127.16, 329.04, 3301.0719, 3317.10, 4117.01, 5101.02, 5101.58, 5153.161, 5153.162, and 5709.66 of the Revised Code are amended by this act and also by Sub. H.B. 408 of the 122nd General Assembly. Section 2151.355 of the Revised Code is amended by Section 7 of this act and also by Am. Sub. H.B. 1 of the 122nd General Assembly. Section 3113.33 of the Revised Code is amended by this act and also by Am. Sub. S.B. 1 of the 122nd General Assembly. Sections 5139.04, 5139.07, and 5139.43 of the Revised Code are amended by this act and also by Am. Sub. H.B. 1 of the 122nd General Assembly. Comparison of these amendments in pursuance of section 1.52 of the Revised Code discloses that they are not irreconcilable so that they are required by that section to be harmonized to give effect to each amendment.

  
\_\_\_\_\_  
Director, Legislative Service Commission

(124th General Assembly)  
(Amended Substitute House Bill Number 94)

# AN ACT

To amend sections 9.03, 9.06, 9.821, 9.822, 101.15,  
101.27, 101.30, 101.311, 101.34, 101.37, 101.72,  
101.73, 102.02, 102.03, 102.031, 102.06, 103.143,  
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147.06, 147.13, 147.14, 147.37, 147.371, 151.04,  
166.03, 169.01, 173.35, 173.40, 173.46, 173.47,  
175.03, 175.21, 175.22, 175.24, 179.02, 179.03,  
179.04, 181.51, 181.52, 181.54, 181.55, 181.56,  
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307.86, 313.091, 325.071, 329.04, 329.042,  
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901.43, 901.63, 901.81, 901.82, 917.07, 917.99,  
1309.40, 1309.401, 1309.402, 1309.42, 1329.01,  
1329.04, 1329.06, 1329.07, 1329.42, 1329.421,  
1329.45, 1329.56, 1329.58, 1329.60, 1329.601,  
1345.21, 1501.01, 1501.23, 1501.40, 1503.011,  
1507.01, 1509.06, 1509.071, 1509.08, 1509.11,  
1509.23, 1513.05, 1513.13, 1513.14, 1514.11,  
1517.05, 1517.06, 1517.07, 1521.04, 1531.35,  
1533.13, 1547.67, 1561.05, 1561.07, 1561.11,  
1561.12, 1561.13, 1561.14, 1561.15, 1561.16,

electronic funds transfer remits those taxes by some means other than by electronic funds transfer as prescribed by this section and the rules adopted by the treasurer of state, and the ~~treasurer tax commissioner~~ determines that such failure was not due to reasonable cause or was due to willful neglect, the ~~treasurer shall notify the tax commissioner of the failure to remit by electronic funds transfer and shall provide the commissioner with any information used in making that determination.~~ The tax commissioner may collect an additional charge by assessment in the manner prescribed by section 5739.13 of the Revised Code. The additional charge shall equal five per cent of the amount of the taxes required to be paid by electronic funds transfer, but shall not exceed five thousand dollars. Any additional charge assessed under this section is in addition to any other penalty or charge imposed under this chapter, and shall be considered as revenue arising from taxes imposed under this chapter. The tax commissioner may remit all or a portion of such a charge and may adopt rules governing such remission.

No additional charge shall be assessed under this division against a permit holder that has been notified of its obligation to remit taxes under this section and that remits its first two tax payments after such notification by some means other than electronic funds transfer. The additional charge may be assessed upon the remittance of any subsequent tax payment that the permit holder remits by some means other than electronic funds transfer.

Sec. 5739.07. (A) The tax commissioner shall refund to vendors the amount of taxes paid illegally or erroneously or paid on any illegal or erroneous assessment if the vendor has not been reimbursed from the consumer. When the illegal or erroneous payment or assessment was not paid to a vendor but was paid by the consumer directly to the treasurer of state or, an agent of the treasurer of state, ~~the tax commissioner, or an agent of the tax commissioner,~~ the tax commissioner shall refund to the consumer. When a refund is granted for payment of an illegal or erroneous assessment issued by the department, the refund shall include interest as provided by section 5739.132 of the Revised Code.

(B) The tax commissioner may make a refund to the consumer of taxes paid illegally or erroneously if the tax has not been refunded to the vendor and any of the following circumstances apply:

(1) The consumer is unable to receive a refund from the vendor because the vendor has ceased business;

(2) The vendor is unable to issue a refund because of bankruptcy

or similar financial condition;

(3) The consumer receives a refund of the full price paid to the vendor from a manufacturer or other person, other than the vendor, as a settlement for a complaint by the consumer about the property or service purchased.

(C) Applications for refund shall be filed with the tax commissioner, on the form prescribed by the tax commissioner, within four years from the date of the illegal or erroneous payment of the tax, unless the vendor or consumer waives the time limitation under division (A)(3) of section 5739.16 of the Revised Code. If the time limitation is waived, the four-year refund limitation shall be extended for the same period of time as the waiver. On the filing of an application for refund, the commissioner shall determine the amount of refund due and certify that amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code.

Sec. 5739.102. A person who is liable for a tax levied under section 5739.101 of the Revised Code shall file a return with the ~~treasurer of state~~ tax commissioner showing ~~his~~ the person's taxable gross receipts from sales described under division (B)(1) or (2) of that section. The tax commissioner shall prescribe the form of the return, and the six- or twelve-month reporting period. The person shall file the return on or before the last day of the month following the end of the reporting period prescribed by the commissioner, and shall include with the return payment of the tax for the period. The remittance shall be made payable to the treasurer of state.

Upon receipt of a return, ~~the treasurer of state~~ tax commissioner shall credit any money included with it to the resort area excise tax fund, which is hereby created, ~~and shall forward the return to the tax commissioner.~~ ~~The treasurer of state shall stamp or otherwise mark on the return the date it was received, and shall indicate on the return the amount of payment received with it.~~ Within forty-five days after the end of each month, the commissioner shall provide for the distribution of all money paid during that month into the resort area excise tax fund to the appropriate municipal corporations and townships, after first subtracting and crediting to the general revenue fund one per cent to cover the costs of administering the excise tax.

If a person liable for the tax fails to file a return or pay the tax as required under this section and the rules of the tax commissioner, ~~he~~ the person shall pay an additional charge of the greater of fifty dollars or ten per cent of the tax due for the return period. The

assessed maintains no place of business in this state and is not a resident of this state, the certified copy of the entry may be filed in the office of the clerk of the court of common pleas of Franklin county.

The clerk, immediately upon the filing of such entry, shall enter a judgment for the state against the party 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 state, county, and transit authority retail sales tax" or, if appropriate, "special judgments for resort area excise tax," and shall have the same effect as other judgments. Execution shall issue upon the judgment upon the request of the tax commissioner, and all laws applicable to sales on execution shall apply to sales made under the judgment except as otherwise provided in this chapter.

The portion of the assessment not paid within sixty days after the date 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 the assessment is paid. Interest shall be paid in the same manner as the tax and may be collected by issuing an assessment under this section.

(D) All money collected by the commissioner under this section shall be paid to the treasurer of state, and when paid shall be considered as revenue arising from the taxes imposed by or pursuant to sections 5739.01 to 5739.31 of the Revised Code.

Sec. 5739.18. On the first business day of each week, each county auditor shall make in triplicate a list showing the names of all vendors licensed in his ~~the auditor's~~ county during the preceding week pursuant to sections 5739.01 to 5739.31, ~~inclusive~~, of the Revised Code, and such other information as to each, available from the records in his ~~the auditor's~~ office, as the tax commissioner prescribes, and shall immediately certify one of such lists to the commissioner, one to the treasurer of state, and one to the county treasurer. The commissioner shall keep an alphabetical index of such licensees so certified to him ~~the commissioner~~ but he may delete therefrom the names of those persons whose licenses have been cancelled.

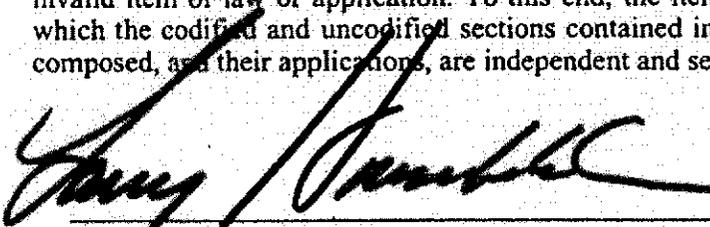
Sec. 5741.10. The tax commissioner shall refund to sellers the amount of tax levied pursuant to section 5741.02, 5741.021, 5741.022, or 5741.023 of the Revised Code paid on any illegal or erroneous payment or assessment, where the seller has reimbursed the consumer. When such payment or assessment was not paid to a

seller, but was paid ~~by the consumer~~ directly to the treasurer of state, or the treasurer of state's agent, ~~by the consumer commissioner, or the commissioner's agent,~~ the treasurer of state shall make refund to the consumer. When such a refund is granted, it shall include interest thereon as provided by section 5739.132 of the Revised Code. Applications for refund shall be filed with the tax commissioner, on the form prescribed by the commissioner, within four years from the date of the illegal or erroneous payment of the tax except where the vendor or consumer waives the time limitation under division (C) of section 5741.16 of the Revised Code, in which case the four-year refund limitation shall be extended for the same period of time as the waiver. On filing such application, the commissioner shall determine the amount of refund due and shall certify such amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code.

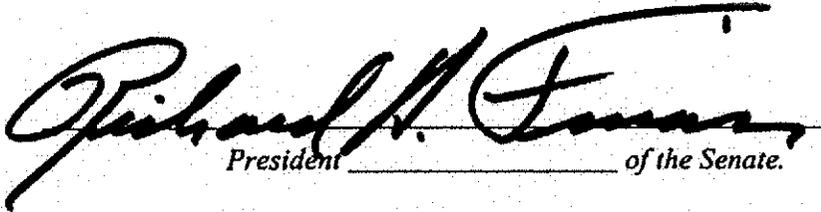
Sec. 5741.12. (A) Each seller required by section 5741.17 of the Revised Code to register with the tax commissioner, and any seller authorized by the commissioner to collect the tax imposed by or pursuant to section 5741.02, 5741.021, 5741.022, or 5741.023 of the Revised Code is subject to the same requirements and entitled to the same deductions and discount for prompt payments as are vendors under section 5739.12 of the Revised Code. The powers and duties of the commissioner and the treasurer of state with respect to returns and tax remittances under this section shall be identical with those prescribed in section 5739.12 of the Revised Code.

(B) Every person storing, using, or consuming tangible personal property or receiving the benefit of a service, the storage, use, consumption, or receipt of which is subject to the tax imposed by or pursuant to section 5741.02, 5741.021, 5741.022, or 5741.023 of the Revised Code, when such tax was not paid to a seller, shall, on or before the twenty-third day of each month, file with the ~~treasurer of state~~ ~~tax commissioner~~ a return for the preceding month in such form as is prescribed by the commissioner, showing such information as the commissioner deems necessary, and shall pay the tax shown on the return to be due. Remittance shall be made payable to the treasurer of state. The commissioner may require consumers to file returns and pay the tax at other than monthly intervals, if ~~he~~ ~~the commissioner~~ determines that such filing is necessary for the efficient administration of the tax. If the commissioner determines that a consumer's tax liability is not such as to merit monthly filing,

SECTION 251. If any item of law that constitutes the whole or part of a codified or uncodified section of law contained in this act, or if any application of any item of law that constitutes the whole or part of a codified or uncodified section of law contained in this act, is held invalid, the invalidity does not affect other items of law or applications of items of law that can be given effect without the invalid item of law or application. To this end, the items of law of which the codified and uncodified sections contained in this act are composed, and their applications, are independent and severable.



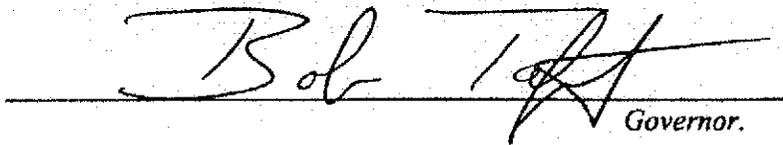
Speaker \_\_\_\_\_ of the House of Representatives.



President \_\_\_\_\_ of the Senate.

Passed May 30, 2001

Approved June 6, 2001



\_\_\_\_\_  
Governor.

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

*Robert M. Shapiro*

*Director, Legislative Service Commission.*

Filed in the office of the Secretary of State at Columbus, Ohio, on the 6th day of June, A. D. 2001.

*J. Kenneth Blackwell*

*Secretary of State.*

File No. 12

Effective Date 6/6/01; Cert sections effective on other dates.

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**manner, n. (and int.)**

DRAFT REVISION Sept. 2009

*Brit.* /ˈmænə/, *U.S.* /ˈmænər/ Forms: ME **manieir**, ME **maniere**, ME **manire**, ME **manur**, ME **manyer**, ME **manyere**, ME **maynere**, ME **moner**, ME **monere**, ME-15 **manar**, ME-15 **maneer**, ME-15 **maneere**, ME-15 **manere**, ME-15 **manier**, ME-15 **manyre**, ME-16 **maner**, ME-**manner**, 15 **manor**, 15 **manoure**, 16 **mannon**; Sc. pre-17 **mainer**, pre-17 **mainnar**, pre-17 **manar**, pre-17 **manare**, pre-17 **maneir**, pre-17 **maneire**, pre-17 **maner**, pre-17 **manere**, pre-17 **maneyr**, pre-17 **manieir**, pre-17 **manier**, pre-17 **manir**, pre-17 **mannon**, pre-17 **manyr**, pre-17 **mayner**, pre-17 **maynere**, pre-17 **mendir**, pre-17 **meneir**, pre-17 **mener**, pre-17 **menor**, pre-17 17 **mainer**, pre-17 17- **manner**, 18 **mainthir**, 18- **menner**. [*<* Anglo-Norman *manere*, *maner*, *maneire*, *maniere* *manner*, kind, conduct (compare Old French *maniere* (1119), French *manière*) *<* *manier*, *maneir*, *maner*, *manner* held in the hand, tractable (compare Old French *manier* held in the hand (c1140), skilful (c1155)) *<* classical Latin *manuarius* operated by hand *<* *manus* hand (see MANUS *n.*<sup>1</sup>) + *-arius* (compare *-ER* suffix<sup>2</sup>). With the Anglo-Norman and Old French noun compare Old Occitan *maneira* (c1180), *maniera* (13th cent.), Spanish *manera* (1209; 1152 as *maneira*), Portuguese *maneira* (1192), Italian *maniera* (a1257), and the post-classical Latin loan *maneries* kind, class, sort, form, mode (12th-14th centuries in British sources). With the Anglo-Norman and Old French adjective compare Old Occitan *manier* held in the hand (1218), Italian *maniero* easy to handle (first half of the 13th cent.), and the post-classical Latin loan *manerus* accustomed to being handled (13th cent. in British sources). Compare Anglo-Norman and Old French *manier* to handle (12th cent.), and MANAGE *v.* The Old French noun has a number of Germanic derivatives (chiefly in senses corresponding to those at branch II.), e.g. Old Frisian *manære*, Middle Dutch *maniere*, *meniere* (Dutch *manier*), Middle High German *maniere* (German *Manier*), Swedish *manér*, Danish *manér*.

Senses in each of the three main branches below are attested also for Old French, Middle French, French *manière* from the 12th cent. onwards. The sense 'kind or sort' (see branch I.) is well attested in Old French and Middle French (from c1150), although in modern French *sorte* or *genre* are more common in this sense. Plural use in the sense 'habits, conduct' (see branch II.) is attested from the late 12th cent.: in modern French *manières* is used in the sense 'social behaviour (as deemed good or

APP085

bad)', but *mæurs* is more usual in the sense 'social habits, customs', and *air*, *attitude*, or other terms in uses corresponding to sense 5. Use in senses corresponding to branch III. are attested early in Old French and persist in modern French (alongside similar use of *façon*).

The sense development has probably also been influenced considerably by classical Latin *modus* (especially in senses at branches I. and III., and in senses 15 and 16: compare *MODE n.*) and *mōs* (especially in senses at branch II.: compare *MORES n.*); the English word became a conventional translation of both Latin words at an early date.

Sense 8, which corresponds to Aristotle's use of  $\mu\omicron\theta\eta$ , is influenced by the use of French *mæurs* and Latin *mōrēs* in French and post-classical Latin versions of the *Poetics* (compare also classical Latin *mōrēs* in Horace *Ars Poetica* 156, influenced by Aristotle's *Poetics*).

With sense 12 compare Old French, Middle French, French *manière* style of architecture (1260), style of painting (1538), style of literary composition (1690); Italian *maniera* style of an artist, of a school (15th cent.)]

## I. A type, a kind.

1. A distinct type or kind (of person, thing, etc.). Modified by a determiner, numeral, or adjective and complemented by a noun phrase introduced by *of* (‡formerly often without *of*).

[Omission of *of* occurs very early in Middle English and is probably due to the fact that *manner* was used in the same way as the older synonym *kin* and succeeded to its syntax: see *KIN n.*<sup>1</sup> 6b. (French expressions such as *nul manere deceyte*, *nul manere drap* are attested in British sources of the 13th-15th centuries but probably reflect the influence of the English idiom.) Just as *kin* was frequently written as one word with a preceding determiner such as *all*, *many*, etc., so *all manner*, *no manner*, and *these manner* are found as single words in some Middle English and early modern English texts.]

a. Species, kind, or sort. Now *rare exc.* in ***what manner of*** —? (also ‡***what manner a*** —?), and as in senses 1b and 1d.

**a1225** *MS Lamb.* in R. Morris *Old Eng. Homilies* (1868) 1st Ser. 51  
Crabbe is an manere of fisce in þere sea. **c1300** *St. Brendan* (Laud) 719  
in C. Horstmann *Early S.-Eng. Legendary* (1887) 239 3wane ore louerd  
eche-manere men to him haueth i-drawe. **a1400** (**a1325**) *Cursor Mundi*  
(Fairf. 14) 6765 Cow or shepe hors or oþer maner of aȝt. **?a1425**  
*Mandeville's Trav.* (Egerton) (1889) Pref. 3 Whare dwelles many diuerse  
maners of folke. **c1450** (**c1385**) *CHAUCER Complaint of Mars* 116 She ne  
founde ne saugh no maner wyght. **a1470** *MALORY Morte Darthur* (Winch.  
Coll.) 985 The bonys be of such maner of kynde that who that handelyth  
hym..shall never be wery. **c1485** (1456) G. HAY *Bk. Law of Armys* (2005)  
12 He sett him jn ane othir maner fassoun to procede. **?c1500** J. BLOUNT

tr. N. Upton *Essent. Portions De Studio Militari* (1931) 26 What maner of wyse surete ys geven by sttyng to sygne or tyle. **1528** TYNDALE *Parable Wicked Mammon* 6 They fele no maner workynge of the spyryte. **1549** H. LATIMER *1st Serm. before Edward VI* (1869) 27 God prescrybid vnto them an order, howe the[y] shulde chose their kyng, and what manner a man he shoulde be. **1600** E. FAIRFAX tr. Tasso *Godfrey of Bulloigne* xvii. iii. 296 Come say (my muse) what manner times these weare. **1608** SHAKESPEARE *Richard II* iv. i. 286 These externall manners [**1623** manner] of laments. **a1616** SHAKESPEARE *Winter's Tale* (1623) iv. iii. 84 What manner of Fellow was hee that robb'd you? **1651** T. HOBBS *Leviathan* i. x. 46 Kings..gave divers manners of Scutchions, to such as went forth to the War. **1690** W. WALKER *Idiomatologia Anglo-Lat.* 289, I believe you can tell what a manner of father I have. **1710** H. PRIDEAUX *Original & Right Tithes* App.: Reasons for Bill 3 The people..laying claim to customary manners of Tithing [etc.]. **1798** S. T. COLERIDGE *Anc. Marinere* VII, in Wordsworth & S. T. Coleridge *Lyrical Ballads* 48 What manner man art thou? **1861** T. HUGHES *Tom Brown at Oxf.* i. v. 84 Tom..[was] much exercised in his mind as to what manner of man he had fallen upon. **1881** R. F. BURTON tr. L. de Camoens *Lusiad* i. 363 The 'Sebastianistas', as they were called, looked forward to a manner of Messiah. **1917** E. R. BURROUGHS *Princess of Mars* xx. 222 What manner of creature are you? **1991** D. R. KOONTZ *Cold Fire* i. iv. 131 She also wanted to know..what manner of creature had popped out of her nightmare and seized her.

**b.** In *sing.*, modified by a plural determiner such as *all, many, these*, etc., or a numeral: kinds, sorts. Now only in ***all manner of***. Cf. **KIND** *n.* 14b. *by all manner of means*: see **MEAN** *n.*<sup>3</sup> Phrases 5.

**c1230** (?a1200) *Ancrene Riwe* (Corpus Cambr.) (1962) 9 þer beoþ twa dalen to twa manere þe beoð of religiuse. **c1300** (?a1200) LA3AMON *Brut* (Otho) 894 Somme seiden elles mani manere spellen. **c1300** *St. Barnabus* (Laud) 82 in C. Horstmann *Early S.-Eng. Legendary* (1887) 29 Alle manere turmentz huy him duden. **a1450** *Castle of Love* (Bodl. Add.) (1967) 1595 The threttenyth day all maner men Shull dyen. **1485** *Act 1 Hen. VII* c. 10 §9 'To have and enjoie almaner seisours forfeitures and penaltees. **1525** LD. BERNERS tr. J. Froissart *Chron.* II. ccvi. [ccii.] 633 In many maner of wayes. **1526** *Bible* (Tyndale) Matt. x. 1 To heale all maner of sicknesses and all maner off deseases. **1542** N. UDALL tr. Erasmus *Apophthegmes* 142 These-manner monstres. **1556** in J. G. Nichols *Chron. Grey Friars* (1852) 79 Dyschargyd from the crowne and from almaner of possessions of the kyng their fader. **1612** L. ANDREWES 96 *Serm.: Nativity* (1629) vii. 54 Many manner waies. **a1613** S. HIERON *Wks.* (1614) I. 181 These manner of speches the Scripture vseth. **1644** P. HEYLYN *Stumbling-block* in *Tracts* (1681) 696, I shall endeavour to make [that]

good by two manner of proofs. **1664** J. PLAYFORD *Brief Introd. Skill Musick* (ed. 4) l. 88 There are three Sorts of Basse Viols, as there is three manner of ways in playing. **1732** W. LAW *Serious Call* (ed. 2) iii. 33 To practise all manner of righteousness. **1789** J. BENTHAM *Introd. Princ. Morals & Legisl.* xii. p. clix, The weak would..be oppressed and injured in all manner of ways, by the strong at home, and both together..by oppressors from abroad. **1856** N. HAWTHORNE *Eng. Note-bks.* 10 May (1879) II. 27 The English nose..disports itself in all manner of irregularity. **1873** T. W. HIGGINSON *Oldport Days* iv. 91 Jelly-fishes..shot through and through in the sun-light with all manner of blue and golden glistenings. **1901** B. T. WASHINGTON *Up from Slavery* xvi. 283 We were flooded with invitations to attend all manner of social functions. **1969** A. CARTER *Heroes & Villains* i. 16 Moon-daisies, buttercups and all manner of wild flowers hid in the foaming grass. **1988** L. APPIGNANESI *Simone de Beauvoir* iv. 73 All manner of food and basic commodities were in short supply.

†**c. in** (also **on, by**) **this** (also **what, any, such, etc.**) **manner (of) wise**: in this (what, any, such, etc.) way. Also (occas.) with omission of the initial preposition; also in negative constructions, as **in no manner of wise**, etc. *Obs.*

**a1375** *William of Palerne* 698 Metynt [read Metyng] miȝt it be non in no maner wise. **a1393** GOWER *Confessio Amantis* (Fairf.) l. 1086 Thurgh sleȝhte..It [sc. Troy] wan be such a maner wise. **1422** *Rolls of Parl.* IV. 176/1 The paiements in eny maner wyse maad. **c1440** (a1349) R. ROLLE *Eng. Prose Treat.* (1866) 14 One þis manerewyse þe more joy and blysse sall it hafe in heuene. **1499** in *Lett. Richard III & Henry VII* (Rolls) l. 132 Nor suffre hym in any maner of wise to abide. **c1510** T. MORE tr. G. F. Pico della Mirandola *Lyfe J. Picus* in *Wks.* 26 b<sup>v</sup>, We wote not howe soone, nor in what manerwise. **c1530** TYNDALE *Pathway Holy Script.* in *Wks.* (1573) 382/2 Christ standeth vs in double stede, and vs serueth two maner wise. **1588** R. PARKE tr. J. G. de Mendoza *Hist. Kingdome of China* 81 By way of phisicke they do permit..to comfort themselues with some conserues..But wine in no maner of wise.

**d. no** (also **any**) **manner (of)**: no (any) (person or thing) whatever. See also sense 1c.

*by no* (also *any*) *manner of means*: see *MEAN* n.<sup>3</sup> Phrases 2, *MEAN* n.<sup>3</sup> 2d.

**a1393** GOWER *Confessio Amantis* (Fairf.) III. 173 Sche..techeth every lif Withoute lawe positif, Of which sche takth nomaner charge. **1426** W. PASTON in *Paston Lett. & Papers* (2004) l. 6, I herde..no maner lykly ne credible euidence. **c1500** (?a1475) *Assembly of Gods* (1896) 600 No

maner of thyng can hym hurt. **1523** LD. BERNERS tr. J. Froissart *Cronycles* I. lxxv. 96 Ther abode alyue no maner a person. **1533** T. CRANMER *Let.* 23 July in *Remains* (1833) I. 47 When it shall be by any manner way void. **1542** N. UDALL tr. Erasmus *Apophthegmes* f. 4, In suche persons he saied that there was nomaner hope of recoverie. **1583** in D. Masson *Reg. Privy Council Scotl.* (1880) 1st Ser. III. 604 As pertening in na maner of way to the said George. **1606** G. W. tr. Justinus *Hist.* VII. 35 It had full scope and passage, without any manner interruption. **1687** W. PETTY *Polit. Arithm.* (1691) viii. 107 Which I wish were true, but find no manner of reason to believe. **1704** SWIFT *Disc. Mech. Operat. Spirit*, in *Tale of Tub* 285, I have had no manner of Time to digest it into Order. **1766** J. LIGHTHALL *Let.* 29 Nov. in P. L. White *Beekman Mercantile Papers* (1956) II. 961 My being Confined has put some things at Schenectady out of any manner of ways being properly settled unless I am their [*sic*] my self. **1800** DUKE OF WELLINGTON *Suppl. Dispatches* (1858) II. 162 No manner of duties or customs was allowed to be exacted from any article brought into camp. **1884** *Manch. Examiner* 13 May 5/2 There can be no manner of doubt as to the terms of his instructions. **1958** T. H. WHITE *Once & Future King* IV. vii. 605 There I shall answer you as a knight should, that hither I came for no manner of mal engine. **1978** *Daily Colonist* (Victoria, Brit. Columbia) 1 July 16/3 The sail flattened down, and the four of them that was below was held in just like rats in a trap and didn't have no manner of chance. **1994** T. CLANCY *Debt of Honor* xlvi. 753 He took his time preflighting the airliner, checking visually for fluid leaks, loose rivets, bad tires, any manner of irregularity.

‡2. In adjective phrases used predicatively. ***all manner***: of all kinds. ***two manner***: twofold. *Obs. rare.*

?**1500** in T. Wright & R. P. Wülcker *Anglo-Saxon & Old Eng. Vocab.* (1884) I. 767/9 *Hec musca*, a fflye, alle maner. **1534** R. WHITTINTON tr. Cicero *Thre Bks. Tullyes Offyces* I. sig. A.5, Every questyon of offyce is two maner [*L. duplex*].

II. Senses relating to the way in which a person, animal, etc., acts or behaves.

3. a. Customary mode of acting or behaviour; habitual practice; usage, custom, fashion. Now *arch.* exc. in phrases formed with *after* or *in*, esp. ***after*** (also ***in***) ***the manner of***. Cf. sense 10b.

‡***for the manner*** (quot. ?c1430): in accordance with the fashion (*obs.*).

**c1230** (?a1200) *Ancrene Riwe* (Corpus Cambr.) (1962) 7 For þi mot þeos changin hire misliche efter euchanes manere. **c1300** *Life & Martyrdom*

*Thomas Becket* (Harl. 2277) (1845) 19 For the pays of the londe he wolde holde also fawe, As Seint Thomas in his manere, holi churchelawe. **a1400** (a1325) *Cursor Mundi* (Vesp.) 4067 All luted him on þair maner. **c1400** (?c1390) *Sir Gawain & Green Knight* (1940) 90 Anoper maner meued him eke, þat he þurȝ nobelay had nomen. **?c1430** (c1400) *WYCLIF Eng. Wks.* (1880) 156 Where goode prestis traueilen faste to lerne goddis lawe, þei gon for þe manere to cyuyle or canon. **a1500** (a1400) *Awntyrs Arthure* (Douce) 498 þe lordes by-lyue hom to list ledes With many seriant of mace, as was þe manere. **c1510** *Gest Robyn Hode* l. 29 in F. J. Child *Eng. & Sc. Pop. Ballads* (1888) III. v. 57 A gode maner than had Robyn... Euery daye..Thre messis wolde he here. **a1533** *LD. BERNERS* tr. A. de Guevara *Golden Bk. M. Aurelius* (1546) Ll vij, Them that be of a meke and still maner. **1598** *W. PHILLIP* tr. J. H. van Linschoten *Disc. Voy. E. & W. Indies* l. xcii. 163/2 And now I will shew vnto you the manner that is vsed in the ships when they sayle home againe. **1611** *Bible* (A.V.) Jer. xxii. 21 This hath bin thy maner from thy youth, that thou obeyedst not my voice. **1674** A. CREMER tr. J. Scheffer *Hist. Lapland* 90, I shall add the figures of both Sexes habited after their manner. **1712** J. ADDISON *Spectator* No. 289. ¶9 The Dervise..laid down his Wallet, and spread his Carpet after the Manner of the Eastern Nations. **1775** J. ADAIR *Hist. Amer. Indians* 6 Holding this Indian razor between their fore-finger and thumb, they deplume themselves, after the manner of the Jewish novitiate priests. **1853** C. KINGSLEY *Hypatia* l. xiii. 277 She suddenly and silently, after the manner of mastiffs, sprang upon them. **1875** B. JOWETT tr. Plato *Dialogues* (ed. 2) l. 229 Here Ctesippus, as his manner was, burst into a roar of laughter. **1904** G. K. CHESTERTON *Napoleon of Notting Hill* l. i. 11 Taking their food slowly and continuously, after the manner of cows. **1956** N. ALGREN *Walk on Wild Side* l. 48 A flight of pelicans., the tail-bird supplanting the leader after the manner of pelicans, in a ceaselessly changing cycle. **1998** H. MANTEL *Giant, O'Brien* iv. 29 When they docked, and stood on dry land, Pybus fell about, and affected to be unable to walk except in the manner of a sailor.

**b. to the manner born:** (originally) familiar from birth with a given custom, role, etc.; (now usually) naturally suited for, or taking readily to, a given role or task.

**1603** SHAKESPEARE *Hamlet* l. iv. 16 Though I am Natue here, and to the maner [1623 manner] borne, It is a custome, more honourd in the breach, Then in the obseruance. **1792** S. WHYTE *Poems* (ed. 2) 25 Forbid it, justice, to reproach or scorn, Worth native there and to the manner born. **1874** T. HARDY *Far from Madding Crowd* l. ii. 16 If occasion demanded he could do or think a thing with as mercurial a dash as can the men of towns who are more to the manner born. **1893** *Times* 26 Apr. 9/5 Yankee

experts to the manner born. **1922** J. JOYCE *Ulysses* II. 287 Then did you, chivalrous Terence, hand forth, as to the manner born, that nectarous beverage. **1963** *Observer* 1 Dec. 21/1 John F. Kennedy was to the manner born. Nothing became him so much as the White House. **1996** *Guardian* 31 May (Review section) 21/1 They wear their knighthoods and dameries to the manner born.

#### 4. In *pl.*

†**a.** A person's habitual behaviour or conduct; morals. *Obs.*

**c1230** (?a1200) *Ancrene Riwe* (Corpus Cambr.) (1962) 112 Hwen a wis mon neowliche haueð wif ilead ham, hi nimeð ȝeme al softeliche of hire maneres. **c1300** *St. Kenelm* (Laud) 87 in C. Horstmann *Early S.-Eng. Legendary* (1887) 347 Borewenild..to alle guod-nesse..drouȝ; Quendrith, þe oþur soster, of hire maneres nas nouȝt, For heo tornede to feolonie. **a1382** *Prefatory Epist. St. Jerome in Bible* (Wycliffite, E.V.) (Bodl. 959) (1959) viii. 3 Thou hast here þe mast louyd broþer of þe Euseby..telling þe honeste of þi maners; þe dispising of þe world, þe feyþ of frenschep, þe loue of crist. **c1450** (1369) CHAUCER *Bk. Duchess* 1014 She used gladly to do wel; These were hir maners everydel. **a1500** (c1400) *Sir Cleges* (Adv.) 21 The pore pepull he wold releve And no man wold he greve, Meke of maners was hee. **1509** A. BARCLAY tr. S. Brant *Shyp of Fohys* f. cxviii, An olde prouerbe..Sayth that good lyfe and maners makyth man. **1535** *Bible* (Coverdale) 1 Cor. xv. D, Euell speakinges corruppe good maners. **1585** T. WASHINGTON tr. N. de Nicolay *Nauigations Turkie* I. xviii. 21 [He] changed his good maners and vertues into most vitious tyrannies. **1600** SHAKESPEARE *Merchant of Venice* II. iii. 19 Though I am a daughter to his blood I am not to his manners. **1641** J. JACKSON *True Evang. Temper* I. 6 The turning of fierce and brutall men..unto sweet..and sociable manners. **1757** JOHNSON *Rambler* No. 172. ¶1 Nothing has been longer observed, than that a change of fortune causes a change of manners. **1794** A. RADCLIFFE *Mysteries of Udolpho* I. i. 6 In the few ornaments of the apartments, that characterised the manners of its inhabitants. **1833** C. WILLIAMS *Fall River* v. 83 My conscience reproaches me for the harshness with which I spoke to her, when memory recalls the tears she shed, and her meek, forbearing manners.

**b.** The prevailing modes of life, the conditions of society; the customary rules of behaviour in a particular society, period, etc.

In some uses, not readily distinguishable from sense 4d.

?**a1425** (c1400) *Mandeville's Trav.* (Titus C. 16) (1919) 13, I haue hight ȝou to schewe ȝou a partie of custumes and maneres & dyuersitees of

contrees. **c1450** (c1350) *Alexander & Dindimus* 200 Michil ben 3our manerus fram oþur men varied. **1578** J. LYLY *Euphues* f. 62<sup>v</sup>, That he be..brought vp in such a place as is incorrupt both for y<sup>e</sup> aire & manners. **1605** W. CAMDEN *Remaines* I. 146 Many approoved customes, lawes, maners, fashions, and phrases have the English alwayes borrowed of their neighbours the French. **1616** SHAKESPEARE *Comedy of Errors* (1623) I. ii. 12 Ile view the manners of the towne, Peruse the traders, gaze vpon the buildings. **1718** LADY M. W. MONTAGU *Let.* 10 Mar. (1965) I. 385 Those..tales..are a real representation of the manners here. **1791** J. BOSWELL *Life Johnson* anno 1776 II. 32, I have always loved the simplicity of manners, and the spiritual-mindedness of the Quakers. **1841** I. D'ISRAELI *Amenities Lit.* (1867) 582 Of all our dramatists, Jonson..alone professed to study the..manners of the age. **1870** J. E. T. ROGERS *Hist. Gleanings* 2nd Ser. 199 Contemporary novels are good evidence of manners. **1937** L. C. KNIGHTS in *Scrutiny* 6 II. 122 It has been easy for recent critics..to turn the moral argument upside down, to find freedom of manners where Macaulay found licentiousness. **1985** B. ZEPHANIAH *Dread Affair* 105 We spoke of general manners And how one should treat a wife.

#### †c. Good social conditions or customs. *Obs.*

**1578** J. LYLY *Euphues* f. 61<sup>v</sup>, Wee shoulde not speake of manners or vertue, to those whose mindes are infected with vice. **1598** SHAKESPEARE *Henry IV, Pt. 1* III. i. 180 Defect of maners [1623 Manners], want of gouernment. **1807** WORDSWORTH *Poems* I. 140 Oh! raise us up, return to us again; And give us manners, virtue, freedom, power.

#### †d. Conduct in its moral aspect; morality; the moral code of a society. *Obs.*

**1589** T. NASHE *Anat. Absurditie* sig. Eiii<sup>v</sup>, Socrates who reduced all Philosophy vnto the manners, sayd, that thys was the greatest wisdom, to distinguish good & euill thinges. **1597** BACON *Ess. Ep. Ded.* sig. Aiii<sup>v</sup>, Nothing..contrarie or infectious to the state of Religion, or manners. **1644** MILTON *Areopagitica* 37 That also which is impious or evil absolutely either against faith or maners no law can possibly permit. **1666** J. TILLOTSON *Rule of Faith* I. iii, in *Wks.* (1742) IV. 571 Had they believed not the scriptures but something else to have been the rule of faith and manners. **1767** A. YOUNG *Farmer's Lett.* 184 It is manners alone which increase or decrease the number of people. **1776** GIBBON *Decline & Fall* I. ix. 231 Divorces were prohibited by manners rather than by laws.

#### 5. a. Outward bearing, deportment; a person's characteristic style of

attitude, gesture, or speech.

**c1300** *St. Thomas Becket* (Laud) 316 in C. Horstmann *Early S.-Eng. Legendary* (1887) 115 þo he was in is dignete al clanliche i-do, he chaungede euerrech-del is lif and is maneres al-so. **a1393** GOWER *Confessio Amantis* (Fairf.) vi. 1868 Sche tok good hiede of his manere, And wondreth why he dede so. **a1400** (a1325) *Cursor Mundi* (Vesp.) 24078 Soth in speche, in maner mild. **c1450** (c1375) CHAUCER *Anelida & Arcite* 249 Youre observaunces in so low manere. **1487** (a1380) J. BARBOUR *Bruce* (St. John's Cambr.) xi. 197 Suld I tell all thar effer, Thair countrynans and thar maner. **1534** T. MORE *Dialoge of Comfort* II, in *Wks.* 1200/1 Arrogant maner, high solayn solemne port, ouerlooking the poore in woorde and countenance. **1557** *Tottel's Misc.* (1870) 234, I see well..by thy lokes and thy manere,..That thou art stuffed full of wo. **1631** J. WEEVER *Anc. Funerall Monuments* 785 Coming, after a pompous and bragging manner. **1719-20** SWIFT *Let. to Young Gentleman* (1721) 5 Neither is it rare to observe among excellent..Divines, a certain ungratious Manner, or an unhappy Tone of Voice. **1768** O. GOLDSMITH *Good Natur'd Man* II. 28 He has got into such a rhodomontade manner all the morning. **1856** J. A. FROUDE *Hist. Eng.* (1858) II. vi. 109 Something in the boy's manner attracted the banker's interest. **1888** T. E. KEBBEL *Crabbe* v. 87 His manner to women seems to have been of the kind called philandering. **1924** *Ladies' Home Jrnl.* May 22/1 A vivid wrap of emerald and gold, framing a costume of lemon yellow splashed with bubbles of green and blue, must be worn with a manner *dégagé* and *distingué* and all that, if one is to get away with it. **1930** V. SACKVILLE-WEST *Edwardians* v. 213 His manner towards her was always full of consideration. **1991** *Observer* 17 Nov. (Colour Suppl.) 58/3 What she keeps a secret, behind the blare and brass and the punky vagaries of her manner, is her political cunning.

**b. spec.** A distinguished, dignified, or superior bearing or air. Now somewhat *arch*.

**1694** W. CONGREVE *Double-dealer* II. i. 15 *Cynt.* A Manner! what's that, Madam? *L. Froth.* Some distinguishing Quality, as for example, the *Belle-air* or *Brilliant* of Mr. Brisk..or something of his own, that should look a little *Jene-scay-quoysh*. **1773** O. GOLDSMITH *She stoops to Conquer* II. 39 We Country persons can have no manner at all.. But who can have a manner, that has never seen..such places where the Nobility chiefly resort? **1883** R. G. WHITE *Washington Adams* 83 Her manners were quite as good as Lady Boreham's; and her manner was as superior as that of the so-called Venus of Milo might be to that of the Venus of a burlesque. **1932** H. C. WYLD *Universal Dict. Eng. Lang.* 704/3 Distinguished, self-possessed bearing.."To have a great deal of manner; he had fair manners, but no

manner.' **1934** E. BOWEN *Cat Jumps* 269 She was barely nineteen, and could not..be expected to put up anything of 'a manner'.

## 6. In *pl.*

**a.** A person's social behaviour or habits, judged according to the degree of politeness or the degree of conformity to accepted standards of behaviour or propriety.

‡Formerly also in *sing.*

**a1375** *William of Palerne* 508 His maners were so menskful, a-mende hem miȝt none. **c1430** (c1386) CHAUCER *Legend Good Women* 1504 She..knew by hyre manere..That it were gentil men of gret degre. **1530** J. PALSGRAVE *Lesclarcissement* 415/1 Though thou do me good, it is not good maner to abrayde me therof. **1593** G. HARVEY *Pierces Supererog.* in *Wks.* (1884) II. 9 Some of vs are not so deuoid of good manner, but we..will euer be prest to interteine Curtesie with curtesie. **a1616** SHAKESPEARE *Othello* (1622) v. i. 96 These bloody accidents must excuse my manners, That so neglected you. **1617** F. MORYSON *Itinerary* I. 208 They hold it ill manners that one should touch the meat with his hand. **1663** W. DAVENANT *Siege of Rhodes* Ded., The ill manners and indiscretion of ordinary Dedicators. **1711** R. STEELE *Spectator* No. 53. ¶5 The Women lost their Wit, and the Men their good Manners. **1791** *Gentleman's Mag.* Jan. 20/2 The young minister would become a pattern to the manners as well as to the morals of his neighbourhood. **1855** MACAULAY *Hist. Eng.* III. xii. 168 His manners and conversation were those of a gentleman who had been bred in the most polite..of all Courts. **1891** 'Q' *Noughts & Crosses* 115 As for his manners,..at the age of four they were those of a prince. **1955** D. EDEN *Darling Clementine* viii. 78 Don't you know it's very bad manners to read other people's letters? **1986** G. JOSIPOVICI *Contre-jour* ii. 106 No one has manners like his. No one eats with the same combination of dignity and enjoyment.

**b. spec.** Polite or refined social behaviour or habits. ‡Formerly also in *sing.*

Also as *int.* (short for *mind your manners!* at *MIND* v. 8d).

*Marerez* in quot. c1400 is read by most modern editors as a transmission error for *manerez*: see *MARRER* n.

[**c1400** (?c1380) *Pearl* 382, I am bot mol and marerez mysse.] **a1425** (c1385) CHAUCER *Troilus & Criseyde* (1987) I. 880 Of good name and wisdom and maner She hath ynough, and ek of gentillesse. **c1450** (c1385) CHAUCER *Complaint of Mars* 294 Compleyneth her that euere hath had yow dere; Compleyneth Beaute, Freedom, and Manere. **a1500** *Eng. Conquest Ireland* (Rawl.) (1896) 23 We haue for vs..ayeyn har boldnys

and ouer-truste, mekenesse and maner. **1530** (c1425) ANDREW OF WYNTOUN *Oryg. Cron. Scotl.* (Royal) v. 2166 Hawtane in hys fere He past all mesure and manere. **1588** T. KYD tr. Tasso *Housholders Philos.* f. 9, That which for manner sake wee are wont to doe to others. **1608** SHAKESPEARE *King Lear* v. iii. 209 The time will not allow The complement that very manners vrges. **1610** *Bible* (Douay) II. *Ecclus.* xxxi. 17 Leauē of first, for maners sake, and exceede not. **1653** R. BROME *Queen & Concubine* III. vii. 61 in *Five New Playes* (1659), *Cur.* Wilt thou be a Scholar? *Andr.* After you is manners. *Cur.* Now by mine intellect, discreetly spoken. **1669** DRYDEN *Wild Gallant* III. i. 29 Have you no more manners then to overlook a man when he's a Writing? **1695** W. CONGREVE *Love for Love* I. i. 14 *Valentine.* Well Lady Galloper, how does Angelica? *Frail.* Angelica? Manners! **1768** H. BROOKE *Fool of Quality* III. xvi. 232 He pressed us so earnestly to dinner that we could not, in good manners, refuse him. **1828** SCOTT *Fair Maid of Perth* viii, in *Chron. Canongate* 2nd Ser. I. 218 Our manners would have taught us to tarry till your lordship had invited us. **1894** E. E. SOMERVILLE & 'M. ROSS' *Real Charlotte* I. ix. 130, I have always been taught that it was manners to wait till you're asked. **1921** J. GALSWORTHY *To Let* 144 We don't get many like him now, with everybody in such a hurry. The War was bad for manners, sir—it was bad for manners. **1960** M. SPARK *Ballad of Peckham Rye* vii. 153 Trevor threw half a crown backwards on to the counter. 'Manners,' the barmaid said as she rang the till. **1984** Q. CRISP *Manners from Heaven* vi. 63 Manners..are a means of getting what we want without appearing to be absolute swine.

**c. for manners:** in order to comply with socially acceptable rules of polite behaviour.

Freq. used with reference to the convention of leaving a small part of a dish or meal uneaten; cf. *manners-bit* n. at Compounds 1b. Also (occas.) with personification, as *for Miss Manners, for Mr Manners*.

**1608** R. ARMIN *Nest of Ninnies* sig. E, As our wantons doe at a feast, spare for manners in company but alone cram most greedily. **1661** T. FULLER *Worthies, Devon* in *Trans. Philol. Soc.* 1925-30 (1931) 133 The Pope not expecting so great a sum would be tendered him, and Raleigh not suspecting he would take all, but leave at least a morsel for manners. **1666** R. FANSHAWE *Hurtado de Mendoza's Querer por solo Querer* (1670) II. 62 'Twas for manners I forbore To take leave of her before. **1804** J. MATHER *Songs* (1862) lxii. 79 Tiger for manners retreated, And left the old virgin to risk it. **1847** R. B. PEAKE *Title Deeds* III. i. 43 Come, I have not decanted too close; always leave a little for manners. **1909** L. M. MONTGOMERY *Anne of Avonlea* xxvii. 318 Milty says when company comes his mother gives them cheese and cuts it herself..one little bit

apiece and one over for manners. **1960** L. R. BANKS *L-shaped Room* xii. 168, I toyed with the final concoction, just to prove I could if I wanted to, and that any I happened to leave was just for manners. **1968** in *Dict. Amer. Regional Eng.* (1996) III. 502/2 You 'leave something for Miss Manners'. **1990** J. BURCHILL *McLaren's Children in Sex & Sensibility* (1992) 97 It was amusing to watch how, suddenly, hipsters and Right-Ons became such finicky eaters, socially speaking, leaving everything that came about after 1945 on the side of their plate for Mr Manners.

**d.** Forms of behaviour exemplifying politeness or respect. Now only in **to make** (also **do**) **one's manners** (*regional*): to curtsy, bow; to perform conventional politenesses; to pay one's respects.

**a1616** SHAKESPEARE *Taming of Shrew* (1623) I. i. 240, I advise you vse your manners discreetly in all kind of companies. **a1616** SHAKESPEARE *All's Well that ends Well* (1623) IV. v. 88 Madam, I was thinking with what manners I might safely be admitted. **1701** D. DEFOE *True-born Englishman* ii. 34 But like our Modern Quakers of the Town, Expect your Manners, and return you none. **1725-6** W. PATTISON *Poet. Wks.* (1728) 31 Apollo beheld him, and call'd him aloud; Declaring his Manners, tho' perhaps not his Wit. **1824** in *Spirit of Public Jrnls.* (1825) 226 Having done their manners to his Worship, Mr. Dennis Macarthy proceeded to question his beloved. **1824** J. F. COOPER *Pilot* 239 The ship is to be so cluttered with she-cattle [*i.e.* women], that a man will be obligated to spend half his time in making his manners! **1825** J. NEAL *Brother Jonathan* I. 138 Declaring, with a bow, or a bob, that 'nobody needn't plague themselves..;' and—making their manners, once more—'and, whether or no' [etc.]. **1863** E. C. GASKELL *Sylvia's Lovers* I. ii. 30, I humbly make my manners, missus. **a1908** in M. Traynor *Eng. Dial. Donegal* (1953) 179 *To make one's manners*, to salute one's superiors.., to bow, curtsy. **1930** G. B. JOHNSON in B. A. Botkin *Folk-say* II. 357 When a Negro tells his child, on the approach of a white person, 'Make yo' manners', he is repeating a command used in England to remind children to curtsy or touch the hat in the presence of superiors. **1942** Z. N. HURSTON *Dust Tracks on Road* (1944) vi. 49 Death..entered the room. He bowed to Mama..She made her manners and left us. **1991** S. KING *Needful Things* 416 Ole Harry Samuels said you ast if I'd stop by this mornin if I had a chance... I'm just makin my manners to you, sir.

**7.** In *pl.* In extended use.

**†a.** The characteristic habits or behaviour of an animal. *Obs.*

**c1400** (c1378) LANGLAND *Piers Plowman* (Laud) B. v. 438, I am vnkynde

αειν his curteisye..For I haue and haue hadde som dele haukes maneres. **1500** (c1340) R. ROLLE *Psalter* (Univ. Oxf. 64) (1884) lxxvii. 50 Thai hafe hundis maners that thai will not honour thaire fadere and thaire modire and prelates. **1576** A. FLEMING in tr. J. Caius *Eng. Dogges To Rdr.* sig. Aiv, The sundry sortes of Englishe dogges he discouereth so euidently..their manners he openeth so manifestly. **1661** R. LOVELL *Πανζωορρικτολογία* Isagoge sig. C, As for their nature and manners, they [sc. serpents] have their poyson in the taile. **1796** J. MORSE *Amer. Universal Geogr.* (new ed.) I. 202 In his manners he [sc. the racoon] resembles the squirrel. **1831** J. RENNIE *Montagu's Ornithol. Dict.* (ed. 2) 534 The whimbrel has all the manners of the curlew. **1835** A. STEEDMAN *Wanderings S. Afr.* II. 114 In its habits and manners the Aard-wolf resembles the fox.

**b. Of a horse: action, trained behaviour.**

**1861** G. J. WHYTE-MELVILLE *Market Harborough* 20 There's some legs—there's some hocks and thighs!.. Carries his own head, too; and if you could see his manners! **1886** W. CARLETON *City Ballads* 79 'Flash' was a white-foot sorrel, an' run on Number Three: Not much stable manners—an average horse to see. **1977** *Horse & Hound* 14 Jan. 39/1 (*advt.*) Freda is a very gentle mare with super manners. **1997** *Farmers Guardian* 19 Sept. (Classified section) 24/4 (*advt.*) Attractive bay mare..Excellent temperament with manners to burn.

**c. The responsiveness, handling, and overall ease of control of a motor vehicle, sailing vessel, etc.**

**1963** A. BIRD & F. HUTTON-STOTT *Veteran Motor Car* 159 The result may be a hybrid but it is undeniably magnificent with better-than-100 m.p.h. performance and perfect road manners. **1985** *Dirt Bike* Mar. 24/1 They were..revalved to suit the 125, and have improved the front-end manners of the KTM to a remarkable degree. **1997** *Classic Boat* May (Boatman Suppl) (verso rear cover), Lean and easily driven, it has impeccable manners under oars.

**†8. In pl. *Literary Criticism*. The distinctive varieties of character and temperament portrayed in a work of literature; characterization. *Obs.***

**1674** T. RYMER in tr. R. Rapin *Reflections Aristotle's Treat. Poesie* 35 §xxv, After the Design or Fable, Aristotle places the Manners [Fr. *les mœurs*] for the second Part; he calls the Manners the cause of the action, for it is from these that a Man begins to act. **1695** DRYDEN in tr. C. A. Du Fresnoy *Art of Painting* Pref. p. xxvi, The Persons, and Action of a Farce

are all unnatural, and the Manners false, that is, inconsistent with the characters of Mankind. **1700** DRYDEN *Fables* Pref. sig. \*A2<sup>v</sup>, The Words are the Colouring of the Work, which...is last to be consider'd. The Design,..the Manners, and the Thoughts, are all before it. **1712** J. ADDISON *Spectator* No. 273. ¶1 These are what Aristotle means by the Fable and the Manners, or, as we generally call them in English, the Fable and the Characters. **1780** J. HARRIS *Philol. Enquiries* (1781) II. viii. 165 When the principal persons of any drama preserve such a consistency of conduct,..that..we conjecture what they will do hereafter, from what they have done already, such persons in poetry may be said to have manners, for by this, and this only, are poetic manners constituted.

### III. Senses relating to the way in which an action is performed.

**9. a.** The way in which something occurs or is performed; a method of action; a mode of procedure. Chiefly in phrases formed with *in* or (*arch.*) *after* (see also sense 3a); †formerly also with other prepositions, as *by*, *on*, *under*, and with an infinitive or adverb phrase.

Formerly freq. without determiner when modified by an adjective or adjectival phrase, as *in manner following*, etc.; see also sense 9b.

**c1300** (?a1200) LABAMON *Brut* (Otho) 18983 þes þinges weren forþriht in þilke manere idiht [**c1275** Calig. þus weoren idihte]. **c1325** (c1300) *Chron. Robert of Gloucester* (Calig. A. 11) 502 In þis manere iwis Corineus bi wan cornwaile to him. **1340** *Ayenbite* (1866) 51 Ine vif maneres me zenezep be mete and be drinke. **1393** GOWER *Confessio Amantis* (Fairf.) VI. 680 So as sche mai in good manere Hir honour and her name save. **c1450** in S. B. Meech *Early Treat. in Eng. conc. Lat. Gram.* (1935) 98 In how many maners schalt thou by gynne to make Latyn? **1500** (?c1450) *Merlin* (1899) 2 We yede and assaied hym in alle the maners that we cowden. **1500** (?a1475) *Assembly of Gods* (1896) 5 Musyng on a maner how that I myght make Reason & Sensualyte in oon to acorde. **1523** in *Gentleman's Mag.* (1785) II. 939/1, I..dyd christen the same childe under this manner. **1530** J. PALSGRAVE *Lesclarcissement* 750/1, I have no joy to be taken up of you on this maner. **1557** *Bible* (Geneva) Heb. i. 1 God spake at sondrie tymes & in diuers maners in the olde tyme to our fathers by the Prophetes. **1611** *Bible* (A.V.) Neh. vi. 4 They sent vnto me foure times,..and I answered them after the same maner. **1616** SHAKESPEARE *Julius Caesar* (1623) IV. ii. 241 For certaine she is dead, and by strange manner. **1647** C. COTTERELL & W. AYLESBURY tr. E. C. Davila *Hist. Civill Warres France* I. i. 43 They disposed the order of their Councel in manner as followeth. **1704** *London Post* 28-30 June 2/1 The Nurse and 2 Maids who lay in a Room backwards, were heard to Skrieche out a considerable time, in a most pitiful manner. **1766** O. GOLDSMITH *Vicar of Wakefield* I.

x. 94 We should go there in as proper a manner as possible; not altogether like the scrubs about us. **1807** G. ROLAND *Treat. Art Fencing* 96, I may, with this smart sudden jirk from my wrist, strike your blade in such a manner as will leave your body quite exposed. **1870** *Herald* (Melbourne) 4 Apr. 3/2 Three larikins..had behaved in a very disorderly manner in Little Latrobe-street. **1912** H. BELLOC *This & That* 172 He will kick, buck, and rear, and behave in a manner altogether out of his nature. **1949** V. S. REID *New Day* I. xxxi. 152 Eyre has shown the manner in which he intends to settle this business, and right now Ramsey is building two gallows. **1990** R. SMITH *Nemesis* ii. 5 Maggie was tall, five feet ten, and carried herself in a forthright manner that was mistaken for pride.

**b. in** (also †*on* and †without preposition) **like manner**: in a similar way, similarly. **in** (also †*by* and †without preposition) **no manner**: not in any way, not at all. Now somewhat *arch*.

**c1330** (?c1300) *Speculum Guy* (Auch.) 628 He..pat nele be make in none manere. **c1384** *Bible* (Wycliffite, E.V.) (Douce 369(2)) (1850) Matt. xxi. 36 He sente other seruauntis..and liche maner [**a1425** *L.V.* in lijk maner, *L. similiter*] thei diden to hem. **c1450** in T. Wright & R. P. Wüleker *Anglo-Saxon & Old Eng. Vocab.* (1884) I. 598/11 *Nullatenus*, no manere. **a1470** MALORY *Morte Darthur* (Winch. Coll.) 30 Whan kyng Arthure saw the batayle wolde nat be ended by no maner. **1556** W. LAUDER *Compend. Tractate Dewtie of Kyngis* sig. B2<sup>v</sup>, Than can 3e, be no maner want Gold. **1563** N. WINBET *Certain Tractates* (1888) I. 81 Baptim onlyke maner makis ws saif. **1611** *Bible* (A.V.) Transl. Pref. sig. ¶8, In like maner, Vpilas is reported..to haue translated the Scriptures into the Gothicke tongue. **1724** SWIFT *Some Observ. Wood's Half-pence* 18 In no manner Derogatory or Invasive of any Liberty or Privilege of his Subjects. **1767** W. BLACKSTONE *Comm. Laws Eng.* II. 467 These also..are made assignable and indorsable in like manner. **1813** DUKE OF WELLINGTON *Dispatches* (1838) XI. 107, I can interfere in no manner whatever in the internal concerns of the country. **1863** C. LYELL *Geol. Evid. Antiq. Man* 25 Among other characters, the diminished thickness of the bones [etc.]..are relied on; and in like manner, the diminished size of the horns of the bull. **1910** *Encycl. Brit.* I. 205/2 The Irish court has in like manner become a part of the High Court of Justice in Ireland by virtue of the Judicature Act passed in 1877. **1916** E. R. BURROUGHS *Beasts of Tarzan* vii. 107 Though none of these statements agreed with Kaviri's.., Tarzan was in no manner surprised at the discrepancies. **1995** *Wine Spectator* 28 Feb. 20/1 They're vinified in like manner, and they often display similar flavor profiles, acidity, body and tannin structure.

**c. Chiefly Law. manner and form** *n.* the exact way in which actions are

to be carried out, usually as precisely specified in a will, contract, or other legal document.

**c1432** *Petition* in J. H. Fisher et al. *Anthol. Chancery Eng.* (1984) 229  
And in cas the seid william Aleyne a pere nought in the Chauncerie to the  
seid writ, that thanne lyke you to ordeyne that your seid supplaiunt be  
restorid to the seid londis and tenementes in maner and forme afore seid.  
**1478** *Will Sir R. Verney* in J. Bruce *Verney Papers* (1853) 25, I Rauf  
Verney, knyght, citezein mercer and alderman of the citee of  
London..make and ordeigne this my present testament in maner and  
forme as folowith. **1509** *Last Test. of J. de Veer* in *Archaeologia* (1915) **66**  
310 Massez of Requiem to be saide and song for my Soule by Preestes in  
maner and forme folowing. **1623** T. POWELL (*title*) The attourneys  
academy: or, the manner and forme of proceeding practically, vpon any  
suite, plaint or action whatsoever, within this kingdome. **1651** tr. J.  
Kitchin *Jurisdictions* 423 Where one pleads out of his Fee, the other saith  
within, without that, that it was out in manner and forme. **1748** S.  
RICHARDSON *Clarissa* VII. lxxxvi. 297, I Clarissa Harlowe,..do..make and  
publish this my Last Will and Testament, in manner and form following.  
**1762** L. STERNE *Life Tristram Shandy* V. viii. 50 'Trim..went on with his  
oration upon death, in manner and form following. **1824** *Saunders' King's*  
*Bench Rep.* I. 308a (*note*) When an inferior court, in obedience to the writ  
of certiorari, returns an indictment to the K.B. it is annexed to the caption,  
then called a schedule, and the caption concludes with stating, that 'it is  
presented in manner and form as appears in and by a certain indictment  
annexed to this schedule'. **1975** *Univ. Toronto Law Jrnl.* Summer 205  
Tarnopolsky appears to suggest in his *The Canadian Bill of Rights* that the  
majority judgment in *Drybones* could be taken as support for the  
proposition that parliament can impose a 'manner and form' requirement.

**d. Grammar. adverb of manner** *n.* an adverb which expresses the way in which an action occurs or is carried out; an adverb which answers the question *how*?

[**1652** F. LODOWYCK *Groundwork New Perfect Lang.* 15 John and Peter (1  
The Agent.) *travelled together to* (2 The Verb.) Rome, Peter *ran hastily* (3  
The Manner.) *to* London (4 The place.)] **1728** E. CHAMBERS *Cycl.* I. 37  
Adverbs..may be reduced under the general Classes of Adverbs of Time, of  
Place, of Order, of Quantity, of Quality, of Manner [etc.]. **1872** R. MORRIS  
*Hist. Outl. Eng. Accidence* 193 Adverbs of..Manner or Quality, as *well*,  
*wisely* [etc.]. **1895** *N.E.D.* s.v. *Fall* v., *Fall out*,..To prove to be, turn out...  
Now only with adverb of manner. **1992** I. A. E. CUNNINGHAM *Syntactic*  
*Anal. Sea Island Creole* 168 Reference, here, is to the SE single-word

adverbs of manner which generally end in the morpheme, *ly*.

**10. a.** The case or state of affairs with regard to some matter; the nature, character, or disposition of someone or something. In later use only in ***the manner of***. Now rare. Perh. *Obs.*

**c1300** *Life & Martyrdom Thomas Becket* (Harl. 2277) (1845) 2 The manere of Engelonde this Gilbert hire tolde. **c1390** CHAUCER *Man of Law's Tale* 880 The kyng..axeth where his wyf and his child is; The constable gan aboute his herte colde, And pleyndly al the manere he hym tolde. **?a1400** (a1338) R. MANNYNG *Chron.* (Petyt 511) II. 275 A messengere þei sent to telle alle þe maners [Fr. *manere*]; To þe Scottis he went, & said as ȝe may here. **a1450** (a1338) R. MANNYNG *Chron.* (Lamb.) I. 15864 'Lo!' sche seide, 'wher he comeþ here!' & telde of Pellit al þe manere. **a1470** MALORY *Morte Darthur* (Winch. Coll.) 716 Sir Palomydes tolde sir Hermynde all the maner and how they slew sir Lamorak. **a1475** LYDGATE tr. G. de Guileville *Pilgr. Lyf Man* 6710 In that myrour dyde I se The maner hool off the cyte. **1523** LD. BERNERS tr. J. Froissart *Cronycles* I. xvii. 18 (*heading*) Here the hystory speketh of the maner of the Scottis, and howe they can warre. **1530** J. PALSgrave *Lesclarcissement* 707/2, I scryve a thyng, I discrybe the maner of it. **1557** M. BASSET tr. T. More *Treat. Passion* in tr. T. More *Wks.* 1383/2 As hys trespas was a great deale more heynous, so was the manoure of hys well deseruyd ende, muche more pyteous. **1653** H. COGAN tr. F. M. Pinto *Voy. & Adventures* v. i. 20 There was a..conflict between them, but..I am not able to deliver the manner of it. **1665** J. BUNYAN *Holy Citie* 59 These words..give us also to understand the manner of her strength. **1711** LD. SHAFTESBURY *Characteristicks* I. III. i. 286 'Tis no wonder if we slight the Gardenership, and think the manner of Culture a very contemptible Mystery. **1804-8** W. BLAKE *Milton* I, in *Poetry & Prose* (1965) 97 This is the manner of the Daughters of Albion in their beauty Every one is threefold in Head & Heart & Reins. **1858** H. BUSHNELL *Serm. for New Life* 31 The manner of the fact is uninvestigable and mysterious. **1902** J. PAYNE *Poet. Wks.* I. 350 The Bedouin..conjured him by God's sheen The history to tell him of the bean, So he might know the manner of the thing.

**b. in the manner of** (also *arch. in manner of*): after the fashion of, in the form or style of. Cf. sense 3a.

**a1375** *William of Palerne* 821 Boþe þe þrusch & þe þrustele..Meleden ful merye in maner of here kinde. **c1390** CHAUCER *Parson's Tale* 329 þey sowed of figge leues in manere of breches. **?a1425** *MS Hunterian* 95 f. 163, Boile hem to gidere to þei be in maner of ane emplaister. **1486-1504** in W. Denton *Eng. in 15th Cent.* (1888) Note D 318 My lord byschope..dyd

stand in maner of a wauereyng mynd. **1533** LD. BERNERS tr. A. de Guevara *Golden Bk. M. Aurelius* (1546) sig. K<sup>v</sup>, There came a Centuryon in maner of a messenger with great haste. **1585** T. WASHINGTON tr. N. de Nicolay *Nauigations Turkie* II. xxi. f. 58<sup>v</sup>, A purse..which hee holdeth in his hande in manner of a gloue. **1659** J. PEARSON *Expos. Creed* (1839) 358 The grave to him is in the manner of a womb to bring him forth. **1720** J. STRYPE *Stow's Survey of London* (rev. ed.) II. VI. i. 8/1 To make a Dragon in Manner of a Standard or Ensign of certain red Samitt. **1774** *Philos. Trans.* (Royal Soc.) **64** 426 A large book..ruled in the manner of a bill-book, used by tradesmen. **1852** P. J. BAILEY *Festus* (ed. 5) 506 Pavonian canopy of azure held, In manner of a sunshade. **1967** E. SHORT *Embroidery & Fabric Collage* iii. 60 The coverlet tells the story of Tristan, in a series of scenes showing different incidents, in the manner of a strip cartoon. **1994** D. HEALY *Goat's Song* xvii. 219 She'd walk the beach hugging Sara's elbow, her head wrapped in towels in the manner of a turban.

**11. a.** With *of* and gerund or noun of action: a way, method, or mode of doing something. Now somewhat *arch.* exc. as in sense 11b.

In first quot. with omission of *of*.

**c1330** (?c1300) *Speculum Guy* (Auch.) 835 Ac anoþer manere wasshing Makeþ clene of alle þing. **1340** *Ayenbite* (1866) 15 Zuo heþ þe dyeuel diverse maneres of waytinges. **c1400** (1391) CHAUCER *Treat. Astrolabe* (Brussels) II. §3. f. 85, Take this maner of settyng for a general rule. **c1475** (1392) *MS Wellcome* 564 f. 105, For by þis weye of worduinge y fonde moost profit in þis manere of worchyng. **1534** R. WHITTINTON tr. Cicero *Thre Bks. Tullyes Offyces* I. sig. A.3, Plato if he wolde have practysed this maner of persuadyng, he myght haue persuaded with syngular grauytie. **1597** T. MORLEY *Plaine & Easie Introd. Musicke* 45 This is our vsual maner of pricking and setting downe of the Proportions. **1597** SHAKESPEARE *Richard II* V. vi. 9 The maner [1623 manner] of their taking may appeare At large discoursed in this paper heere. **1632** R. SANDERSON *Serm.* 47 Obserue secondly the Apostles maner of speech. **1666** BP. S. PARKER *Free Censure Platonick Philos.* (1667) 36 Plato's manner of arguing is more succinct than the tedious way of Syllogising. **1726** W. R. CHETWOOD *Voy. Capt. Boyle* 125 His manner of going to the Appointment was in Disguise. **1764** O. GOLDSMITH *Hist. England* I. i. 6 A more just manner of thinking and expression. **1809** G. ROLAND *Amateur of Fencing* 118 The manner of executing it was [etc.]. **1881** H. JAMES *Washington Square* vii. 56 Mrs. Penniman declared that his manner of singing was 'most artistic'. **1934** R. GRAVES *I, Claudius* xi. 158 This was an unusual manner of fighting, for the ordinary German soldier does all his work with the slim-shafted, narrow-headed assegai. **1990** M. ROBERTS *In*

*Red Kitchen* (1991) 141 The young men told me about their manner of dying, their manner of surviving in the trenches before they went into battle.

**b. manner of speaking** *n.* [perhaps after or reinforced by Middle French, French *manière de parler* (1549)] form of expression. **in a manner of speaking**: as one might say, so to speak.

**α1387** J. TREVISA tr. R. Higden *Polychron.* (St. John's Cambr.) I. 5 In our tyme..nobilite and faire manere of spekyng were all i-lost. **?1533** TYNDALE *Expos. Mathew* v. f. l, To turne the other cheke is a maner of spekyng and not to be vnderstande as the wordes sounde. **1577** T. VAUTROLLIER tr. M. Luther *Epist. to Galathians* 83 It seemeth a very straunge and a monstrous maner of speaking thus to say: I liue, I liue not: I am dead, I am not dead [etc.]. **1706** *Phillips's New World of Words* (ed. 6), *Hysteron Proteron*, a preposterous manner of speaking or writing, expressing that first which should be last. **α1777** S. FOOTE *Devil upon Two Sticks* (1778) I. 15, I consider this [sc. the use of epithets such as *devilish*, *hellish*, *damn'd*, etc.] as a rhetorical figure, a manner of speaking devis'd and practis'd by dulness, to conceal the lack of ideas, and the want of expressions. **1875** *Appletons' Jrnl.* 27 Mar. 389/2 You are the strangest young girl—lady I mean—I ever met; so mean-spirited, in a manner of speaking. **1883** R. L. STEVENSON *Treasure Island* x. 81 She would swear the same, in a manner of speaking, before chaplain. **1890** R. BOLDREWOOD' *Colonial Reformer* (1891) 219 The cattle..has been, in a manner of speaking, neglected. **1922** J. JOYCE *Ulysses* III. 613 One time I could read a book in the dark, manner of speaking. **1951** C. HARE *Eng. Murder* v. 57 'What are you doing, hanging about here?' 'Well, sir, hanging about is my job, in a manner of speaking.' **1996** R. MISTRY *Fine Balance* iii. 159 It was the first time they found themselves face to face with her. In a manner of speaking, that is, for a black burkha hid her countenance.

**12. a.** Method or style of composition or execution in art, literature, etc.

With reference to literature, *manner* was formerly often contrasted with *matter*, the distinction being more or less equivalent to that now drawn between *form* and *content*.

**α1375** CHAUCER *Monk's Tale* 3181, I wol biwaille in manere of tragedie The harm of hem that stode in heigh degree. **α1387** J. TREVISA tr. R. Higden *Polychron.* (St. John's Cambr.) II. 71 þere were somtyme buldes wiþ vice arches and fontes in þe manere of Rome [L. *Romano more*]. **?α1425** (c1400) *Mandeville's Trav.* (Titus C. 16) (1919) 55 Adryan..made Ierusalem azen & the temple in the same manere as Saloman made it. **1662** J. EVELYN *Sculptura* iii. 30 They..ruin'd all those..excellent Works, wherever they became Masters, introducing their

lame, and wretched manner, in all those Arts which they pretended to restore. **1664** J. EVELYN tr. R. Fréart *Parallel Antient Archit.* I. ii. 10 The heroic and gigantine manner of this Order [sc. the Doric]..discovering a certain masculine and natural beauty, which is properly that the French call *la grand Maniere*. **1695** DRYDEN in tr. C. A. Du Fresnoy *De Arte Graphica* Pref. p. xii, Plato himself is accustom'd to write loftily, imitating, as the Critiques tell us, the manner of Homer. **1708** J. ADDISON *Let.* 27 May in *Ann. Reg.* 1778 (1779) 176/2 The whole is concluded by a nightingale, that has a much better voice than Mrs. Tofts, and something of the Italian manner in her divisions. **1754** T. GRAY *Let.* 13 Aug. in *Corr.* (1971) I. 404 He [sc. Kent] introduced a mix'd Style, which now goes by the name of the Battey Langley Manner. **1780** W. COWPER *Table Talk* 542 Manner is all in all, whatever is writ, The substitute for genius, sense, and wit. **1824** T. F. DIBDIN *Library Compan.* p. iv., Miniature engravings in the line manner. **1850** J. S. BLACKIE tr. *Æschylus Lyrical Dramas* I. Pref. 7 Poetry is distinguished from prose more by the manner than by the matter. **1850** A. JAMESON *Legends Monastic Orders* (1863) 52 Chanting the divine services according to the Gregorian manner. **1878** R. W. DALE *Lect. Preaching* vi. 178 Lord Macaulay's manner is very contagious. **1908** *Cambr. Hist. Eng. Lit.* II. 239 With James I the outlook changes, and in the poems of Henryson, Dunbar, Douglas and some of the minor 'makars' the manner of the earlier northern poetry survives only in stray places. **1992** *Apollo* June 367/1 Paintings and drawings..[which] are deceptively in his manner and for which the name Constable has seemed a plausible ascription.

**b. spec.** A heightened or distinctive style characteristic of the work of a particular artist, writer, etc.

Often in unfavourable sense, implying affectation; cf. **MANNERISM** *n.* 2.

**1706** J. SAVAGE tr. R. de Piles *Art of Painting* 356 He at last degenerated into what we call *Manner*, and very seldom consulted Nature. **1779** JOHNSON *Dryden in Pref. Wks. Eng. Poets* III. 188 He who writes much, will not easily escape a manner, such a recurrence of particular modes as may be easily noted... His [sc. Dryden's] stile could not easily be imitated. **1797** *Encycl. Brit.* X. 538/2 *Manner*, in painting..But the best painter is he who has no manner at all. **1813** *Examiner* 10 May 299/2 Most Artists have what is denominated a manner, unlike the unobtrusiveness of Nature. **1837** *Penny Cycl.* IX. 440/2 The great excellence of his works in other respects was enhanced by the absence of all *manner*, except such as belonged to the painter after whom he engraved. **1855** A. BAIN *Senses & Intellect* II. ii. 472 Let a composer vary his works as he may, there is a manner that usually sits upon every one of them. **1993** *New Yorker* 20 Sept. 125/2 Much of Wolfe's writing on popular culture..reads now as pure

manner, but it's canonical, because it's New.

**c.** Any of several distinct styles of an artist, each characteristic of a particular phase or period in his or her career.

**1727-52** E. CHAMBERS *Cycl.* (at cited word), The curious in pictures..distinguish readily..between the antient and the new *manner* of the same painter. **1762** H. WALPOLE *Vertue's Anecd. Painting* I. iii. 50 A picture of Raphael in his first manner. **1867** A. BARRY *Life Sir C. Barry* iv. 97 The building which most distinctly marks his 'second manner'. **1892** *Athenæum* 13 Feb. 220/3 In Italy artists we call 'primitives', such as Crivelli..still adhered to the early manner while Titian was in his glory. **1902** *Daily Chron.* 22 Apr. 3/1 Mr. Henderson's attempt to divide Wagner's works into four styles or manners is rather misleading. **1940** *Scrutiny* 9 289 The 'simplicity' of Auden's later manner merges into neo-Georgianism. **1991** *Renaissance Stud.* Dec. 440 Particularly before his so-called third manner, when his style shifted in the direction of increased grandeur, Raphael explored the theme of *grazia*.

**13. in a manner** (also †*in manner*): in some way, in some degree, so to speak, as it were; to a considerable degree, almost entirely, very nearly. Similarly †*in some good manner*.

**c1425** (a1420) LYDGATE *Troyyes Bk.* (Augustus A. 4) III. 2671 Whan þe twylyȝt, wiþ a pale chere, In maner morneth þe absence of þe sonne. **c1500** (?a1475) *Assembly of Gods* (1896) 1075 The slepyr grasse made many of hem fall, And from thense in maner depart sodeynly. **1502** tr. *Ordynarye of Crysten Men* I. iii. sig. c.ii<sup>v</sup>, [They] ben uncrystened & made as in maner forsakyng theyr fayth. **1545** R. ASCHAM *Toxophilus* I. f. 6<sup>v</sup>, The Persians which vnder Cyrus conquered in a maner all the worlde. **1560** J. DAUS tr. J. Sleidane *Commentaries* f. cccxxiii<sup>v</sup>, They..found in manner [L. *ferè*] nothing. **1584** T. COGAN *Hauen of Health* ccxliii. 279 There dyed in the same disease in manner within sixe dayes space..eight hundred persons. **1588** A. KING tr. St. Peter Canisius *Catech.* f. 96, The worthy fructs of pœnance, quhair be we recompense (at the least in a mainer) the..sinnes of our former lyf. **1606** P. HOLLAND tr. Suetonius *Hist. Twelve Caesars* 32 Of these murderers, there was not one in manner [L. *ferè*] that either survived him aboue three yeares, or died of his naturall death. **1615** W. LAWSON *Country Housewives Garden* (1623) 12 Fruits are..desired of so many (nay, in a manner of all) and yet few will..take paines to provide them. **1619** SIR D. CARLETON in S. R. Gardiner *Lett. Relations Eng. & Germany* (1865) 1st Ser. 44 His busines is in some good manner prepared for him. **a1658** J. DURHAM *Law Unsealed* (1676) 110 Chance, luck, fortune, &c. are so much looked to, and in a manner deified. **1737** W.

WHISTON tr. Josephus *Hist. Jewish Wars* Pref. §1 The war..hath been the greatest..in a manner of those that ever were heard of. **1790** E. BURKE *Refl. Revol. in France* 148 Our education is in a manner wholly in the hands of ecclesiastics. **1838** T. ARNOLD *Hist. Rome* I. v. 74 The poorest citizens..were considered in a manner as supernumeraries. **1875** T. W. HIGGINSON *Young Folks' Hist. U.S.* ix. 65 Massachusetts, being first settled, was in a manner the parent of these later colonies. **1913** W. CATHER *O Pioneers!* v. ii. 299 She reflected that she was, in a manner, immune from evil tidings. **1953** V. RANDOLPH & G. P. WILSON *Down in Holler* 170 The phrase *in a manner*..seems to mean nearly, virtually, or almost. 'Them biscuit is in a manner done,' a housewife said, 'an' we'll have 'em on the table in a minute'. **1975** H. NEMEROV *Coll. Poems* (1977) 499 The soul is in a manner all there is.

†14. **to find** (also **take**) **the manner** (also **manners**) **to** [after Middle French *trouver la manière de* (15th cent.)]: to find means to. **to make manner to** [after Middle French *faire manière de* (15th cent.)]: to make as if to do something, to give a show of doing something; to take steps towards doing something. *Obs.*

**1477** CAXTON tr. R. Le Fèvre *Hist. Jason* (1913) 68 He sholde fynde the maners if he might to sende him in to the yle. **1523** LD. BERNERS tr. J. Froissart *Cronycles* I. cxix. 141 The erle of Derby made no maner to rescue theym. **1533** LD. BERNERS tr. *Bk. Duke Huon of Burdeux* (1882-7) lii. 175 He wolde go &..fynde the maner to speake with her. **1600** *Diurnal of Remarkable Occurrents* (1833) 306 Bot thaj gaif in haistie ansuer, bit tuik maner to adwyse thair-on. **1673** A. JAFFREY *Diary* (1833) 15 Havin made the manner to learn some Greek in Banchory, I entered to my logics.

†IV. Other uses.

**15.** Measure, moderation. **in manner**: in due measure. *Obs.*

**1382** *Bible* (Wycliffite, E.V.): *Prov.* (Bodl. 959) xxiii. 4 But to thi prudence put maner [L. *pone modum*]. **1393** GOWER *Confessio Amantis* (Fairf.) VII. 2132 Be this ensample a king mai lere That forto yive is in manere. **1400** GOWER *Eng. Wks.* (1901) II. 483 It sit hem wel to do pite and grace; Bot yit it mot be tempred in manere. **1440** tr. Palladius *De Re Rustica* (Fitzw.) I. 212 And take on hond, in husbondyng of londe, As thou may bere in maner and mesure. **1502** tr. *Ordynarye of Crysten Men* II. viii. sig. l.i, Without maner & attemperance no vertue is parfyte.

**16.** A musical mode or melody. *Obs. rare*<sup>-1</sup>.

**a1382** *Bible* (Wycliffite, E.V.) (Bodl. 959) (1965) *Ecclus.* xliv. 5 Preise we glorious men..in þer wisdam sechinge þe musik maneris [L. *modos musicos*].

**17. a. Reason, cause. Obs.**

**c1390** CHAUCER *Physician's Tale* 264 The peple anon had suspect in this thyng, By manere of the cherles chalangyng, That it was by the assent of Apus. **a1393** GOWER *Confessio Amantis* (Fairf.) VI. 323 Why men pleigneth After the court..I wol the tellen the manere. **a1450** *Generides* (Helm.) 2882 Sore he hated the prisonere, I can not tell for what maner. **1532** (c1385) *Usk's Test. Loue in Wks. G. Chaucer* I. f. cccxxxi, Wherefore to enfourme you lady the maner why I meane, se nowe.

**b. A condition, proviso. Obs. rare.**

**c1400** (?a1300) *King Alexander* (Laud 622) 3188 Alisaunder..afongeþ þis coroune In þe name of raunsoune..By suffraunce of swiche manere þat 3ee make amendement Of Leonyne. **a1500** *Eng. Conquest Ireland* (Rawl.) (1896) 9 He was delyueryd out of pryson on this manere, That he and Morice..sholde..wende into Irland.

COMPOUNDS

**C1. a. General attrib.**

‡**manner-piercing** *adj. Obs.*

**1776** W. J. MICKLE tr. L. de Camoens *Lusiad* (1778) VIII. 369 His fraudulent art, though veil'd in deep disguise, Shone bright to Gama's \*manner-piercing eyes.

**b. manners-bit** *n. regional* a small part of a dish left uneaten, out of politeness (see quotes.; cf. sense 6c).

**1829** J. HUNTER *Hallamshire Gloss.*, \**Manners-bit*, a portion of a dish left by the guests that the host may not feel himself reproached for insufficient preparation. **1859** A. L. ELWYN *Gloss. Supposed Americanisms* 73 *Mannersbit*, a portion of a dish left by the guests, that the host may not feel himself reproached for insufficient preparation... This still exists in New England.

**C2. attrib. Grammar.** Designating an adverb, phrase, etc., which expresses the manner of an action. Cf. *adverb of manner* n. at sense 9d.

**1965** N. CHOMSKY *Aspects of Theory of Syntax* ii. 103 Verbs generally take Manner Adverbials freely, but there are some which do not. **1983** *Amer. Speech* **63** 137 Manner adjuncts focus on the action and stress how it was carried out. **1991** *Using Corpora* (Proc. Conf. Univ. Waterloo Centre for New OED) 76 Adverbs like *briefly, frankly* and *naturally*..can be used as either manner adjuncts or style/content disjuncts but never take the sole intonation focus in the latter function.

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## DERIVATIVES

'**manner-like** *adv.* (also **manners-like**) in a mannerly way, politely, courteously.

**1489** (a1380) J. BARBOUR *Bruce* (Adv.) III. 72 He set ensample thus mydlike, The-quehethir he mycht mar \*manerlik Lyknyt hym to Gaudifer de Larys. **1596** R. NAUNTON *Let.* 23 Mar. in G. Ungerer *Spaniard in Elizabethan Eng.* (1976) II. 94 He is loth to thrust too [*perh. read un-*] manner-like into heauen before his ould Mr. **1826** T. HOOD *Last Man* in *Whims & Oddities* 25 Full manners-like he tender'd the dram.

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# Statutes and Statutory Construction

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**SEVENTH EDITION**

**NORMAN J. SINGER**

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one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed.<sup>30</sup>

### § 51:3 Statutes deemed to be in pari materia

Statutes are considered to be in pari materia when they relate to the same person or thing, to the same class of persons or things,<sup>1</sup> or

<sup>30</sup>**California.** *Western States Newspapers, Inc. v. Gehringer*, 203 Cal. App. 2d 793, 22 Cal. Rptr. 144 (4th Dist. 1962).

**United States.** *Water Quality Ass'n Employees' Benefit Corp. v. U.S.*, 795 F.2d 1303, 7 Employee Benefits Cas. (BNA) 1737, 86-2 U.S. Tax Cas. (CCH) P 9527, 58 A.F.T.R.2d 86-5410 (7th Cir. 1986); *Flahertys Arden Bowl, Inc. v. C.I.R.*, 115 T.C. 269, Tax Ct. Rep. Dec. (RIA) 115.19, 2000 WL 1372869 (2000), aff'd, 271 F.3d 763, 2001-2 U.S. Tax Cas. (CCH) P 50770, 88 A.F.T.R.2d 2001-6850 (8th Cir. 2001).

**Alabama.** *House v. Cullman County*, 593 So. 2d 69 (Ala. 1992).

**Connecticut.** *Doe v. Statewide Grievance Committee*, 41 Conn. App. 671, 677 A.2d 960 (1996), judgment rev'd on other grounds, 240 Conn. 671, 694 A.2d 1218 (1997).

**Kansas.** *Fought v. State*, 14 Kan. App. 2d 17, 781 P.2d 742 (1989).

**North Dakota.** *Kroh v. American Family Ins.*, 487 N.W.2d 306 (N.D. 1992).

**Tennessee.** *State v. Davis*, 654 S.W.2d 688 (Tenn. Crim. App. 1983).

**Virginia.** *Williams v. Matthews*, 248 Va. 277, 448 S.E.2d 625 (1994).

*Richards & Stearns, Shareholder By-Laws Requiring Boards of Directors to Dismantle Rights Plans Are Unlikely to Survive Scrutiny Under Delaware Law*, 54 Bus Law 607 (1999).

#### [Section 51:3]

<sup>1</sup>**United States.** *Wong Kam Wo v. Dulles*, 236 F.2d 622 (9th Cir. 1956); 222 East Chestnut St. Corp. v. Lakefront Realty Corp., 256 F.2d 513 (7th Cir. 1958); *Kleinfelter v. U. S.*, 162 Ct. Cl. 88, 318 F.2d 929 (1963); *U. S. ex rel. Nelson v. Zelker*, 335 F. Supp. 85 (S.D. N.Y. 1971) (Securities and Exchange Acts of 1933 and 1934 were parts of a comprehensive scheme to be construed in pari materia); *Matos Ortiz v. Com. of Puerto Rico*, 103 F. Supp. 2d 59 (D.P.R. 2000); *Jackson v. Birmingham Bd. of Educ.*, 309 F.3d 1333, 170 Ed. Law Rep. 539, 96 Fair Empl. Prac. Cas. (BNA) 658, 83 Empl. Prac. Dec. (CCH) P 41235 (11th Cir. 2002), rev'd and remanded on other grounds, 544 U.S. 187, 125 S. Ct. 1497, 161 L. Ed. 2d 361, 95 Fair Empl. Prac. Cas. (BNA) 669, 86 Empl. Prac. Dec. (CCH) P 41871 (2005); *U.S. v. Lillyblad*, 56 M.J. 636 (N.M.C.C.A. 2001); *Brown v. Gillard*, 2003 WL 396372 (D.V.I. 2003); *U.S. v. Moore*, 288 F. Supp. 2d 955 (E.D. Wis. 2003); *Belt v. EmCare, Inc.*, 444 F.3d 403, 11 Wage & Hour Cas. 2d (BNA) 553, 152 Lab. Cas. (CCH) P 35120 (5th Cir. 2006), cert. denied, 127 S. Ct. 349, 166 L. Ed. 2d 43, 11 Wage & Hour Cas. 2d (BNA) 1632 (U.S. 2006).

**Alaska.** *Keane v. Local Boundary Com'n*, 893 P.2d 1239 (Alaska 1995).

**California.** *Williams v. City of San Carlos*, 233 Cal. App. 2d 290, 43 Cal. Rptr. 486 (1st Dist. 1965).

**District of Columbia.** *Harman v. U.S.*, 718 A.2d 114 (D.C. 1998).

**Hawaii.** *State v. Carmichael*, 99 Haw. 75, 53 P.3d 214 (2002), as corrected, (Sept. 5, 2002) and as amended, (Sept. 9, 2002).

**Idaho.** *Burge v. Tibor*, 88 Idaho 149, 397 P.2d 235 (1964); *Chief Industries, Inc. v. Schwendiman*, 99 Idaho 682, 587 P.2d 823 (1978).

**Illinois.** *People ex rel. Tilley v. New York, C. & St. L.R. Co.*, 364 Ill. 456, 4 N.E.2d 867 (1936).

It has been suggested that statutes may relate to the same subject matter without being "strictly in pari materia." *Freberg v. Board of Trustees of Firemen's Pension Fund of City of Highland Park*, 128 Ill. App. 2d 369, 262 N.E.2d 22 (2d Dist. 1970).

**Indiana.** *State v. Gerhardt*, 145 Ind. 439, 44 N.E. 469 (1896); *Collins v. State*, 275 Ind. 86, 415 N.E.2d 46 (1981).

**Iowa.** *In Interest of E.C.G.*, 345 N.W.2d 138 (Iowa 1984).

**Kansas.** *Triplett v. Grundy Elec. Co-op., Inc.*, 389 S.W.2d 401 (Mo. Ct. App. 1965); *Schwartz v. Kunze*, 29 Kan. App. 2d 21, 22 P.3d 618 (2001).

**Kentucky.** *Chambers v. Com., ex rel. Twehues*, 723 S.W.2d 868 (Ky. Ct. App. 1986).

**Maine.** *Charlton v. Town of Oxford*, 2001 ME 104, 774 A.2d 366 (Me. 2001).

**Maryland.** *Willis v. State*, 302 Md. 363, 488 A.2d 171 (1985); *Farris v. State*, 351 Md. 24, 716 A.2d 237 (1998).

**Massachusetts.** *McDonald v. Town Manager of Southbridge*, 39 Mass. App. Ct. 479, 657 N.E.2d 1285 (1995), rev'd on other grounds, 423 Mass. 1018, 672 N.E.2d 10 (1996).

**Michigan.** *Rathbun v. State*, 284 Mich. 521, 280 N.W. 35 (1938); *Mooney v. Unemployment Compensation Commission*, 336 Mich. 344, 58 N.W.2d 94 (1953); *Richardson v. Jackson County*, 432 Mich. 377, 443 N.W.2d 105 (1989).

Gasoline tax increases held in pari materia with highway department appropriation statutes and so not subject to a referendum. *County Road Ass'n v. Board of State Canvassers*, 407 Mich. 101, 282 N.W.2d 774 (1979).

**Minnesota.** *State ex rel. Carlton v. Weed*, 208 Minn. 34294 N.W. 370 (1940).

**Montana.** *Faucette v. Christensen*, 145 Mont. 28, 400 P.2d 883 (1965).

**New Jersey.** *Gualano v. Board of School Estimate of Elizabeth School Dist.*, 72 N.J. Super. 7, 177 A.2d 580 (Law Div. 1962), judgment aff'd, 39 N.J. 300, 188 A.2d 569 (1963).

**New Mexico.** *State ex rel. State Park and Recreation Commission v. New Mexico State Authority*, 76 N.M. 1, 411 P.2d 984 (1966).

**New York.** *People ex rel. Doscher v. Sisson*, 222 N.Y. 387, 118 N.E. 789 (1918); *Bright Tunes Productions, Inc. v. Lee*, 43 Misc. 2d 21, 249 N.Y.S.2d 632 (Sup 1964); *Norry v. Land*, 44 Misc. 2d 556, 254 N.Y.S.2d 176 (Sup 1964); *Farone v. Korey Motors, Inc.*, 44 Misc. 2d 565, 254 N.Y.S.2d 209 (Sup 1964).

**Ohio.** *State v. Trunzo*, 75 Ohio L. Abs. 187, 137 N.E.2d 511 (Ct. App. 8th Dist. Cuyahoga County 1956); *Suez Co. v. Young*, 118 Ohio App. 415, 25 Ohio Op. 2d 315, 195 N.E.2d 117 (6th Dist. Lucas County 1963).

**Pennsylvania.** *Medrow v. Com., Dept. of Transp.*, 120 Pa. Commw. 306, 548 A.2d 393 (1988).

**Rhode Island.** *Narragansett Food Services, Inc. v. Rhode Island Dept. of Labor*, 420 A.2d 805, 91 Lab. Cas. (CCH) P 55292 (R.I. 1980); *Stebbins v. Wells*, 2001 WL 1255079 (R.I. Super. Ct. 2001).

**South Dakota.** *Goetz v. State*, 2001 SD 138, 636 N.W.2d 675 (S.D. 2001); *Lewis & Clark Rural Water System, Inc. v. Seeba*, 2006 SD 7, 709 N.W.2d 824 (S.D. 2006).

**Texas.** *City of Corpus Christi v. Gregg*, 275 S.W.2d 547 (Tex. Civ. App. San Antonio 1954), judgment rev'd on other grounds, 155 Tex. 537, 289 S.W.2d 746 (1956); *State v. Easley*, 390 S.W.2d 24 (Tex. Civ. App. Beaumont 1965), writ dismissed, (July 28, 1965) and writ granted, (Oct. 6, 1965) and judgment rev'd on other grounds, 404 S.W.2d 296 (Tex. 1966); *Mills v. State*, 722 S.W.2d 411 (Tex.

have the same purpose or object.<sup>2</sup>

Crim. App. 1986).

**Utah.** *Utah County v. Orem City*, 699 P.2d 707 (Utah 1985).

**Vermont.** *Board of Trustees of Kellogg-Hubbard Library, Inc. v. Labor Relations Bd.*, 162 Vt. 571, 649 A.2d 784 (1994); *State v. Baron*, 176 Vt. 314, 848 A.2d 275 (2004).

**Washington.** *Paltro v. Aetna Cas. & Sur. Co.*, 119 Wash. 101, 204 P. 1044 (1922); *Monroe By and Through Broulette v. Soliz*, 132 Wash. 2d 414, 939 P.2d 205 (1997), as amended, (July 15, 1997).

**West Virginia.** *Rhodes v. Workers' Compensation Div.*, 209 W. Va. 8, 543 S.E.2d 289 (2000); *Meadows v. Hopkins*, 211 W. Va. 382, 566 S.E.2d 269, 19 I.E.R. Cas. (BNA) 1197 (2002); *State ex rel. McKenzie v. Smith*, 212 W. Va. 288, 569 S.E.2d 809 (2002).

**Wisconsin.** *Schrab v. State Highway Commission*, 28 Wis. 2d 290, 137 N.W.2d 25 (1965); *In re Estate of Flejter*, 240 Wis. 2d 401, 2001 WI App 26, 623 N.W.2d 552 (Ct. App. 2000).

Cf. "All statutes must be read in pari materia whenever possible." *Executive House Bldg., Inc. v. Demarest*, 248 So. 2d 405 (La. Ct. App. 4th Cir. 1971).

*McBee*, Federal Rule of Evidence 415: Making it Work, 36 Washburn L J 89 (1996); *Sullivan*, Overhauling the Vessel Exception, 43 Naval L. Rev. 57 (1996); *Ritts*, Pre-emption and Medical Devices: A Response to Adler and Mann, 51 Food & Drug, 51 Food & Drug L J 1 (1996); *Toma*, The Decline of Emergency Medical Services Coordination in California: Why Cities Are at War With Counties Over Illusory Ambulance Monopolies, 23 Sw U L. Rev. 285 (1994).

<sup>2</sup>**United States.** *Oscar Mayer & Co. v. Evans*, 441 U.S. 750, 99 S. Ct. 2066, 60 L. Ed. 2d 609, 19 Fair Empl. Prac. Cas. (BNA) 1167, 19 Empl. Prac. Dec. (CCH) P 9216 (1979); *U.S. v. Colorado & N.W.R. Co.*, 157 F. 321 (C.C.A. 8th Cir. 1907); *Willapoint Oysters v. Ewing*, 174 F.2d 676 (9th Cir. 1949); *Common Cause v. Federal Election Com'n*, 842 F.2d 436 (D.C. Cir. 1988); *U.S. v. Carr*, 880 F.2d 1550, 30 Env't. Rep. Cas. (BNA) 1128, 19 Env'tl. L. Rep. 21137 (2d Cir. 1989); *Miller v. Ribicoff*, 195 F. Supp. 534 (W.D. S.C. 1961) (Social Security Act and Administrative Procedure Act); *Massachusetts Trustees of Eastern Gas & Fuel Associates v. U. S.*, 202 F. Supp. 297, 1962 A.M.C. 445 (D. Mass. 1962), opinion amended on other grounds, 210 F. Supp. 822, 1962 A.M.C. 1162 (D. Mass. 1962), judgment aff'd, 312 F.2d 214, 1963 A.M.C. 371 (1st Cir. 1963), judgment aff'd, 377 U.S. 235, 84 S. Ct. 1236, 12 L. Ed. 2d 268, 1964 A.M.C. 1085 (1964) (Merchant Marine Act and Merchant Ship Sales Act); *Flax v. Potts*, 204 F. Supp. 458 (N.D. Tex. 1962), judgment aff'd, 313 F.2d 284 (5th Cir. 1963) (pupil placement law and statute maintaining dual school system); *U.S. v. Freeling*, 31 F.R.D. 540 (S.D. N.Y. 1962) (use of identical words in the same sense); *Matos Ortiz v. Com. of Puerto Rico*, 103 F. Supp. 2d 59 (D.P.R. 2000); *U.S. v. Lillyblad*, 56 M.J. 636 (N.M.C.C.A. 2001); *Brown v. Gillard*, 2003 WL 396372 (D.V.I. 2003); *U.S. v. Moore*, 288 F. Supp. 2d 955 (E.D. Wis. 2003).

**Alabama.** *Ex parte Stinson*, 532 So. 2d 636 (Ala. Civ. App. 1988); *Ex parte City of Tarrant*, 850 So. 2d 366 (Ala. Crim. App. 2002).

**Alaska.** *Keane v. Local Boundary Com'n*, 893 P.2d 1239 (Alaska 1995).

**Arizona.** *State ex rel. Pennartz v. Olcavage*, 200 Ariz. 582, 30 P.3d 649 (Ct. App. Div. 1 2001).

**Arkansas.** *Johnson v. State*, 331 Ark. 421, 961 S.W.2d 764 (1998).

**California.** *Union Iron Works v. Industrial Acc. Commission of Cal.*, 190 Cal. 33, 210 P. 410 (1922); *Old Homestead Bakery v. Marsh*, 75 Cal. App. 247, 242 P. 749 (3d Dist. 1925).

The great-bodily-injury provisions employ the same language and have an "identical purpose or object" of deterring the infliction of serious injury upon the victims of crime; they are obviously in *pari materia*. *People v. Caudillo*, 21 Cal. 3d 562, 146 Cal. Rptr. 859, 580 P.2d 274 (1978) (disapproved of on other grounds by, *People v. Escobar*, 3 Cal. 4th 740, 12 Cal. Rptr. 2d 586, 837 P.2d 1100 (1992)) and (overruled by, *People v. Martínez*, 20 Cal. 4th 225, 83 Cal. Rptr. 2d 533, 973 P.2d 512 (1999)).

When the legislature provides that one law does not supersede another, the two are to be construed together. *Drouet v. Superior Court*, 31 Cal. 4th 583, 3 Cal. Rptr. 3d 205, 73 P.3d 1185 (2003).

**Connecticut.** *Knights of Columbus Federal Credit Union v. Salisbury*, 3 Conn. App. 201, 486 A.2d 649 (1985).

**District of Columbia.** *Willcher v. U. S.*, 408 A.2d 67 (D.C. 1979); *Harman v. U.S.*, 718 A.2d 114 (D.C. 1998).

**Florida.** *Grant v. State*, 832 So. 2d 770 (Fla. Dist. Ct. App. 5th Dist. 2002).

**Hawaii.** A three-step approach is used when interpreting statutes that appear to relate to the same subject matter; first, legislative enactments are presumptively valid and should be interpreted in such a manner as to give them effect, second laws in *pari materia* shall be construed with reference to each other, and third, where there is a plainly irreconcilable conflict between a general and a specific statute concerning the same subject matter, the specific will be favored, but where the statutes simply overlap in their application, effect will be given to both, if possible. *State v. Batson*, 99 Haw. 118, 53 P.3d 257 (2002).

**Idaho.** *State v. Jeppesen*, 138 Idaho 71, 57 P.3d 782 (2002); *City of Sandpoint v. Sandpoint Independent Highway Dist.*, 139 Idaho 65, 72 P.3d 905 (2003).

**Illinois.** *People ex rel. Community High School Dist. No. 231 v. Hupe*, 2 Ill. 2d 434, 118 N.E.2d 328 (1954); *County of Will v. Village of Rockdale*, 226 Ill. App. 3d 634, 168 Ill. Dec. 617, 589 N.E.2d 1017 (3d Dist. 1992); *Land v. Board of Educ. of City of Chicago*, 202 Ill. 2d 414, 269 Ill. Dec. 452, 781 N.E.2d 249, 172 Ed. Law Rep. 910 (2002); *Knolls Condominium Ass'n v. Harms*, 202 Ill. 2d 450, 269 Ill. Dec. 464, 781 N.E.2d 261 (2002).

**Indiana.** *Rose v. State*, 168 Ind. App. 674, 345 N.E.2d 257 (1976); *Petition of McClure*, 549 N.E.2d 392 (Ind. Ct. App. 1990); *Capehart v. Capehart*, 771 N.E.2d 657 (Ind. Ct. App. 2002).

**Iowa.** *Ballstadt v. Iowa Dept. of Revenue*, 368 N.W.2d 147 (Iowa 1985).

**Kansas.** *State v. Bradley*, 215 Kan. 642, 527 P.2d 988 (1974).

**Louisiana.** *In re RLV*, 484 So. 2d 206 (La. Ct. App. 1st Cir. 1986).

**Maine.** *Charlton v. Town of Oxford*, 2001 ME 104, 774 A.2d 366 (Me. 2001).

**Maryland.** *Farmers & Merchants Nat. Bank of Hagerstown v. Schlossberg*, 306 Md. 48, 507 A.2d 172, 1 U.C.C. Rep. Serv. 2d 928 (1986); *Farris v. State*, 351 Md. 24, 716 A.2d 237 (1998).

**Michigan.** *Rathbun v. State*, 284 Mich. 521, 280 N.W. 35 (1938); *Richardson v. Jackson County*, 432 Mich. 377, 443 N.W.2d 105 (1989); *Pavlov v. Community Emergency Medical Service, Inc.*, 195 Mich. App. 711, 491 N.W.2d 874 (1992); *People v. Rutledge*, 250 Mich. App. 1, 645 N.W.2d 333 (2002); *Michigan Coalition For Responsible Gun Owners v. City of Ferndale*, 256 Mich. App. 401, 662 N.W.2d 864 (2003).

**Minnesota.** *Foley v. Whelan*, 219 Minn. 209, 17 N.W.2d 367 (1945); *State v. Lucas*, 589 N.W.2d 91 (Minn. 1999); *Pestka v. County of Blue Earth*, 654 N.W.2d 153 (Minn. Ct. App. 2002).

No-fault and worker's compensation acts read in *pari materia* to the extent

that both provide compensation for injuries arising from motor vehicle accidents. *Record v. Metropolitan Transit Commission*, 284 N.W.2d 542 (Minn. 1979).

**Missouri.** *Davis v. Byram*, 31 S.W.3d 148 (Mo. Ct. App. E.D. 2000); *State v. Goebel*, 83 S.W.3d 639 (Mo. Ct. App. E.D. 2002); *State v. Goebel*, 83 S.W.3d 639 (Mo. Ct. App. E.D. 2002).

**Montana.** *Putnam v. Putnam*, 86 Mont. 135, 282 P. 855 (1929).

**New Jersey.** *Hackensack Water Co. v. Ruta*, 3 N.J. 139, 69 A.2d 321 (1949); *State Farm Mut. Auto. Ins. Co. v. Molino*, 289 N.J. Super. 406, 674 A.2d 189 (App. Div. 1996); *Sea-Land Service, Inc. v. Director, Div. of Taxation*, 16 N.J. Tax 132, 1996 WL 656376 (1996), *aff'd*, 17 N.J. Tax 591, 1998 WL 968258 (Super. Ct. App. Div. 1998).

In ascertaining the intended meaning of language in the New Jersey Employer-Employee Relations Act, the court may look to the analogous language in the federal National Labor Relations Act. *Galloway Tp. Bd. of Educ. v. Galloway Tp. Ass'n of Educational Secretaries*, 78 N.J. 1, 393 A.2d 207, 99 L.R.R.M. (BNA) 2421 (1978); *Weehawken Environment Committee, Inc. v. Weehawken Tp.*, 161 N.J. Super. 381, 391 A.2d 968 (Law Div. 1978).

Statutes governing police training requirements, which are contained in a title relating to state government, departments and officers, a title which contains regulations affecting municipalities generally, must be read in *pari materia* with municipal and civil service statutes relating to police employees. *Borger v. Borough of Stone Harbor*, 178 N.J. Super. 296, 428 A.2d 958 (Ch. Div. 1981).

When statutes deal with the same subject, even if one is specific and the other general, they should be read in *pari materia* and construed so that to the extent possible, each can be given its full effect. *DePalma v. Building Inspection Underwriters*, 350 N.J. Super. 195, 794 A.2d 848, 7 Wage & Hour Cas. 2d (BNA) 1384 (App. Div. 2002).

**New York.** *Jewish Hospital of Brooklyn v. Doe*, 252 A.D. 581, 300 N.Y.S. 1111 (2d Dep't 1937).

**Ohio.** *Weibel v. Poda*, 116 Ohio App. 38, 21 Ohio Op. 2d 260, 186 N.E.2d 504 (9th Dist. Summit County 1962).

**Oklahoma.** *Bankers Union Life Ins. Co. v. Read*, 1938 OK 101, 182 Okla. 103, 77 P.2d 26 (1938).

**Oregon.** *General Elec. Credit Corp. v. Oregon State Tax Commission*, 231 Or. 570, 373 P.2d 974 (1962) (usury laws and tax laws are not in *pari materia*).

**Rhode Island.** *Stebbins v. Wells*, 2001 WL 1255079 (R.I. Super. Ct. 2001).

**South Dakota.** *Goetz v. State*, 2001 SD 138, 636 N.W.2d 675 (S.D. 2001); *Lewis & Clark Rural Water System, Inc. v. Seeba*, 2006 SD 7, 709 N.W.2d 824 (S.D. 2006).

**Tennessee.** *Daugherty v. State*, 216 Tenn. 666, 393 S.W.2d 739 (1965); *Mitchell v. Campbell*, 88 S.W.3d 561 (Tenn. Ct. App. 2002).

**Texas.** *State v. Dyer*, 145 Tex. 586, 200 S.W.2d 813 (1947); *Mills v. State*, 722 S.W.2d 411 (Tex. Crim. App. 1986).

**Utah.** *Utah County v. Orem City*, 699 P.2d 707 (Utah 1985).

**Vermont.** *Board of Trustees of Kellogg-Hubbard Library, Inc. v. Labor Relations Bd.*, 162 Vt. 571, 649 A.2d 784 (1994); *State v. Baron*, 176 Vt. 314, 848 A.2d 275 (2004).

**Washington.** *Paltro v. Aetna Cas. & Sur. Co.*, 119 Wash. 101, 204 P. 1044 (1922); *accord*, *Shouse v. Board of Com'rs of Cherokee County*, 151 Kan. 458, 99 P.2d 779 (1940), *opinion adhered to on reh'g*, 152 Kan. 41, 102 P.2d 1043 (1940).

The Public Disclosure Act closely parallels the federal Freedom of Information Act and thus judicial interpretations of the federal act are particularly helpful

The rule of *in pari materia* is generally used when there is some doubt or ambiguity in the wording of the statute under consideration.<sup>3</sup> Characterization of the object or purpose is more important than characterization of subject matter in determining whether different statutes are closely enough related to justify

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in construing the state Act. *Hearst Corp. v. Hoppe*, 90 Wash. 2d 123, 580 P.2d 246, 3 Media L. Rep. (BNA) 2399 (1978).

**West Virginia.** *Rhodes v. Workers' Compensation Div.*, 209 W. Va. 8, 543 S.E.2d 289 (2000); *Meadows v. Hopkins*, 211 W. Va. 382, 566 S.E.2d 269, 19 I.E.R. Cas. (BNA) 1197 (2002).

**Wisconsin.** *In re Estate of Flejter*, 240 Wis. 2d 401, 2001 WI App 26, 623 N.W.2d 552 (Ct. App. 2000).

Dooley, *An Implied Right of Contribution Under Rule 10b-5: An Essential Element of Attaining The Goals of the Securities Exchange Act of 1934*, 61 *Fordham L. Rev.* 185 (1993); *Toma, The Decline of Emergency Medical Services Coordination in California: Why Cities Are at War With Counties Over Illusory Ambulance Monopolies*, 23 *Sw U L. Rev.* 285 (1994).

<sup>3</sup>**United States.** Under Colorado law, the meaning of a statute may not be determined by reading it *in pari materia* with other statutes, when the statute in question is unambiguous. *Planned Parenthood of Rocky Mountains Services Corp. v. Owens*, 107 F. Supp. 2d 1271 (D. Colo. 2000), judgment aff'd, 287 F.3d 910 (10th Cir. 2002).

**Alabama.** *State, Home Builders Licensure Bd. v. Teel*, 887 So. 2d 900 (Ala. Civ. App. 2003).

**Colorado.** *M.S. v. People*, 812 P.2d 632 (Colo. 1991).

**Hawaii.** *State v. Carmichael*, 99 Haw. 75, 53 P.3d 214 (2002), as corrected, (Sept. 5, 2002) and as amended, (Sept. 9, 2002).

**Illinois.** *Carter v. Du Page County Sheriff*, 304 Ill. App. 3d 443, 238 Ill. Dec. 161, 710 N.E.2d 1263 (2d Dist. 1999).

**Kansas.** *Schwartz v. Kunze*, 29 Kan. App. 2d 21, 22 P.3d 618 (2001).

**Louisiana.** *Saacks v. Mohawk Carpet Corp.*, 855 So. 2d 359 (La. Ct. App. 4th Cir. 2003), writ denied, 860 So. 2d 1158 (La. 2003); *Corbello v. Iowa Production*, 860 So. 2d 686, 33 *Env'tl. L. Rep.* 20230, 157 *O.G.R.* 1120 (La. 2003), as clarified on reh'g, (June 20, 2003).

**Michigan.** *Travelers Ins. v. U-Haul of Michigan, Inc.*, 235 Mich. App. 273, 597 N.W.2d 235 (1999); *Houghton Lake Area Tourism & Convention Bureau v. Wood*, 255 Mich. App. 127, 662 N.W.2d 758 (2003).

**Ohio.** *Board of Com'rs of Clermont County v. Public Employees Retirement Bd.*, 51 Ohio App. 3d 206, 555 N.E.2d 683 (12th Dist. Clermont County 1988).

The *in pari materia* rule of construction may be used in interpreting statutes, but first some doubt or ambiguity should exist. *State ex rel. Burrows v. Indus. Comm.*, 78 Ohio St. 3d 78, 1997, 1997-Ohio-310, 676 N.E.2d 519 (1997), opinion corrected on reconsideration on other grounds, 78 Ohio St. 3d 1505, 679 N.E.2d 7 (1997).

**South Dakota.** *Goetz v. State*, 2001 SD 138, 636 N.W.2d 675 (S.D. 2001).

**Virginia.** *Com., Dept. of Social Services, Div. of Child Support Enforcement ex rel. Gagne v. Chamberlain*, 31 Va. App. 533, 525 S.E.2d 19 (2000).

Goffette, *Sovereignty in Sentencing: Concurrent and Consecutive Sentencing of a Defendant Subject to Simultaneous State and Federal Jurisdiction*, 37 *Val. L. Rev.* 1035 (2003).