

IN THE SUPREME COURT OF OHIO

ORIGINAL

Global Knowledge Training, LLC,	)	
	)	Case No. 09-1543
Appellant,	)	
	)	
vs.	)	Appeal from the Ohio
	)	Board of Tax Appeals
Richard A. Levin,	)	
Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	BTA Case No. 2006-V-471

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MERIT BRIEF OF APPELLANT GLOBAL KNOWLEDGE TRAINING, LLC

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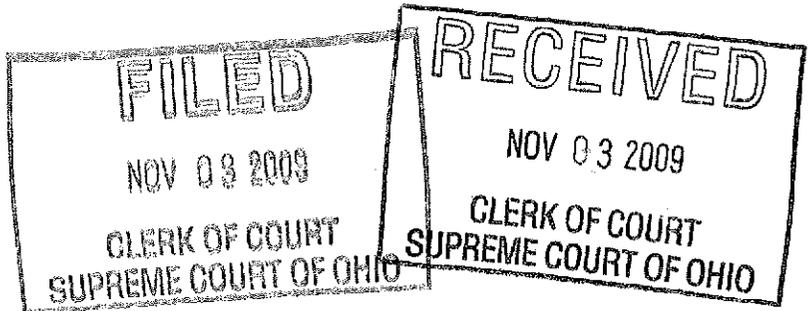
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## INTRODUCTION

Global Knowledge Training, LLC (“Global”) respectfully submits this brief in support of its appeal to this Court from the Decision and Order of the Ohio Board of Tax Appeals (“BTA”), in *Global Knowledge Training, LLC v. Levin* (July 28, 2009), BTA Case No. 2006-V-471 (“*Global Knowledge*”). The BTA affirmed the Tax Commissioner’s final determination as to 34 of 36 Global training courses he audited and found taxable as “computer services” under R.C. 5739.01(B)(3)(e) and R.C. 5739.01(Y)(1)(b). The BTA’s decision should be reversed, and judgment entered in Global’s favor, because it is unreasonable and unlawful, for at least two reasons. First, the thirty-four courses found taxable by the BTA may not be taxed because on its face R.C. 5739.01(Y)(1)(b) is unconstitutional. It taxes protected speech based on its content, in violation of the rights to freedom of speech and equal protection. It also is unconstitutionally vague, in violation of the rights to due process and freedom of speech. Thus, this Court should reverse the BTA’s decision as to all courses found taxable, and enter judgment in Global’s favor. Second, twenty-four of the courses found taxable by the BTA do not meet the three Statutory Criteria (as defined on page 3, *infra*) required to be “computer services” under R.C. 5739.01(Y)(1)(b), and so this Court should reverse the BTA’s decision as to those twenty-four courses, and enter judgment in Global’s favor as to them.

The statutory provisions at issue are R.C. 5739.01(B)(3)(e) and R.C. 5739.01(Y)(1)(b).<sup>1</sup> R.C. 5739.01(B)(3)(e) taxes “computer services.”<sup>2</sup> R.C. 5739.01(Y)(1)(b), the key provision for

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<sup>1</sup> R.C. 5739.01(B)(3)(e) and R.C. 5739.01(Y)(1)(b) have not been amended since the beginning of the relevant audit period. See Appendix to the Merit Brief of Appellant Global Knowledge Training, LLC (“Appx.”), at Appxs. H, I.

<sup>2</sup> R.C. 5739.01(B)(3)(e) provides, in relevant part:

(B) “Sale” or “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:

purposes of this appeal, expands upon R.C. 5739.01(B)(3)(e) by defining “computer services” to include “training of computer programmers and operators” that is “provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.”<sup>3</sup> In its regulation implementing R.C. 5739.01(Y)(1)(b), the Ohio Department of Taxation (“DOT”) explained the meaning of “training” under the statute. O.A.C. 5703-9-46(A)(6) (1993). The regulation defines “training” to be instruction of “computer programmers and operators in the use of computer equipment and its systems software,” but not “instruction in the use of application software or other result-oriented procedures.” *Id.*<sup>4</sup>

Taken together, the “training” provision of R.C. 5739.01(Y)(1)(b) and its implementing regulation establish that training must meet three Statutory Criteria to be taxable as “computer services”:

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\* \* \*

(3) All transactions by which:

\* \* \*

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

<sup>3</sup> In its entirety, R.C. 5739.01(Y)(1)(b) states: “‘Computer services’ means providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.”

<sup>4</sup> During the audit period at issue, O.A.C. 5703-9-46(A)(6) (1993) stated: “‘Training’ means instructing computer programmers and operators in the use of computer equipment and its systems software. It does not include instruction in the use of application software or other result-oriented procedures.” The DOT amended the language of O.A.C. 5703-9-46 in 2004; however, its substance remains unchanged. The amended regulation specifies that “computer services” under R.C. 5739.01(Y)(1)(b) include “[t]raining computer programmers and operators in the operation and use of computer equipment and its systems software.” O.A.C. 5703-9-46(A)(2)(d) (2009). The regulation specifically excludes “application software” from the definition of “systems software.” O.A.C. 5703-9-46(A)(4) (2009); see Appx. K.

Statutory Criterion I: The content of the training must be computer programming or operation; the statute only taxes instruction “in the use of computer equipment and its systems software,” and does not tax “instruction in the use of application software or other result-oriented procedures” or instruction in any other subject matter.<sup>5</sup>

Statutory Criterion II: The training must be “provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.”<sup>6</sup>

Statutory Criterion III: Attendees of the training must be “computer programmers and operators.”<sup>7</sup>

Only if training meets all three of these Statutory Criteria can it be taxed as “computer services” under the “training” provision of R.C. 5739.01(Y)(1)(b).

As discussed in Proposition of Law No. I, *infra*, the “training” provision of R.C. 5739.01(Y)(1)(b) is facially unconstitutional because it taxes protected speech based on its content, in violation of the right to freedom of speech protected by the United States and Ohio Constitutions. Statutory Criterion I demonstrates that the “training” provision of R.C. 5739.01(Y)(1)(b) *necessarily* taxes training based on its content; only training “in the use of computer equipment and its systems software” may be taxed. Such a content-based tax on

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<sup>5</sup> R.C. 5739.01(Y)(1)(b); O.A.C. 5703-9-46(A)(2),(6) (1993) (subsection (A)(2) mirrors the language of the statute); see also Supplement to the Merit Brief of Appellant Global Knowledge Training, LLC (“Supp.”) 37, 66; S.T. 1, 57; *Global Knowledge*, at 7-15; *Burke Mktg. Services, Inc. v. Tracy* (Sept. 6, 1996), BTA No. 91-J-377, unreported, 1996 Ohio Tax LEXIS 1052, at \*23-\*24 (stating that the Tax Commissioner did not tax training in application software, but did tax training in systems software); *Ohio Edison Co. v. Limbach* (May 28, 1993), BTA No. 90-G-1182, unreported, 1993 Ohio Tax LEXIS 953, at \*16-\*18 (stating that if courses “about the future of computers” and “operating non-taxable communication equipment” had taken place in Ohio, they would not have been taxable as “computer services”).

<sup>6</sup> R.C. 5739.01(Y)(1)(b); O.A.C. 5703-9-46(A)(2) (1993); see also *Global Knowledge*, at 10-13; *Mentor Technologies L.P. v. Tracy* (Aug. 25, 1995), BTA No. 94-A-1058, unreported, 1995 Ohio Tax LEXIS 1035, at \*4 (stating this as a criterion for training to be taxed under the statute).

<sup>7</sup> R.C. 5739.01(Y)(1)(b); O.A.C. 5703-9-46(A)(2),(6) (1993); see also *Global Knowledge*, at 13-14; *Mentor Technologies*, 1995 Ohio Tax LEXIS 1035, at \*4-\*9 (stating this as a criterion for training to be taxed under the statute and defining “computer operator” by reference to the term “computer programmer”); *Burke Mktg.*, 1996 Ohio Tax LEXIS 1052, at \*24-\*25 (distinguishing between computer programmers and operators, and other professionals, for purposes of taxing training under the statute).

protected speech is presumptively invalid and subject to strict scrutiny. Because Ohio has no compelling state interest that justifies this content-based taxation, the “training” provision of R.C. 5739.01(Y)(1)(b) violates the right to freedom of speech under the United States and Ohio Constitutions.

Likewise, as explained in Proposition of Law No. II, *infra*, the “training” provision of R.C. 5739.01(Y)(1)(b) on its face violates the right to equal protection under the United States and Ohio Constitutions, because it differentially taxes members of the same class based on the content of protected speech. The relevant class here is for-profit companies providing technical instruction to corporate personnel. Statutory Criterion I shows that only members of this class providing training “in the use of computer equipment and its systems software” are taxed; members of the class that do not provide training with such content are not taxed under the statute. Selective, content-based taxation of members of the same class is subject to strict scrutiny. Because Ohio has no compelling interest in this content-based taxation, the “training” provision of R.C. 5739.01(Y)(1)(b) violates the right to equal protection under the United States and Ohio Constitutions.

Proposition of Law No. III explains that R.C. 5739.01(Y)(1)(b) – in its entirety – is facially unconstitutional because the terms “computer equipment” and “computer systems” as used in the statute and its implementing regulation are impermissibly vague, in violation of the rights to due process and freedom of speech protected by the United States and Ohio Constitutions.<sup>8</sup> A statutory term is unconstitutionally vague where persons of ordinary intelligence must necessarily guess at its meaning. In reviewing laws impacting protected

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<sup>8</sup> Because all services defined as “computer services” under R.C. 5739.01(Y)(1)(b) must involve “computer equipment” or “computer systems” to be taxable, the impermissible vagueness of those terms renders the entire statute facially unconstitutional, not just the “training” provision. See footnote 26, *infra*, for further detail.

speech, this standard is stringent. Statutory Criteria I and II require that training involve “computer equipment” or “computer systems” to be taxable. Although capable of precise definition, these inherently vague terms are undefined in Ohio law, leaving it entirely unclear what equipment falls within their scope, and thus what training is taxable. Because persons of ordinary intelligence must necessarily guess at the meaning of these terms, the statute is impermissibly vague in violation of the rights to due process and freedom of speech protected by the United States and Ohio Constitutions.

Because R.C. 5739.01(Y)(1)(b) is unconstitutional on its face, this Court should reverse the BTA’s decision as to all thirty-four courses it found taxable under the statute, and enter judgment in Global’s favor.

In addition to the above-discussed constitutional violations, Propositions of Law Nos. IV, V, and VI, and Attachment A hereto, *infra*, demonstrate that it was unreasonable and unlawful for the BTA to tax twenty-four of Global’s courses, because they do not meet the Statutory Criteria to be taxable as “computer services.” The twenty-four courses all are non-taxable for one or more of three reasons: (i) they were instruction in the use of routers and switches, not “computer equipment” or “computer systems” as required under Statutory Criteria I and II; (ii) they did not involve instruction in “systems software” as required under Statutory Criterion I; and (iii) they were not attended by “computer programmers and operators” as required under Statutory Criterion III. Thus, this Court should reverse the decision of the BTA as to those twenty-four courses on statutory grounds, and enter judgment in Global’s favor as to them.

## STATEMENT OF FACTS

Global is a world leader in education in the areas of information technology, telecommunications, and broadband. (Supp. 4, 70-71, 74; H.R. 11; S.T. 68, 71, 74.)<sup>9</sup> Global conducts regularly scheduled courses at various training centers around the world. (Supp. 39-40, 70-71, 74; S.T. 11-12, 68, 71, 74.) Global also conducts courses for specific clients at their locations, and provides courses over the Internet. (Supp. 40, 70; S.T. 12, 68.) The courses vary in difficulty, ranging from introductory to advanced subject matter. (Supp. 9-18; H.R. 30-66.) The typical attendee of a course varies with the level of difficulty; Global's introductory courses are attended by career-changers and entry-level information technology ("IT") personnel, whereas its more complex courses are attended by advanced IT professionals. (Supp. 9-18, 29, 108-114, 117-118; H.R. 30-66, 110-111; H.R. Ex. 9 at 1-7, 10-11.) Global provides courses in application software, as well as systems software, and on different types of hardware. (Supp. 4-5, 9-10, 108-114, 116-118; H.R. 13-14, 31-32, 36-37; H.R. Ex. 9 at 1-7, 9-11.)

This appeal involves taxation of training courses conducted by Global in Ohio from July 1, 1997 through June 30, 2000. (See Supp. 37; S.T. 1.) After auditing Global's sales, the Tax Commissioner determined that 36 of its courses held during this period were taxable as "computer services" under R.C. 5739.01(B)(3)(e) and R.C. 5739.01(Y)(1)(b). (*Global Knowledge*, at 6; Supp. 37, 108-114; H.R. Ex. 9 at 1-7; S.T. 1.) On February 15, 2006, the Tax Commissioner issued a final determination, assessing \$91,872.15 in use tax and interest against Global. (Supp. 37; S.T. 1.) On July 28, 2009, in the decision that is the subject of this appeal,

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<sup>9</sup> "S.T." will refer to the Statutory Transcript, while "H.R." will refer to the Transcript of Recorded Board of Tax Appeals Hearing, May 6, 2008, both of which are of record. As previously noted, "Supp." will refer to the Supplement to the Merit Brief of Appellant Global Knowledge Training, LLC, and "Appx." will refer to the Appendix to the Merit Brief of Appellant Global Knowledge Training, LLC.

the BTA held that the Tax Commissioner was correct in taxing 34 of the 36 courses as “computer services” under R.C. 5739.01(B)(3)(e) and R.C. 5739.01(Y)(1)(b), but erred in taxing the remaining two courses. (*Global Knowledge*, at 14-15.) The BTA affirmed assessment of \$73,233.15 in use tax, plus interest. (See Supp. 37, 79-81, 105-106; H.R. Ex. 7; S.T. 1, 105-107.)

In making its determination, the BTA conducted an inquiry into Global’s curriculum, examining each course against the Statutory Criteria set forth above. In particular, it scrutinized: (i) the content of the instruction; (ii) the equipment trained upon; and (iii) the course attendees. (See *Global Knowledge*, at 7-15; Supp. 9-29, 41-64, 71-74, 108-119; H.R. 30-66 (Fox direct testimony regarding curriculum), 71-108 (Fox cross-examination testimony regarding curriculum), 110-113 (Examiner questioning regarding curriculum); H.R. Ex. 9 at 1-12 (Global’s detailed summary of courses); S.T. 21-44, 71-74 (course descriptions).)<sup>10</sup> The BTA relied upon each of these Statutory Criteria in reaching its decision. (See *Global Knowledge*, at 7-15.)

In order for this Court to evaluate that part of Global’s appeal that is not a constitutional challenge, but rather is based upon the statute (*i.e.*, Propositions of Law Nos. IV, V and VI, *infra*), Global must describe the courses at issue and analyze them against the Statutory Criteria utilized by the BTA. So doing reveals that – in addition to the two courses the BTA found non-taxable – twenty-four of the thirty-six courses are non-taxable under the statute.<sup>11</sup> Each of those twenty-four courses does not meet one or more of the Statutory Criteria.

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<sup>10</sup> Michael Fox, Global’s Senior Vice President for Product Management and Enterprise Solutions, and Brian Holland, Global’s General Counsel, testified for Global at the BTA Hearing. The Tax Commissioner presented no witnesses.

<sup>11</sup> The BTA correctly found two courses non-taxable based on their content, as they were instruction in application software, not systems software, as required by the statute. (*Global Knowledge*, at 9.)

- Seventeen of the twenty-four courses were instruction in the use of routers and switches, which are network equipment that functions independently of a computer's central processing unit ("CPU"). These devices operate as the "traffic cops" that manage the flow of information over various types of networks, including computer, cable and telecommunications networks. As the BTA correctly determined, "routers and switches are not computers per se." *Global Knowledge*, at 12. They also are not "computer equipment" or "computer systems." These courses thus are non-taxable under the "training" provision of R.C. 5739.01(Y)(1)(b) because they do not meet Statutory Criteria I and II.<sup>12</sup>
- Six of the twenty-four courses were instruction in application software, not systems software. Systems software is the small subset of software considered "operating systems," such as UNIX, VMS, and Windows. Application software is that with which the end user interfaces to perform various work and personal functions; it operates on top of systems software. Instruction in application software is not taxable under the statute. These courses thus are non-taxable under the "training" provision of R.C. 5739.01(Y)(1)(b) because they do not meet Statutory Criterion I.<sup>13</sup>
- Ten of the twenty-four courses were introductory courses, the attendees of which were career-changers or entry-level IT personnel. The attendees of these courses had not yet achieved the required technical acumen to be considered "computer programmers and operators." These courses thus are non-taxable under the "training" provision of R.C. 5739.01(Y)(1)(b) because they do not meet Statutory Criterion III.<sup>14</sup>

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Global conceded that 10 courses, which involved instruction in systems software, are taxable under the statute. (*Global Knowledge*, at 6; Supp. 15, 17-18, 108, 112-114; H.R. 54-55, 62-66; H.R. Ex. 9 at 1, 5-7.) However, because the statute is unconstitutional on its face, see Propositions of Law Nos. I, II and III, *infra*, those 10 courses are not properly taxable either.

<sup>12</sup> (See O.A.C. 5703-9-46(A)(2),(6) (1993); Supp. 5-7, 9-16, 28-29, 85, 87, 89-92, 95-96, 98-104, 109-113, 116-117, 124; H.R. 14-15, 20-24, 33-38, 41-48, 52, 56-61, 109-110; H.R. Ex. 5 at 3, 5, 7-10; H.R. Ex. 6 at 3-4, 9-15; H.R. Ex. 9 at 2-6, 9-10, Att. B.)

<sup>13</sup> (See O.A.C. 5703-9-46(A)(6) (1993); Supp. 9, 14-16, 111-113, 118; H.R. 51-52, 55-58; H.R. Ex. 9 at 4-6, 11.)

<sup>14</sup> (See O.A.C. 5703-9-46(A)(2),(6) (1993); Supp. 9, 12-16, 108-109, 111-113, 117; H.R. 32-33, 45-49, 52, 56-61; H.R. Ex. 9 at 1-2, 4-6, 10.)

The Tax Commissioner presented no evidence before the BTA disputing the content of these courses, the equipment used, or their attendees. (Supp. 34; H.R. 133.)<sup>15</sup>

### ARGUMENT

This Court reviews BTA decisions for reasonableness and lawfulness. R.C. 5717.04. If this Court determines that a BTA decision is unreasonable or unlawful, it “shall reverse and vacate the decision or modify it and enter final judgment in accordance with such modification.” *Id.* This Court “will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion.” *Bd. of Educ. of Gahanna-Jefferson Local Sch. Dist. v. Zaino* (2001), 93 Ohio St.3d 231, 232, 754 N.E.2d 789 (citation omitted). Facial constitutional challenges to taxing statutes may be raised in the first instance on appeal to this Court from the BTA. *Comtech Systems, Inc. v. Limbach* (1991), 59 Ohio St.3d 96, 101, 570 N.E.2d 1089. “[S]trict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed.” *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 127, 661 N.E.2d 1011 (citation and internal quotation marks omitted).

The BTA’s decision cannot stand as to any of Global’s courses found taxable, because the statute on which the tax was based is unconstitutional on its face in several respects. See Propositions of Law Nos. I, II and III, *infra*. Moreover, as to twenty-four courses, the BTA’s decision cannot stand because those courses do not meet the Statutory Criteria required to be

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<sup>15</sup> For ease of reading, Global has not set forth a description of each course in the Statement of Facts. A detailed description of the content of each course at issue, any equipment trained upon, and its attendees can be found in Attachment A hereto (pages 36-47, *infra*).

For a spreadsheet summarizing the reasons why each of the thirty-six courses is non-taxable, see Appx. L.

taxable “computer services” under the “training” provision of R.C. 5739.01(Y)(1)(b). See Propositions of Law Nos. IV, V and VI, and Attachment A, *infra*.

**I. Proposition of Law No. I: The “training” provision of R.C. 5739.01(Y)(1)(b) on its face violates the right to freedom of speech protected by the United States and Ohio Constitutions.**<sup>16</sup>

Section 11 of Article I of the Ohio Constitution is interpreted in accordance with the First Amendment to the United States Constitution. *State ex rel. Beacon Journal Publ’g Co. v. Bond* (2002), 98 Ohio St.3d 146, 150, 781 N.E.2d 180 (citations omitted).<sup>17</sup> Both provisions protect the right to freedom of speech. On its face, the “training” provision of R.C. 5739.01(Y)(1)(b) violates both provisions. That is because: (i) under the First Amendment, training in computer programming and operation is protected speech; (ii) the “training” provision of R.C. 5739.01(Y)(1)(b) taxes that protected speech based on its content, rendering it presumptively invalid under the First Amendment and subject to strict scrutiny; and (iii) the State cannot meet its “heavy burden” under strict scrutiny, because there is no compelling interest that justifies the content-based taxation of that protected speech. The statute is unconstitutional on its face.

**A. Training in Computer Programming and Operation is Protected Speech.**

The purpose of the First Amendment “is to protect the market in ideas, broadly understood as the public expression of ideas, narratives, concepts, imagery, opinions – scientific, political, or aesthetic – to an audience whom the speaker seeks to inform, edify, or entertain.” *Hardy v. Jefferson Cmty. Coll.* (C.A.6, 2001), 260 F.3d 671, 683 (citation and internal quotation marks omitted), certiorari denied *Besser v. Hardy* (2002), 535 U.S. 970, 122 S.Ct. 1436, 152 L.Ed.2d 380. It protects “the advancement of knowledge, the transformation of taste, political

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<sup>16</sup> Proposition of Law No. 1 corresponds with Assignment of Error No. 1 raised in Global’s Notice of Appeal.

<sup>17</sup> The First Amendment is applicable to the states by virtue of the Fourteenth Amendment. *Id.* at 150 n.2.

change, cultural expression, and the other objectives, values, and consequences of \* \* \* speech \* \* \* .” *Id.* (ellipses added; citation and internal quotation marks omitted). “[E]ven dry information, devoid of advocacy, political relevance, or artistic expression, has been accorded First Amendment protection.” *Goulart v. Meadows* (C.A.4, 2003), 345 F.3d 239, 248 (citation and internal quotation marks omitted). Thus, instruction in technical subject matter is protected speech. See *id.* at 247-248 (stating that the “transmission of knowledge or ideas by the way of the spoken or written word” is “pure speech,” and holding that instruction in the topics of geography and fiber arts is protected speech) (internal quotation marks omitted); *Big Mama Rag, Inc. v. United States* (C.A.D.C.1980), 631 F.2d 1030, 1034-1035 (finding that a tax exemption granted based on the type of “instruction or training” provided by an organization implicated the First Amendment). Because it is such instruction, training in computer programming and operation is protected speech under the First Amendment.

**B. The “Training” Provision of R.C. 5739.01(Y)(1)(b) is Presumptively Invalid and Subject to Strict Scrutiny Because, On Its Face, It Taxes Training Based on Its Content**

A statute presumptively violates the First Amendment and is subject to strict scrutiny if, by its terms, it taxes protected speech based on its content. *Simon & Schuster, Inc. v. New York Crime Victims Board* (1991), 502 U.S. 105, 115-118, 112 S.Ct. 501, 116 L.Ed.2d 476; *Arkansas Writers’ Project v. Ragland* (1987), 481 U.S. 221, 229-231, 107 S.Ct. 1722, 95 L.Ed.2d 209. To overcome the presumption of invalidity, the State must demonstrate that the statute is “necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” *Simon & Schuster*, 502 U.S. at 118 (internal quotation and citation omitted); *Arkansas Writers’ Project*, 481 U.S. at 231 (citation omitted). A statute that cannot meet strict scrutiny’s “heavy burden” must be struck down as unconstitutional. *Id.*

In *Arkansas Writers' Project*, the United States Supreme Court held that an Arkansas statute, which taxed magazines based on their content, violated the First Amendment. 502 U.S. at 234. The statute exempted proceeds from the sale of “religious, professional, trade and sports” magazines from sales tax, but did not exempt proceeds from the sale of general interest magazines. *Id.* at 224. Thus, “a magazine’s tax status depended entirely on its *content*.” *Id.* at 229 (emphasis *sic*). To determine whether a magazine was subject to sales tax, Arkansas tax authorities necessarily had to examine the content of the message being conveyed. *Id.* at 230. The Court deemed “[s]uch official scrutiny of the content of publications as the basis for imposing a tax [to be] entirely incompatible with the First Amendment’s guarantee of freedom of the press.” *Id.* (citation omitted). Arkansas, therefore, faced a “heavy burden in attempting to defend its content-based approach to taxation of magazines.” *Id.* at 231. Although there was “no evidence” that the legislature had acted with an “improper censorial motive,” the Court held that such a content-based provision still was subject to strict scrutiny. *Id.* at 228, 231. Arkansas could not demonstrate a compelling interest that justified the “selective, content-based taxation of certain magazines,” and so the statute failed strict scrutiny and violated the First Amendment right to freedom of the press. *Id.* at 234.

Building upon the principles articulated in *Arkansas Writers' Project*, in *Simon & Schuster* the Court held that content-based taxation of *any* protected speech is presumptively invalid and subject to strict scrutiny under the First Amendment. See 502 U.S. at 115-118. That conclusion was based not upon the First Amendment’s right to freedom of the press, but upon its broader right to freedom of speech. *Id.* The New York law at issue in *Simon & Schuster* confiscated income that an accused or convicted criminal garnered from works describing his crime. *Id.* at 109. Those funds were placed in an escrow account and made available to the

victims of the crime and the criminal's other creditors. *Id.* The Court found this law indistinguishable from the tax law at issue in *Arkansas Writers' Project* because “[b]oth forms of financial burden operate as *disincentives to speak.*” *Id.* at 116-117 (emphasis added). Finding the notion “so obvious as to not require explanation,” the Court held that a “statute plainly impos[ing] a financial disincentive only on speech of a particular content” is presumptively inconsistent with the right to freedom of speech. *Id.* at 115-116 (emphasis added; citation and internal quotation marks omitted). The Court made clear that this principle “does not vary with the identity of the speaker.” *Id.* at 117. Because the law imposed a content-based financial disincentive on protected speech, the Court subjected it to strict scrutiny. *Id.* at 118. In doing so, the Court explicitly rejected the contention that “discriminatory financial treatment is suspect under the First Amendment only when the legislature intends to suppress certain ideas.” *Id.* at 117. As the State could not show that the law was narrowly tailored to serve a compelling interest, the Court held that the law failed strict scrutiny and violated the First Amendment right to freedom of speech. *Id.* at 123.

In *United States Satellite Broadcasting Co., Inc. v. Lynch* (E.D.Cal. 1999), 41 F.Supp.2d 1113, the court applied the principles enunciated in *Arkansas Writers' Project* and *Simon & Schuster*. Plaintiff there brought suit challenging the California Boxing Act, which imposed a tax on pay-per-view telecasts of boxing, wrestling, kickboxing, and similar contests. *Id.* at 1116. The court found that “[o]n its face, the Boxing Act tax[ed] some telecasts, and not others, based on the content of those telecasts.” *Id.* at 1120. It thereby created a “financial disincentive” to broadcast telecasts with a particular content. *Id.* at 1121 (quoting *Simon & Schuster*). Applying *Arkansas Writers' Project* and *Simon & Schuster*, the court held the tax presumptively invalid and “immediately subject[] to strict scrutiny” under the First Amendment. *Id.* at 1120-1121.

The Boxing Act failed strict scrutiny, because the State had no compelling interest in taxing telecasts based on their content. *Id.* at 1121-1123. Because the Act constituted “exactly the kind of judgment about content which the First Amendment does not allow California to make,” the court held it unconstitutional under the First Amendment right to freedom of speech. *Id.* at 1123.

The statute at issue here must fail, just as did the statutes in *Arkansas Writers’ Project*, *Simon & Schuster*, and *United States Satellite Broadcasting*.<sup>18</sup> As previously discussed, Statutory Criterion I requires that, to be taxable, training must be in computer programming or operation. Indeed, O.A.C. 5703-9-46(A)(6) (1993) states that the statute only taxes instruction “in the use of computer equipment and its systems software,” and does not tax “instruction in the use of application software or other result-oriented procedures,” or instruction in any other subject matter.<sup>19</sup> The statute and its implementing regulation impose a tax upon – and thus impermissibly place a “financial disincentive” upon – protected speech of only a particular content, *i.e.*, instruction in the use of computer equipment and its systems software. In order to determine whether any particular training is taxable under the provision, the Ohio tax authorities must *necessarily* scrutinize its content, because training is *only* taxable if the authorities determine that it consists of instruction in the use of computer equipment and its systems

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<sup>18</sup> See also, *e.g.*, *Opinion of the Justices to the Senate* (2002), 436 Mass. 1201, 1202, 1205-1206, 764 N.E.2d 343 (advising the Massachusetts Senate that a proposed law, requiring proceeds related to a crime to be placed in an escrow account, on its face constituted an impermissible financial disincentive on protected speech under the First Amendment); *Dep’t of Revenue v. Magazine Publishers of Am.* (Fla. 1992), 604 So.2d 459, 461-463 (holding a law, which used the content of a publication as one of five criteria for taxation, to be unconstitutional under the First Amendment).

<sup>19</sup> This Court “must consider” the DOT’s implementation and interpretation of R.C. 5739.01(Y)(1)(b), including its authoritative construction promulgated in O.A.C. 5703-9-46 (1993). See *Forsyth County v. The Nationalist Movement* (1992), 505 U.S. 123, 131, 133-134, 112 S.Ct. 2395, 120 L.Ed.2d 101 (citations omitted) (stating the same point, and holding that an ordinance “as construed by the county” was content-based because “the ordinance often require[d] that the fee be based on the content of the speech”).

software; instruction in other content is not taxable. Such official scrutiny of content as the basis for taxation is “entirely incompatible” with the First Amendment. See *Simon & Schuster*, 502 U.S. at 115 (citation and internal quotation marks omitted); *Arkansas Writers’ Project*, 481 U.S. at 230 (citation omitted); *United States Satellite Broadcasting*, 41 F.Supp.2d at 1120 (citation and internal quotation marks omitted). Accordingly, the statute is presumptively invalid and subject to strict scrutiny. See 502 U.S. at 115, 118; 481 U.S. at 230-231; 41 F.Supp.2d at 1120.

The application of the statute to Global in this case reinforces this conclusion. Both the Tax Commissioner and the BTA rigorously examined the content of the 36 courses to determine whether each one was taxable under R.C. 5739.01(Y)(1)(b). *Global Knowledge*, at 7-15; Supp. 9-29, 37, 41-64, 66, 71-74, 108-119; H.R. at 30-66 (Fox direct testimony regarding course content), 71-108 (Fox cross-examination testimony regarding course content), 110-113 (Examiner questioning of Fox regarding course content and equipment); H.R. Ex. 9 at 1-12 (Global’s detailed summary of courses); S.T. 1, 21-44, 57, 71-74 (course descriptions and conclusions of the Tax Commissioner and auditor based on course content). The Tax Commissioner and the BTA then selectively taxed Global’s courses based upon their content; they taxed courses that they believed were instruction “in computer equipment and its systems software,” but did not tax courses that they believed were instruction in application software. *Global Knowledge*, at 7-15; Supp. 37, 66; S.T. 1, 57. This selective taxation of Global’s courses by Ohio tax authorities underscores that the statute, on its face, imposes a content-based tax on protected speech.

Because, on its face, the “training” provision of R.C. 5739.01(Y)(1)(b) taxes training based on its content, it is presumptively invalid and subject to strict scrutiny.

C. **The “Training” Provision of R.C. 5739.01(Y)(1)(b) Fails Strict Scrutiny and thus Violates the Right to Freedom of Speech.**

Appellee faces a “heavy burden” in defending this content-based tax against strict scrutiny. *Arkansas Writers’ Project*, 481 U.S. at 231. It must be struck down unless appellee can demonstrate that the law “is necessary to serve a compelling state interest and is narrowly drawn to achieve that end.” *Id.* (citation omitted); *Simon & Schuster*, 502 U.S. at 118 (citation and internal quotation marks omitted). Appellee cannot meet its “heavy burden.”

The Ohio General Assembly enacted the “training” provision of R.C. 5739.01(Y)(1)(b) as part of a comprehensive tax package designed to raise revenue for the State. See Kelly, Ohio Business Groups Back Revised Tax Plan: Package Includes Putting Excises on Some Services, *The Blade*, June 8, 1983, at 3 (describing the tax package enacting this provision); Democrats Pass Ohio Budget Bill in Senate, 17-16: \$25 Billion Measure Lacks GOP Support, *The Blade*, June 25, 1983, at 1, 4 (describing the tax as a revenue raising measure); *Comtech Systems*, 59 Ohio St.3d at 97-98 (discussing the procedural history of the provision in the Ohio General Assembly).<sup>20</sup> That general interest in raising revenue is insufficient as a matter of law to validate the statute’s content-based taxation of training.<sup>21</sup> Consequently, it fails strict scrutiny.

Because, on its face, the “training” provision of R.C. 5739.01(Y)(1)(b) violates the right to freedom of speech protected by the First Amendment to the United States Constitution, and

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<sup>20</sup> Copies of the two cited articles from *The Blade* are found at Appxs. N, O.

<sup>21</sup> See *United States Satellite Broadcasting*, 41 F.Supp.2d at 1121 (“While [the State’s general interest in raising revenue] has been described as ‘critical’ and ‘important,’ as a matter of law it does not justify a content-based tax on speech.”) (citing and quoting *Arkansas Writers’ Project*, 481 U.S. at 231-232); see also *Forsyth*, 505 U.S. at 135-136 (“While [raising revenue for police services] is undoubtedly an important government responsibility, it does not justify a content-based permit fee.”) (citation omitted); *Simon & Schuster*, 502 U.S. at 120-121 (the State does not have a compelling interest in raising funds for victim compensation through confiscation of proceeds from wrongdoer’s speech about crime); *Minneapolis Star v. Minn. Comm’r* (1983), 460 U.S. 575, 585-586, 103 S.Ct. 1365, 75 L.Ed.2d 295 (the State’s interest in raising revenue was “critical” but not “compelling.”).

the coextensive Section 11 of Article I of the Ohio Constitution, the BTA's decision is unreasonable and unlawful. It should be reversed as to all thirty-four of Global's courses found taxable, and judgment entered in Global's favor.

**II. Proposition of Law No. II: The "training" provision of R.C. 5739.01(Y)(1)(b) on its face violates the right to equal protection under the United States and Ohio Constitutions.**<sup>22</sup>

The "training" provision of R.C. 5739.01(Y)(1)(b) on its face also violates the right to equal protection under the Fourteenth Amendment to the United States Constitution, and Section 2 of Article I of the Ohio Constitution.<sup>23</sup> The Equal Protection Clause "protects the individual from state action which selects him out for discriminatory treatment by subjecting him to taxes not imposed on others of the same class." *Boothe Financial Corp. v. Lindley* (1983), 6 Ohio St.3d 247, 249, 452 N.E.2d 1295 (citation and internal quotation marks omitted), certiorari denied *Limbach v. Boothe Financial Corp.* (1984), 464 U.S. 1057, 104 S.Ct. 740, 79 L.Ed.2d 198. Companies engaged in the "same business in character and kind" are members of the same class. *State ex rel. Woodmen Accident Co. v. Conn* (1927), 116 Ohio St. 127, 136, 156 N.E. 114 (citation and internal quotation marks omitted). A statutory classification that differentially treats such similarly-situated companies based on the content of protected speech is subject to strict scrutiny; the classification violates the right to equal protection unless it is necessary to serve a compelling state interest and is narrowly tailored to achieve that end. See *Police Dep't of the City of Chicago v. Mosley* (1972), 408 U.S. 92, 101-102, 92 S.Ct. 2286, 33 L.Ed.2d 212 (subjecting a content-based classification to strict scrutiny and holding that it violated the constitutional right to equal protection); *Thompson*, 95 Ohio St.3d at 269-270, 272-273 (same).

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<sup>22</sup> Proposition of Law No. II corresponds with Assignment of Error No. 1 raised in Global's Notice of Appeal.

<sup>23</sup> The two are "functionally equivalent." *Ohio v. Thompson* (2002), 95 Ohio St.3d 264, 266, 767 N.E.2d 251 (citation and internal quotation marks omitted).

The relevant class here is for-profit companies providing technical instruction to corporate personnel. See *Conn*, 116 Ohio St. at 136.<sup>24</sup> On its face, the statute differentially treats members of that class by taxing or not taxing them based upon the content of protected speech. A member of the relevant class can *only* be taxed if it provides training that meets Statutory Criterion I; such training must be instruction “in the use of computer equipment and its systems software” to be taxable. If a member of the class does not provide instruction with that content, then it cannot be taxed under the statute, even if its training meets the other two Statutory Criteria. The statute therefore taxes members of the relevant class differently, based on the content of their instruction. Such a statutory classification must be subjected to strict scrutiny. See generally *Mosley*, 408 U.S. at 101-102; *Thompson*, 95 Ohio St.3d at 269-270.

This conclusion is bolstered by examining the administration of the statute by the Ohio tax authorities. If they conclude that a member of the relevant class has provided training “in the use of computer equipment and its systems software” (and which also meets the other two Statutory Criteria), they tax that training. *Global Knowledge*, at 7-15; Supp. 37, 66; S.T. 1, 57; see *Burke Mktg.*, 1996 Ohio Tax LEXIS 1052, at \*23-\*24 (stating that the Tax Commissioner taxed systems software training). By contrast, where a member of the relevant class provides training in the use of non-computer equipment or application software, the tax authorities do not tax that training. *Global Knowledge*, at 7-15; Supp. 37, 66; S.T. 1, 57; see *Burke Mktg.*, 1996 Ohio Tax LEXIS 1052, at \*23-\*24 (stating that the Tax Commissioner did not tax application software training); *Ohio Edison*, 1993 Ohio Tax LEXIS 953, at \*16-\*18 (asserting that if courses “about the future of computers” and “operating non-taxable communication equipment” had

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<sup>24</sup> See also *Stewart Dry Goods Co. v. Lewis* (1935), 294 U.S. 550, 566, 55 S.Ct. 525, 79 L.Ed. 1054 (finding vendors engaged in “similar acts” to be members of the same class); *Myers v. City of Defiance* (1940), 67 Ohio App. 159, 174, 36 N.E.2d 162 (finding persons “engaged in the same business” to be members of the same class).

taken place in Ohio, they would not have been taxable as “computer services”). Such selective, content-based taxation of similarly-situated companies is subject to strict scrutiny. See generally *Mosley*, 408 U.S. at 101-102; *Thompson*, 95 Ohio St.3d at 269-270.

Under strict scrutiny, the statute must be struck down unless appellee can demonstrate that the law is necessary to serve a compelling state interest and is narrowly drawn to achieve that end. See *Mosley*, 408 U.S. at 101-102; *Thompson*, 95 Ohio St.3d at 269-270. As already discussed under Proposition of Law No. I, as a matter of law Ohio’s general interest in raising revenue is insufficient to validate the statute’s content-based taxation of similarly-situated companies. As such, it fails strict scrutiny.

The BTA’s decision is unreasonable and unlawful because the statute on its face violates the right to equal protection under the Fourteenth Amendment to the United States Constitution, and the cognate Section 2 of Article I of the Ohio Constitution. For that reason, its decision should be reversed as to all thirty-four courses found taxable, and judgment should be entered in Global’s favor.

**III. Proposition of Law No. III: R.C. 5739.01(Y)(1)(b) is facially unconstitutional because the terms “computer equipment” and “computer systems” as used in the statute and its implementing regulation are impermissibly vague under the United States and Ohio Constitutions.**<sup>25</sup>

The terms “computer equipment” and “computer systems,” as used in R.C. 5739.01(Y)(1)(b) and O.A.C. 5703-9-46(A)(2),(6) (1993), are impermissibly vague under the Due Process Clause of the Fourteenth Amendment to the United States Constitution, and the Free Speech Clauses of the First Amendment to the United States Constitution and Section 11 of Article I of the Ohio Constitution. Statutory Criteria I and II require that training involve

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<sup>25</sup> Proposition of Law No. III corresponds with Assignment of Error No. 1 raised in Global’s Notice of Appeal.

“computer equipment” or “computer systems” to be taxable. Because those key terms are not drafted with the “narrow specificity” required of laws impacting First Amendment rights, they are impermissibly vague and render the entire statute facially unconstitutional.<sup>26</sup> See *Hynes v. Mayor and Council of Borough of Oradell* (1976), 425 U.S. 610, 620, 96 S.Ct. 1755, 48 L.Ed.2d 243 (citation and internal quotation marks omitted).<sup>27</sup>

**A. A Term is Unconstitutionally Vague where Persons of Ordinary Intelligence Must Necessarily Guess At Its Meaning.**

When persons of ordinary intelligence must necessarily guess at the meaning of a statutory term, the term is unconstitutionally vague, in violation of the right to due process. *Hynes*, 425 U.S. at 620; *Big Mama Rag*, 631 F.2d at 1035. The vagueness doctrine is rooted in the due process requirement of notice; those subject to a law must be informed of its meaning. *United Food & Commercial Workers Union v. Sw. Ohio Reg'l Transit Auth.* (C.A.6, 1998), 163 F.3d 341, 358-359; *Big Mama Rag*, 631 F.2d at 1035. The vagueness doctrine also is aimed at preventing the “arbitrary and discriminatory” enforcement of laws by officials lacking specific statutory guidelines. *United Food*, 163 F.3d at 358-359 (citations and internal quotation marks

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<sup>26</sup> Under Propositions of Law Nos. I and II, *supra*, the “training” provision of R.C. 5739.01(Y)(1)(b) is unconstitutional. However, under Proposition of Law No. III, the entire definition of “computer services,” and thus R.C. 5739.01(Y)(1)(b) in its entirety, is unconstitutional. R.C. 5739.01(Y)(1)(b) includes four services within the definition of taxable “computer services”: (i) “specifying computer hardware configurations,” (ii) “evaluating technical processing characteristics,” (iii) “computer programming,” and (iv) “training of computer programmers and operators.” To be taxable under the statute, each of those services must meet the requirement set forth in Statutory Criterion II. In other words, each service must be “provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.” R.C. 5739.01(Y)(1)(b); O.A.C. 5703-9-46(A)(2) (1993). As Proposition of Law No. III explains, the terms “computer equipment” and “computer systems” as used in Statutory Criterion II are unconstitutionally vague. Since all four services must meet this Statutory Criterion to be taxable “computer services,” its invalidity renders the entire definition facially unconstitutional.

<sup>27</sup> As discussed in footnote 19, *supra*, this Court “must consider” the DOT’s implementing regulation in evaluating Global’s facial challenge to R.C. 5739.01(Y)(1)(b). *Forsyth*, 505 U.S. at 131 (citations omitted).

omitted); *Big Mama Rag*, 631 F.2d at 1035 (citations omitted). The test for vagueness is particularly stringent in review of laws regulating protected speech. *Hynes*, 425 U.S. at 620; *United Food*, 163 F.3d at 359; *Big Mama Rag*, 631 F.2d at 1035. “[I]n the First Amendment area government may regulate \* \* \* only with narrow specificity.” *Hynes*, 425 U.S. at 620 (ellipsis in original; citation and internal quotation marks omitted). This stringent requirement recognizes that vague laws impacting First Amendment rights “require (those subject to them) to steer far wider of the unlawful zone, than if the boundaries of the forbidden areas were clearly marked, \* \* \* by restricting their conduct to that which is unquestionably safe. Free speech may not be so inhibited.” *Big Mama Rag*, 631 F.2d at 1035 (ellipsis in original; citations and internal quotation marks omitted).<sup>28</sup>

In accordance with these principles, the United States Supreme Court in *Hynes* found a municipal ordinance unconstitutionally vague. 425 U.S. at 621-622. The ordinance required those canvassing door-to-door for a “recognized charitable cause” or a “political campaign or cause” to “notify the Police Department, in writing, for identification only.” *Id.* at 612 (internal quotation marks omitted). Reviewing the ordinance under the stringent standard required for a law regulating protected speech, the Court found it unconstitutionally vague for two reasons. *Id.* at 620-623. First, it was not clear to which organizations the ordinance applied. *Id.* at 621. For instance, because the term “recognized charitable cause” was not defined, it was uncertain by whom a charitable cause had to be “recognized” to fall within the scope of this term. *Id.* Second, the statute did not define what was required to comply with the notice requirement; it

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<sup>28</sup> See also, e.g., *United Food*, 163 F.3d 341 at 359-360 (holding the undefined terms “controversial” and “aesthetically pleasing” unconstitutionally vague under the strict standard of review); *Bullfrog Films, Inc. v. Wick* (C.A.9, 1988), 847 F.2d 502, 512-514 (holding several regulations unconstitutionally vague under the strict standard of review because, although “one might perhaps make some educated guesses as to the meaning of these regulations \* \* \* one could never be confident that the [agency] would agree.”) (ellipsis added).

gave no indication of what had to be set forth in the notice or what the police considered adequate “identification.” *Id.* This lack of specificity stood in marked contrast to the detailed notice requirements stated in a commercial canvassing ordinance. *Id.* The Court thus held the ordinance to be unconstitutionally vague. *Id.* at 620-623.

The D.C. Circuit struck down a similarly vague law in *Big Mama Rag*. The case addressed a U.S. Treasury regulation defining the term “educational” for purposes of granting a tax exemption to certain organizations. 631 F.2d at 1034. The regulation defined the term by reference to the type of “instruction or training” an organization provided. *Id.* An organization that advocated “a particular position or viewpoint” qualified as “educational” only if it presented a “sufficiently full and fair exposition of the pertinent facts \* \* \* .” *Id.* (ellipsis added). On the other hand, an organization was not “educational” if its “principal function [was] the mere presentation of unsupported opinion.” *Id.* The Court analyzed this definition under the “strict standard” required for a law regulating protected speech. *Id.* at 1035. Like the Court in *Hynes*, the D.C. Circuit found the term “educational” unconstitutionally vague for two reasons. First, it was uncertain to whom the term applied; the regulation “did not clearly indicate which organizations [were] advocacy groups and thereby subject to the ‘full and fair exposition’ standard.” *Id.* at 1037. Second, the statute did not precisely define the line between what constituted a “full and fair exposition of the pertinent facts” and what did not. *Id.* at 1039-1040. The subjective, case-by-case line drawing necessitated by the ambiguous definition of “educational” left IRS officials with impermissible latitude to arbitrarily and selectively apply the regulation. *Id.* at 1037, 1039-1040. The Court thus held the regulation impermissibly vague.

**B. The Terms “Computer Equipment” and “Computer Systems” are Unconstitutionally Vague because Persons of Ordinary Intelligence Must Necessarily Guess At Their Meaning.**

The terms “computer equipment” and “computer systems,” as used in R.C. 5739.01(Y)(1)(b) and O.A.C. 5703-9-46(A)(2),(6) (1993), are inherently vague, and in need of -- but lacking in -- precise statutory definitions. As technology has rapidly evolved, different types of technological equipment -- such as computer, network, telecommunications, and cable equipment -- have become increasingly interconnected. Network equipment now is used to transmit information between and among computers, printers, telephones, televisions, and other types of devices operating on the same or different networks. See Supp. 5-7, 16, 117, 124; H.R. 14-15, 20-21, 23-24, 59; H.R. Ex. 9 at 10, Att. B. This interconnectedness presents an obvious problem when attempting to define what constitutes “computer equipment” and “computer systems” under the statute, and what does not. Absent clear statutory definitions, the boundaries of these terms in relation to other types of equipment -- which are non-taxable under the statute -- cannot be ascertained. Cf. *Mentor Technologies*, 1995 Ohio Tax LEXIS 1035, at \*6 (“Clearly, the parties’ vastly different interpretations set forth in their respective arguments demonstrate the ambiguous nature of the statutory and code sections under consideration.”).

Ohio law does not, however, define these terms. See *Global Knowledge*, at 10. Thus, as in *Hynes*, 425 U.S. at 621-622, and *Big Mama Rag*, 631 F.2d at 1036-1040, the statute’s application is unclear. A company providing technical training cannot know with any certainty what hardware will be deemed “computer equipment” or “computer systems” by the Ohio tax authorities until after its training is conducted, a tax dispute arises, and the tax authorities render their opinion as to whether the devices trained upon come within the meaning of the statute. “One might perhaps make some educated guesses as to the meaning of these [terms], but one could never be confident [the Ohio tax authorities] would agree.” *Bullfrog Films*, 847 F.2d at

513. The statute therefore not only fails to provide notice of what training is taxable, but it also invites arbitrary application. See *Big Mama Rag*, 631 F.2d at 1035. Such subjective, case-by-case line drawing by the Ohio tax authorities is incompatible with the rights to due process and freedom of speech. See *id.* at 1037, 1039-1040.

The need for, and ability to draw, precise statutory definitions of these critical terms is demonstrated by contrasting the careful definition of “computer or peripheral equipment” set forth in the U.S. Internal Revenue Code (“IRC”). The IRC defines a “computer” as:

a programmable electronically activated device which \* \* \* is capable of accepting information, applying prescribed processes to the information, and supplying the results of these processes with or without human intervention, and \* \* \* consists of a central processing unit containing extensive storage, logic, arithmetic, and control capabilities.

Section 168(i)(2)(B)(ii), Title 26, U.S.Code. The IRC defines “peripheral equipment” as “any auxiliary machine (whether on-line or off-line) which is designed to be placed under the control of the central processing unit of a computer.” Section 168(i)(2)(B)(iii), Title 26, U.S.Code.

After defining these terms, the IRC outlines several exceptions:

The term “computer or peripheral equipment” shall not include –  
(I) any equipment which is an integral part of other property which is not a computer, (II) typewriters, calculators, adding and accounting machines, copiers, duplicating equipment, and similar equipment, and (III) equipment of a kind used primarily for amusement or entertainment of the user.

Section 168(i)(2)(B)(iv), Title 26, U.S.Code. As was the case with the commercial canvassing ordinance that the Court contrasted in *Hynes*, see 425 U.S. at 621, the IRC’s detailed definition of “computer or peripheral equipment” stands in marked contrast to the Ohio statute’s similar, yet undefined, terms “computer equipment” and “computer systems.” See *Global Knowledge*, at

10.

As the case before this Court illustrates, the failure of the Ohio General Assembly and the Ohio DOT to draft *any* definition for these terms has left them unconstitutionally vague. The BTA correctly determined that “routers and switches are not computers per se.” *Global Knowledge*, at 12. They are network equipment that is not under the control of a computer’s CPU. Supp. 6-7, 10, 14, 28-29, 85, 87, 89-92, 95-96, 98-104, 116-117, 124; H.R. 20-22, 36, 52, 109-110; H.R. Ex. 5 at 3, 5, 7-10; H.R. Ex. 6 at 3-4, 9-15; H.R. Ex. 9 at 9-10, Att. B. Routers and switches do not meet the IRC definition of “peripheral equipment” stated above. Nor do they meet the definitions of “peripheral” or “computer system” set forth in Webster’s New World Dictionary of Computer Terms (8 Ed. 2000) (“Webster’s Dictionary”).<sup>29</sup> See *id.* at 122, 409. From those definitions, it would be logical to conclude, as Global did, that routers and switches are not “computer equipment” or “computer systems.” Nevertheless, the Tax Commissioner and the BTA found Global’s hardware to be taxable “computer equipment.” This disagreement demonstrates the subjective, case-by-case line-drawing in which Ohio tax authorities must engage in applying these vague terms. Global did not and could not know which of its courses would be considered taxable under Ohio law until after its courses had been delivered, a tax audit was held, the tax authorities reviewed the equipment used in each, and they gave their opinion as to the type of equipment used.

The Ohio General Assembly and the Ohio DOT have failed to draft with the “narrow specificity” required of laws impacting First Amendment rights. *Hynes*, 425 U.S. at 620 (citation and internal quotation marks omitted). Under this strict standard of review, the terms “computer equipment” and “computer systems” are impermissibly vague because persons of ordinary intelligence must necessarily guess at their meaning. *Id.* On its face, the statute thus violates

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<sup>29</sup> See Proposition of Law No. IV, *infra*; Appx. M.

the Due Process Clause of the Fourteenth Amendment to the United States Constitution and the Free Speech Clauses of the First Amendment to the United States Constitution and Section 11 of Article I of the Ohio Constitution. Accordingly, the BTA's decision is unreasonable and unlawful; it should be reversed as to all 34 courses found taxable, and judgment should be entered in Global's favor.

**IV. Proposition of Law No. IV: Seventeen courses at issue were training on routers and switches that are not "computer equipment" or "computer systems" and therefore do not fall within the definition of "computer services" in R.C. 5739.01(Y)(1)(b).**<sup>30</sup>

Seventeen of the training courses at issue are not taxable because they were training on routers and switches, which are not "computer equipment" or "computer systems." Statutory Criteria I and II require that training involve "computer equipment" or "computer systems" to be taxable. As discussed above, the Ohio General Assembly and the Ohio DOT have failed to define these inherently uncertain terms, leaving their scope unconstitutionally vague. However, the definitions of analogous terms make clear that, as a matter of statutory construction, routers and switches should not be included within the scope of "computer equipment" and "computer systems." Moreover, "[s]trict construction of taxing statutes is required, and any doubt must be resolved in favor of the citizen upon whom or the property upon which the burden is sought to be imposed." *Roxane Laboratories*, 75 Ohio St.3d at 127 (citation and internal quotation marks omitted). Especially under that standard, routers and switches cannot be considered "computer equipment" or "computer systems."

Routers and switches are network equipment; they are not "computer equipment" or "computer systems." Global's course manuals define routers and switches in terms of their network usage. Supp. 85, 87, 89-92, 95-96, 98-104; H.R. Ex. 5 at 3, 5, 7-10; H.R. Ex. 6 at 3-4,

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<sup>30</sup> Proposition of Law No. IV corresponds with Assignment of Error No. 2 raised in Global's Notice of Appeal.

9-15. A network is the mechanism by which information – whether voice, data, or image – is transmitted in electronic form among various types of devices. Supp. 116-117, 124; H.R. Ex. 9 at 9-10, Att. B.<sup>31</sup> There are several different kinds of networks, including computer, telecommunications, and cable networks. Supp. 5-7, 16, 116-117, 124; H.R. 14-15, 20-21, 23-24, 59; H.R. Ex. 9 at 9-10, Att. B. Routers and switches operate as the “traffic cops” that manage the flow of information over these networks. Supp. 6, 85, 87, 95-96, 116-117, 124; H.R. 21; H.R. Ex. 5 at 3, 5; H.R. Ex. 6 at 3-4; H.R. Ex. 9 at 9-10, Att. B. Routers use internal tables to discriminate among data and direct it to the appropriate location; they typically operate in a network covering a large geographic area. Supp. 6-7, 28-29, 95-96, 98-104, 116-117, 124; H.R. 21-22, 109-110; H.R. Ex. 6 at 3-4, 9-15; H.R. Ex. 9 at 9-10, Att. B; see also Webster’s Dictionary, at 470 (“A router examines each packet of data it receives and then decides which way to send it onward toward its destination.”). Switches also examine and direct network traffic; however, they perform this function in a high-speed, localized network environment, such as an office location. Supp. 6, 28-29, 85, 116-117, 124; H.R. 21-22, 109-110; H.R. Ex. 5 at 3, H.R. Ex. 9 at 9-10, Att. B. Routers and switches direct network traffic autonomously, utilizing internal tables, protocols, and specifications; they operate independently of a computer’s CPU. See Supp. 6-7, 9, 13-14, 16, 28-29, 85, 87, 89-92, 95-96, 98-104, 116-117, 124; H.R. 20-22, 33, 42, 48-50, 60-61, 109-110; H.R. Ex. 5 at 3, 5, 7-10; H.R. Ex. 6 at 3-4, 9-15; H.R. Ex. 9 at 9-10, Att. B. Accordingly, routers and switches are network equipment, not “computer equipment” or “computer systems.”

The BTA’s rationale for concluding that such devices qualify as “computer equipment” cannot withstand scrutiny. Although the BTA agreed that “routers and switches are not

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<sup>31</sup> For a diagram of a basic network, see Supp. 124; H.R. Ex. 9 at Att. B.

computers per se,” it concluded that routers and switches are “computer equipment” because they have “no utility outside a network of computers.” See *Global Knowledge*, at 12-13. But as just explained, the record clearly shows that routers and switches *do* have utility outside of computer networks, such as in telecommunications and cable networks. Supp. 5-7, 16, 116-117; H.R. 14-15, 20-21, 23-24, 59; H.R. Ex. 9 at 9-10. The use of these devices outside of computer networks is confirmed by the definition of “telecommunications service” in R.C. 5739.01(AA)(1). “Telecommunications service” includes the “*routing* of voice, data, audio, video, or any other information or signals to a point, or between or among points.” *Id.* (emphasis added). This definition specifically recognizes the use of routers in telecommunications networks. The routers and switches used in telecommunications and cable networks are no different than those used in computer networks. Supp. 5-7, 16, 116-117; H.R. 14-15, 20-21, 23-24, 59; H.R. Ex. 9 at 9-10. Thus, because routers and switches do “have utility outside a network of computers,” they do not meet the BTA’s own definition of “computer equipment,” see *Global Knowledge*, at 13.

Moreover, the definitions of terms comparable to “computer equipment” and “computer systems” underscore that routers and switches do not fall within the scope of these terms. Since Ohio law does not define “computer equipment” or “computer systems,” see *id.* at 10, it is instructive to examine analogous legal provisions and technical definitions. Routers and switches do not meet the IRC definition of “peripheral equipment,” nor do they meet the Webster’s Dictionary definitions of “peripheral” or “computer system.” See Section 168(i)(2)(B)(iii), Title 26, U.S.Code; Webster’s Dictionary, at 122, 409. As previously discussed in Section B of Proposition of Law No. III, *supra*, the IRC defines “peripheral equipment” as “any auxiliary machine (whether on-line or off-line) which is designed to be placed under the

control of the central processing unit of a computer.” Section 168(i)(2)(B)(iii), Title 26, U.S.Code. Webster’s Dictionary (at 409) defines “peripheral” as “a device such as a printer or disk drive connected to and controlled by a computer but external to the computer’s central processing unit (CPU).” It defines a “computer system” as “a complete computer installation – including peripherals, such as hard and floppy disk drives, monitor, mouse, operating system, software, and printer – in which all the components are designed to work with each other.” *Id.* at 122. Routers and switches do not fall within any of these definitions, because they are network equipment that is not under the control of a computer’s CPU. See Supp. 6-7, 10, 14, 28-29, 85, 87, 89-92, 95-96, 98-104, 116-117, 124; H.R. 20-22, 36, 52, 109-110; H.R. Ex. 5 at 3, 5, 7-10; H.R. Ex. 6 at 3-4, 9-15; H.R. Ex. 9 at 9-10, Att. B.

Because “routers and switches are not computers per se,” and do not meet the definitions of “peripheral,” “peripheral equipment,” or “computer system,” they cannot be “computer equipment” or “computer systems” under R.C. 5739.01(Y)(1)(b). See *Global Knowledge*, at 12; Section 168(i)(2)(B)(iii), Title 26, U.S.Code; Webster’s Dictionary, at 122, 409. Especially since any doubt regarding the meaning of these terms must be resolved in favor of Global, see *Roxane Laboratories*, 75 Ohio St.3d at 127, the BTA’s decision to tax the seventeen courses that involved training on routers and switches is unreasonable and unlawful. This Court should reverse it and enter judgment in Global’s favor.<sup>32</sup>

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<sup>32</sup> The following courses are non-taxable in light of Proposition of Law No. IV: #150 Understanding Network Protocols; #210 ATM Internetworking; #310 Understanding Networking Fundamentals; #515 Advanced CISCO Router Configuration; #530 Internetworking Routers & Switches; #N530 IBM 8271/8272 LAN Switches; #570 CISCO Installation & Maintenance; #580 Introduction to CISCO Router Configuration; #G1110, 1110 Integrated Curriculum; #3400 Building Broadband Network Technologies; #5500 Building CISCO Remote Access Networks; #5525 CISCO AS5200 Installation & Configuration; #5575 CATALYST 5000; #5900 CISCO OSPF Design & Configuration; #8700 Nortel Hub Connectivity; #8800

**V. Proposition of Law No. V: Six courses at issue did not involve instruction in systems software, and therefore are not taxable as “computer services” under R.C. 5739.01(Y)(1)(b).**<sup>33</sup>

Six training courses at issue are not taxable as “computer services” under R.C. 5739.01(Y)(1)(b) because they did not involve “training” within the meaning of the statute. Statutory Criterion I requires that training be in computer programming or operation to be taxed. Indeed, O.A.C. 5703-9-46(A)(6) (1993) defined “training” as instruction “in the use of computer equipment *and* its systems software.” (emphasis added). The use of the conjunctive leaves no room for doubt – courses that do not involve instruction in the use of systems software (such as courses in application software) are not “training” as defined. *Id.* Thus, Global’s courses involving application software instruction are not taxable as “computer services.” See *id.*

The Ohio DOT defined “systems software” to include “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 media.” O.A.C. 5703-9-46(A)(5)(a) (1993). In other words, systems software is the small subset of software considered “operating systems,” such as UNIX, VMS, and Windows. See Supp. 9, 118; H.R. 31; H.R. Ex. 9 at 11. By contrast, the DOT defined “application software” to include “programs that are intended to perform business functions or control or monitor processes.” O.A.C. 5703-9-46(A)(5)(b) (1993). Application software is that which operates on top of the operating systems; the end user interfaces with this software to perform various work and personal functions. Supp. 9, 118; H.R. 31; H.R. Ex. 9 at 11.

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Router Installation & Basic Configuration; and #8900 Router Configuration & Management. See Attachment A, at pages 36-38, 40-46, *infra*.

<sup>33</sup> Proposition of Law No. V corresponds with Assignment of Error No. 3 raised in Global’s Notice of Appeal.

The record clearly shows that four courses the BTA found taxable were instruction in application software, not systems software.<sup>34</sup> Supp. 14-16, 111-113, 118; H.R. 51-52, 57-58; H.R. Ex. 9 at 4-6, 11. These courses are not properly taxable under the statute.

The BTA also erred when it held that courses #6950 PERL Scripting, and #6980 PERL with CGI for the Web, were instruction in systems software. See *Global Knowledge*, at 10. In reaching this conclusion, the BTA discussed VMS software and referenced a portion of the record discussing courses #4425 Open VMS Fundamentals, and #4625 VMS & DCL Command Procedures. *Id.*; Supp. 15; H.R. 54-55. VMS is systems software, and courses #4425 and #4625 would be taxable under the terms of R.C. 5739.01(Y)(1)(b).<sup>35</sup> Supp. 15; H.R. 54-55. But the undisputed record shows that VMS is *not* taught in courses #6950 and #6980. Supp. 15, 112, 118; H.R. 55-56; H.R. Ex. 9 at 5, 11. Rather, those courses teach the PERL programming language, which is not software; it is a method for creating application software. Supp. 15, 112; H.R. 55-56; H.R. Ex. 9 at 5. To the extent that any software is taught in those courses, it is application software. Supp. 112, 118; H.R. Ex. 9 at 5, 11. Those two courses are not properly taxable either.

Because these six courses are not “training” under R.C. 5739.01(Y)(1)(b), they are not taxable as “computer services.” The BTA’s decision as to these courses was unreasonable and unlawful. This Court should reverse it and enter judgment in Global’s favor.<sup>36</sup>

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<sup>34</sup> These courses are: #8700 Nortel Hub Activity, #8800 Router Installation & Basic Configuration, #8900 Router Configuration & Management, and #9300 Troubleshooting TCP/IP Networks. See Attachment A, at pages 36-38, *infra*.

<sup>35</sup> However, these courses cannot be taxed because, as demonstrated in Propositions of Law Nos. I, II and III, R.C.5739.01(Y)(1)(b) is unconstitutional on its face.

<sup>36</sup> In sum, the following courses are non-taxable in light of Proposition of Law No. V: #6950 PERL Scripting; #6980 PERL Scripting with CGI for the Web; #8700 Nortel Hub Activity, #8800 Router Installation & Basic Configuration, #8900 Router Configuration & Management, and #9300 Troubleshooting TCP/IP Networks.. See Attachment A, at pages 36-40, *infra*.

**VI. Proposition of Law No. VI: Ten courses at issue do not fall within the definition of “computer services” in R.C. 5739.01(Y)(1)(b) because their attendees were not “computer programmers and operators.”**<sup>37</sup>

Statutory Criterion III requires that, for training to be taxable, the attendees of the training must be “computer programmers and operators.” The terms “computer programmer” and “computer operator” as used in R.C. 5739.01(Y)(1)(b) connote a “specialized position within the computer science industry.” *Global Knowledge*, at 13; *Mentor Technologies*, 1995 Ohio Tax LEXIS 1035, at \*7-\*8. A “computer programmer” is “an individual with some level of expertise in the coding of programs used to run a computer.” *Global Knowledge*, at 13; *Mentor Technologies*, 1995 Ohio Tax LEXIS 1035, at \*7. By comparison, a “computer operator” is an individual who has a “higher level of training and understanding of the computer”; such a person must “understand the operations of the computer and be able to not only utilize the computer to complete his or her job effectively, but also be aware of the methods by which problems with the equipment can be corrected.” *Mentor Technologies*, 1995 Ohio Tax LEXIS 1035, at \*8; *Global Knowledge*, at 14.

The record is undisputed that the attendees of Global’s introductory courses are individuals who have *not* yet achieved the required technical acumen to be considered “computer programmers and operators.” Supp. 9, 12-16, 108-109, 111-113, 117; H.R. 32-33, 45-49, 52, 56-61; H.R. Ex. 9 at 1-2, 4-6, 10. “The participants taking these courses typically want a general understanding of networks and how they operate in order to become conversant in current technology.” Supp. 117; H.R. Ex. 9 at 10. The attendees are career-changers and those entering the technology field. Supp. 9, 12-16, 108-109, 111-113, 117; H.R. 32-33, 45-49, 52, 56-61; H.R. Ex. 9 at 1-2, 4-6, 10. By definition, beginners taking introductory courses in a particular subject

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<sup>37</sup> Proposition of Law No. VI corresponds with Assignment of Error No. 5 raised in Global’s Notice of Appeal.

have not yet achieved “expertise” or a “higher level of training and understanding.” See *Global Knowledge*, at 13-14; *Mentor Technologies*, 1995 Ohio Tax LEXIS 1035, at \*7-\*8. Indeed, individuals with professional expertise or training would not take these types of courses, as they would already know the information taught in them. See Supp. 16; H.R. 60. The attendees of these courses therefore are not “computer programmers and operators.”

The BTA based its contrary conclusion on a selective quotation from Mr. Fox’s testimony at Global’s BTA hearing. *Global Knowledge*, at 13; Supp. 24; H.R. at 93. In his testimony, Mr. Fox referred to the inability of a “basic person” to understand “some of” Global’s advanced courses. *Global Knowledge*, at 13; Supp. 24; H.R. at 93. As the transcript plainly shows, Mr. Fox was *not* discussing introductory courses at that point in his testimony. Supp. 24; H.R. at 93. The context of the quotation makes clear that Mr. Fox was referencing some of the “very, very difficult” courses that Global teaches. Supp. 24; H.R. at 93. Furthermore, the BTA acknowledged that introductory courses are “geared towards individuals *entering* into the technology field.” *Global Knowledge*, at 14 (emphasis added). As discussed above, those entering the technology field do not yet have the “expertise” or “higher-level of training and understanding” necessary to be considered “computer programmers and operators.” See *Global Knowledge*, at 13-14; *Mentor Technologies*, 1995 Ohio Tax LEXIS 1035, at \*7-\*8. The BTA’s own admission precludes a finding that the attendees of introductory courses were “computer programmers and operators.”

Because the attendees of ten courses at issue were not “computer programmers and operators,” those courses are not taxable as “computer services” under R.C. 5739.01(Y)(1)(b).

The BTA's decision finding those courses taxable was unreasonable and unlawful. This Court should reverse it, and enter judgment in Global's favor.<sup>38</sup>

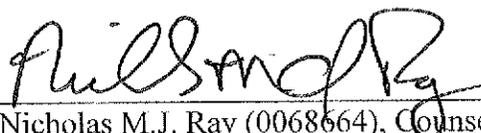
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<sup>38</sup> The following courses are non-taxable in light of Proposition of Law No. VI: #150 Understanding Network Protocols; #310 Understanding Networking Fundamentals; #530 Internetworking Routers & Switches; #900 Internetworking with TCP/IP; #G1110, 1110 Integrated Curriculum; #2200 Essentials of ATM; #3700 Internetwork & Network Communications; #3750 Telecommunications Fundamentals; #8700 Nortel Hub Connectivity; and #8900 Router Configuration & Management. See Attachment A, at pages 44-47, *infra*.

## CONCLUSION

For the foregoing reasons, the BTA's decision in this case was unreasonable and unlawful. For the reasons set forth in Propositions of Law Nos. I, II and III, this Court should reverse the BTA's decision as to all thirty-four courses found taxable, and enter judgment in Global's favor declaring those courses non-taxable. For the reasons set forth in Propositions of Law Nos. IV, V and VI, this Court should reverse the BTA's decision as to the twenty-four courses discussed therein, and enter judgment in Global's favor declaring those courses non-taxable.

Respectfully submitted,



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## ATTACHMENT A

### **I. Two Courses the BTA Correctly Found Non-Taxable Because They Were Training in Application Software.**

The BTA found the following two courses non-taxable based upon their content, as they were both training in application software, which is non-taxable. (See *Global Knowledge*, at 9.)

#### **1. #M720 Exchange 5.5 Concepts & Admin**

This course covered the operation and administration of Microsoft Exchange 5.5, an email application layered over the Microsoft Windows operating software. (Supp. 9, 108; H.R. 30-32; H.R. Ex. 9 at 1.) The focus of the course was instruction on the Exchange application software, not the operating system. (Supp. 9, 108, 118; H.R. 30-32; H.R. Ex. 9 at 1, 11.) The typical attendee of the course was an IT professional. (Supp. 9; H.R. 32.)

#### **2. #5455 CISCO Enterprise Management Solutions**

The instruction in this course related to managing and supporting a CISCO internetwork using CISCO's application software. (Supp. 11, 110; H.R. 39; H.R. Ex. 9 at 3.) The typical attendee of the course was an IT professional. (Supp. 110; H.R. Ex. 9 at 3.)

### **II. Four Courses that the BTA Should Have Found Non-Taxable Because, *Inter Alia*, They were Training in Application Software.**

The BTA should have found the following four courses non-taxable because they were instruction in application software. (Supp. 14-15, 111-113, 118; H.R. 51-52, 56-58; H.R. Ex. 9 at 4-6, 11.) Three of those courses are also non-taxable because they were training on routers and switches, which are not "computer equipment" or "computer systems." (Supp. 14-15, 112-113; H.R. 52, 56-58; H.R. Ex. 9 at 5-6.) Additionally, two of the courses are non-taxable because their attendees were not "computer programmers and operators." (Supp. 14-15, 112, 117; H.R. 52, 56-57; H.R. Ex. 9 at 5, 10.)

## **1. #8700 Nortel Hub Connectivity**

Nortel is a manufacturer of network equipment, and a “hub” is another term for a switch. (Supp. 14; H.R. 52.) This course taught students the concepts and skills necessary to design, implement, and support communications networks and their range of equipment – routers, switches, hubs, fiber cabling – and the application software needed to facilitate transmission of information. (Supp. 112; H.R. Ex. 9 at 5.) This was an introductory course, the attendees of which were individuals wanting “to gain a general understanding of networks and how they operate,” not “computer programmers and operators.” (Supp. 117; H.R. Ex. 9 at 10.) This course is not taxable because: (i) it was instruction in application software; (ii) it was training on routers and switches, which are not “computer equipment” or “computer systems”; and (iii) its attendees were not “computer programmers and operators.”

## **2. #8800 Router Installation & Basic Configuration**

This course taught the design, installation, operation and management of the Nortel routing switch products. (Supp. 15-16, 112-113; H.R. 57-58; H.R. Ex. 9 at 5-6.) The focus was on the installation, configuration, and management functions. (Supp. 15-16, 112-113; H.R. 57-58; H.R. Ex. 9 at 5-6.) The typical attendee was an IT professional. (See Supp. 117-118; H.R. Ex. 9 at 10-11.) During the BTA hearing, Mr. Fox misspoke regarding the type of software used in this course. He stated that it involved training in systems software. (Supp. 16; H.R. 58.) Mr. Fox was referring to the “software that manages the routing environment.” (*Id.*) Such software is not within the small subset of software that qualifies as systems software; indeed, it does not meet the definition of systems software in O.A.C. 5703-9-46(A)(5)(a) (1993).<sup>39</sup> (See Supp. 9, 118; H.R. 31; H.R. Ex. 9 at 11.) Moreover, Exhibit 9 submitted by Global at the BTA hearing

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<sup>39</sup> See Proposition of Law No. V, *supra* (discussing the definition of systems software).

shows that participants in this course learned “to use the applications to create and verify configurations.” (Supp. 113; H.R. Ex. 9 at 6.) These undisputed facts show that this course is not taxable because: (i) it was instruction in application software; and (ii) it was training on routers and switches, which are not “computer equipment” or “computer systems.”

### **3. #8900 Router Configuration & Management**

This course gave an overview of the operation and management of Nortel routers. (Supp. 15, 112; H.R. 56-57; H.R. Ex. 9 at 5.) Participants in the course learned to use the application software that manages and configures Nortel routers and interprets router statistics and event logs to troubleshoot and resolve network problems. (Supp. 15, 112; H.R. 56-57; H.R. Ex. 9 at 5.) This was an introductory course, the attendees of which were individuals wanting “to gain a general understanding of networks and how they operate,” not “computer programmers and operators.” (Supp. 117; H.R. Ex. 9 at 10.) This course is not taxable because: (i) it was instruction in application software; (ii) it was training on routers and switches, which are not “computer equipment” or “computer systems;” and (iii) its attendees were not “computer programmers and operators.”

### **4. #9300 Troubleshooting TCP/IP Networks**

This course taught participants how to prevent, detect, troubleshoot and correct Transmission Control Protocol (“TCP”) and Internet Protocol (“IP”) network problems using metering hardware and application software. (Supp. 14, 111-112; H.R. 51-52; H.R. Ex. 9 at 4-5.) Students learned how to repair problems in the network and how to monitor the network using protocol analyzers. (Supp. 14, 111-112, 118; H.R. 51-52; H.R. Ex. 9 at 4-5, 11.) This course is not taxable because it was instruction in application software.

**III. Two Courses that the BTA Should Have Found Non-Taxable Because They Involve Training in Application Software, but Which the BTA Incorrectly Found to Involve Training in Systems Software.**

The BTA held that the following two courses were taxable because they were instruction in systems software. (See *Global Knowledge*, at 10.) In reaching this conclusion, the BTA discussed VMS software and referenced a portion of the record discussing courses #4425 Open VMS Fundamentals and #4625 VMS & DCL Command Procedures. (*Id.*; Supp. 15; H.R. 54-55.) Global agrees that VMS is systems software, and that instruction of computer programmers and operators in VMS would be taxable under the terms of the statute.<sup>40</sup> (Supp. 15; H.R. 54-55.) The record clearly shows, however, that VMS is *not* taught in the following two courses, and that they do not involve instruction in systems software. (Supp. 15, 112; H.R. 55-56; H.R. Ex. 9 at 5.) These courses thus are non-taxable.

**1. #6950 PERL Scripting**

PERL is a programming language commonly used to create web and network applications. (Supp. 15, 112; H.R. 55; H.R. Ex. 9 at 5). PERL is not software; it thus cannot meet the definition of systems software articulated in O.A.C. 5703-9-46(A)(5)(a) (1993).<sup>41</sup> This course taught the basic skills for creating and running applications in the PERL language. (Supp. 15, 112, 118; H.R. 55; H.R. Ex. 9 at 5, 11.) Additionally, participants learned how to open, read, and write data to files and how to rewrite applications written in other languages. (Supp. 15, 112; H.R. 55; H.R. Ex. 9 at 5.) The typical attendee of this course was an IT professional. (Supp. 15; H.R. 55.) This course is not taxable because PERL is not systems software, and the only software involved in the course was application software.

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<sup>40</sup> However, because the statute is unconstitutional, these courses could not properly be taxed.

<sup>41</sup> See Proposition of Law No. V, *supra* (discussing the definition of systems software).

## **2. #6980 PERL Scripting with CGI for the Web**

“CGI” stands for Common Gateway Interface. (Supp. 15, 112; H.R. 56; H.R. Ex. 9 at 5.) CGI are application programs that interface computer applications with Web information servers. (Supp. 15, 112; H.R. 56; H.R. Ex. 9 at 5.) This course taught participants how to create CGI application programs for Web server execution in the PERL programming language. (Supp. 15, 112, 118; H.R. 56; H.R. Ex. 9 at 5, 11.) This course is not taxable because PERL is not systems software, and the only software involved in the course was application software.

## **IV. Ten Courses that the BTA Should Have Found Non-Taxable Because They Were Training on Routers and Switches, Which are Not “Computer Equipment” or “Computer Systems.”**

The following ten courses were training on routers and switches, which are network equipment that functions independently of a computer’s CPU. Such equipment is not “computer equipment” or “computer systems.” (See Supp. 6-7, 9-12, 14, 28-29, 85, 87, 89-92, 95-96, 98-104, 109-111, 116-117, 124; H.R. 20-22, 33-38, 41-45, 52, 109-110; H.R. Ex. 5 at 3, 5, 7-10; H.R. Ex. 6 at 3-4, 9-15; H.R. Ex. 9 at 2-4, 9-10, Att. B.) These courses therefore should have been found non-taxable.

### **1. #210 ATM Internetworking**

“ATM” stands for Asynchronous Transfer Mode, which is an international language for conveying several types of information (voice, video, or data) over networks. (Supp. 9, 108-109; H.R. 32-33; H.R. Ex. 9 at 1-2.) This course included instruction on the technical standards for an ATM network and managing traffic and system performance. (Supp. 9-10, 109; H.R. 33-34; H.R. Ex. 9 at 2.) The focus of the course was on network equipment, such as hubs, routers and switches. (Supp. 109; H.R. Ex. 9 at 2.) The typical attendee of this course was an IT professional. (See Supp. 117-118; H.R. Ex. 9 at 10-11.) This course is not taxable because it did not involve training on “computer equipment” or “computer systems.”

## **2. #515 Advanced CISCO Router Configuration**

This course taught the participants the commands necessary for prioritizing and segmenting network traffic and rerouting traffic. (Supp. 12, 110; H.R. 43; H.R. Ex. 9 at 3.)

Participants also learned how to configure networks for Wide Area Networking (“WAN”) and Internet Service Provider (“ISP”) connections. (Supp. 110; H.R. Ex. 9 at 3.) The typical attendee of this course was an IT professional. (See Supp. 117-118; H.R. Ex. 9 at 10-11.) This course is not taxable because it did not involve training on “computer equipment” or “computer systems.”

## **3. #N530 IBM 8271/8272 LAN Switches**

The participants of this course learned the installation, configuration, and management of IBM routers. (Supp. 12, 111; H.R. 44-45; H.R. Ex. 9 at 4.) The course was designed to provide knowledge and experience with IBM networking products. (Supp. 12, 111; H.R. 44-45; H.R. Ex. 9 at 4.) In addition, participants learned how to locally manage and determine problems with these products. (Supp. 111; H.R. Ex. 9 at 4.) The typical attendee of this course was an IT professional. (See Supp. 117-118; H.R. Ex. 9 at 10-11.) This course is not taxable because it did not involve training on “computer equipment” or “computer systems.”

## **4. #570 CISCO Installation & Maintenance**

This introductory course covered the basics of hardware recovery, upgrade procedures, and hardware troubleshooting common to CISCO routers and switches. (Supp. 11, 110; H.R. 41; H.R. Ex. 9 at 3.) The class included performing fundamental hardware maintenance on different CISCO routers and switches. (Supp. 11, 110; H.R. 41; H.R. Ex. 9 at 3.) The typical attendee of this course was a networking technician. (Supp. 11; H.R. 41.) This course is not taxable because it did not involve training on “computer equipment” or “computer systems.”

**5. #580 Introduction to CISCO Router Configuration**

This course covered the installation, configuration, and management of CISCO routers. (Supp. 12, 110; H.R. 42-43; H.R. Ex. 9 at 3.) Participants learned about the latest CISCO routers, networking protocols, configuring routers for a variety of hosts and protocols, and preparations for different situations that a router may face. (Supp. 12, 110; H.R. 42-43; H.R. Ex. 9 at 3.) The typical attendee of this course was a routing technician. (Supp. 12; H.R. 43) This course is not taxable because it did not involve training on “computer equipment” or “computer systems.”

**6. #3400 Building Broadband Network Technologies**

This was a course on broadband technology that focused on WAN. (Supp. 10, 109; H.R. 35; H.R. Ex. 9 at 2.) The participants learned how information is transported from a Local Area Network (“LAN”) to a WAN. (Supp. 109; H.R. Ex. 9 at 2.) They also gained an understanding of the various WAN technologies in order to compare and contrast their capabilities with broadband technologies. (Supp. 109; H.R. Ex. 9 at 2.) The typical attendee of this course was an IT professional. (Supp. 109; H.R. Ex. 9 at 2.) This course is not taxable because it did not involve training on “computer equipment” or “computer systems.”

**7. #5500 Building CISCO Remote Access Networks**

This course taught students how to use various CISCO devices for the purpose of setting up remote access. (Supp. 10, 109; H.R. 36; H.R. Ex. 9 at 2.) The course focused on hubs, routers, and switches. (Supp. 10, 109; H.R. Ex. 9 at 2.) Students learned how to build, configure, and troubleshoot a remote access network and interconnect central sites to branch and home offices. (Supp. 109; H.R. Ex. 9 at 2.) The typical attendee of this course was an IT professional. (See Supp. 117-118; H.R. Ex. 9 at 10-11.) This course is not taxable because it did not involve training on “computer equipment” or “computer systems.”

#### **8. #5525 CISCO AS5200 Installation & Configuration**

This course focused on the CISCO AS5200 server and CISCO's 766 routers. (Supp. 11, 109-110; H.R. 38; H.R. Ex. 9 at 2-3.) Students learned how to install, configure, and troubleshoot the servers and routers. (Supp. 11, 109-110; H.R. 38; H.R. Ex. 9 at 2-3.) Additionally, they learned management of an AS5200 network and configuring remote sites for Integrated Services Digital Network ("ISDN") and asynchronous communications. (Supp. 109-110; H.R. Ex. 9 at 2-3.) The typical attendee of this course was an IT professional. (See Supp. 109-110; H.R. Ex. 9 at 10-11.) This course it is not taxable because it did not involve training on "computer equipment" or "computer systems."

#### **9. #5575 CATALYST 5000**

Catalyst 5000 is a specific high-speed network switch. (Supp. 10-11, 109; H.R. 37-38; H.R. Ex. 9 at 2.) Students learned switch concepts, how to install this switch in a network, and about the switch hardware and its architecture, configuration, and management. (Supp. 10-11, 109; H.R. 37-38; H.R. Ex. 9 at 2.) This course also taught students how to troubleshoot the operation of switches. (Supp. 109; H.R. Ex. 9 at 2.) The typical attendee of this course was an IT professional. (Supp. 11; H.R. 38.) This course is not taxable because it did not involve training on "computer equipment" or "computer systems."

#### **10. #5900 CISCO OSPF Design & Configuration**

"OSPF" stands for Open Shortest Path First; it is a protocol used for routing information in networks. (Supp. 12, 110; H.R. 42; H.R. Ex. 9 at 3.) Participants in this course learned the design principles for developing an efficient and stable network infrastructure. (Supp. 110; H.R. Ex. 9 at 3.) The instruction also covered route redistribution of other protocols, like Routing Information Protocol ("RIP") and Interior Gateway Routing Protocol ("IGRP"), designated router design, design of OSPF over non-broadcast protocols, and design of cost effective OSPF

networks. (Supp. 110; H.R. Ex. 9 at 3.) The typical attendee of this course was an IT professional. (See Supp. 117-118; H.R. Ex. 9 at 10-11.) This course is not taxable because it did not involve training on “computer equipment” or “computer systems.”

**V. Eight Introductory Courses that the BTA Should Have Found Non-Taxable because, *Inter Alia*, Their Attendees were Not “Computer Programmers and Operators.”**

The subject matter of the following eight courses is introductory in nature. The attendees of these courses were entry-level IT personnel or career-changers. As they were beginners in the area of study, the attendees had not yet achieved the required technical acumen to be considered “computer programmers and operators.” (See Supp. 9, 12-13, 16, 108-109, 111, 113, 117; H.R. 32-33, 45-49, 58-61; H.R. Ex. 9 at 1-2, 4, 6, 10.) Thus, the following eight courses are not taxable. Additionally, four of those courses are non-taxable because they were training on routers and switches, which as already discussed are not “computer equipment” or “computer systems.” (See Supp. 12-13, 16, 111, 113; H.R. 45-48, 59-61; H.R. Ex. 9 at 4, 6.)

**1. #150 Understanding Network Protocols**

This introductory course taught basic protocol structure and terminology, performance characteristics of various protocols, keys to operation of all routers, and how to route protocols. (Supp. 16, 113; H.R. 60-61; H.R. Ex. 9 at 6.) This course was designed to give individuals a fundamental understanding of current major protocols. (Supp. 16, 113; H.R. 60-61; H.R. Ex. 9 at 6.) The typical attendee of this course was an individual entering the networking field or seeking to broaden his or her understanding of the field. (Supp. 16, 117; H.R. 61; H.R. Ex. 9 at 10.) This course is not taxable because: (i) its attendees were not “computer programmers and operators”; and (ii) it was training on routers and switches, which are not “computer equipment” or “computer systems.”

## **2. #310 Understanding Networking Fundamentals**

This introductory course was designed to give individuals interested in pursuing an IT career a basic understanding of networks. (Supp. 16, 113; H.R. 59-60; H.R. Ex. 9 at 6.) The participants learned networking terminology, technologies, protocols, communication architecture and standards, and appropriate use of network hardware such as switches, hubs, and routers. (Supp. 16, 113; H.R. 59-60; H.R. Ex. 9 at 6.) The course taught “very basic building block information that any existing networking professional would already have.” (Supp. 113; H.R. 60.) The typical attendee of this course was a career-changer or an individual entering the networking field. (Supp. 16, 117; H.R. 59; H.R. Ex. 9 at 10) This course is not taxable because: (i) its attendees were not “computer programmers and operators”; and (ii) it was training on routers and switches, which are not “computer equipment” or “computer systems.”

## **3. #530 Internetworking Routers & Switches**

This introductory course gave an overview of routing and switching technologies and the interoperability of routers and switches, including an introduction to TCP/IP protocols. (Supp. 13, 111; H.R. 47; H.R. Ex. 9 at 4). The typical attendee of this course was a career-changer or an individual entering the networking field. (Supp. 13; H.R. 48.) This course is not taxable because: (i) its attendees were not “computer programmers and operators”; and (ii) it was training on routers and switches, which are not “computer equipment” or “computer systems.”

## **4. # 900 Internetworking with TCP/IP**

This course concentrated on TCP and IP protocols, which are critical for connectivity within a network and between networks. (Supp. 13, 111; H.R. 48-49; H.R. Ex. 9 at 4.) Participants learned to install and configure TCP and IP protocols as well as run, test, and decode them. (Supp. 111; H.R. Ex. 9 at 4.) The attendees of this course were individuals wanting “to

gain a general understanding of networks and how they operate,” not “computer programmers and operators.” (Supp. 117; H.R. Ex. 9 at 10.) This course is therefore not taxable.

**5. #G1110, 1110 Integrated Curriculum**

Participants in this course learned design concepts incorporating elements from a range of Global’s courses that focused on networking hardware, such as routers, hubs, and switches. (Supp. 12, 111; H.R. 45; H.R. Ex. 9 at 4.) This course was an overview of networking theories and concepts, which gave participants an understanding of the network and the role of the components that comprise a network. (Supp. 12, 111; H.R. 45; H.R. Ex. 9 at 4.) The typical attendee of this course was a career-changer or an individual entering the networking field. (Supp. 13, 117; H.R. 46; H.R. Ex. 9 at 10.) This course is not taxable because: (i) its attendees were not “computer programmers and operators; and (ii) it was training on routers and switches, which are not “computer equipment” or “computer systems.”

**6. #2200 Essentials of ATM**

This introductory course taught participants the basics of ATM, including what an ATM network is, the reasons for it, how ATM services network requirements, and the strategies for rolling out an ATM network. (Supp. 9, 108-109; H.R. 32-33; H.R. Ex. 9 at 1-2.) The typical attendee of this course was a career-changer or an individual entering the networking field. (Supp. 9, 117; H.R. 33; H.R. Ex. 9 at 10.) This course is not taxable because its attendees were not “computer programmers and operators.”

**7. #3700 Internetwork & Network Communications**

This course provided fundamental knowledge of data communications systems. (Supp. 13, 111; H.R. 46; H.R. Ex. 9 at 4.) Among other things, participants gained a basic understanding of IP, identified where networking technologies fit into the Internet, and developed an understanding of the tools to manage and protect networks. (Supp. 13, 111; H.R.

46; H.R. Ex. 9 at 4.) The typical attendee of this course was a career-changer, an individual entering the networking field, or someone pursuing an interest in the Internet. (Supp. 13, 117; H.R. 46-47; H.R. Ex. 9 at 10.) This course is not taxable because its attendees were not “computer programmers and operators.”

#### **8. #3750 Telecommunications Fundamentals**

This was a basic course in voice communications. (Supp. 16, 113; H.R. 58-59; H.R. Ex. 9 at 6.) The participants learned about the components of a telephone network and how they are used, telecommunications terminology, differences between analog and digital transmission, and wireless technologies used for transmitting voice communications. (Supp. 16, 113; H.R. 58-59; H.R. Ex. 9 at 6.) The typical attendee of this course was an entry-level employee of a telephone company. (Supp. 16; H.R. 58.) This course is not taxable because its attendees were not “computer programmers and operators.”

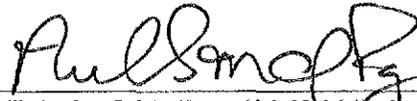
#### **VI. Ten Courses in Systems Software That, At Least under the Terms of the Statute, are Taxable.**

Global conceded that the following ten courses in systems software are taxable under the terms of R.C. 5739.01(Y)(1)(b): #640 Unix Level I, #670 Unix Level II, #4425 Open VMS Fundamentals, #4625 VMS & DCL Command Procedures, #6260 Windows NT Troubleshooting, #6500 Windows NT 4.0 Server, #6550 Advanced Windows NT Server Management, #6600 Windows NT 4.0 Workstation, #6800 Windows 2000 Client Administration, #7000, MS650 MSCE Boot Camp. However, for the constitutional reasons discussed in Propositions of Law Nos. I, II and III, *supra*, these courses are not properly taxable.

**CERTIFICATE OF SERVICE**

This is to certify that on this 3<sup>rd</sup> day of November 2009, a copy of the Merit Brief of Appellant Global Knowledge Training, LLC, and a copy of the Appendix to the Merit Brief of Appellant Global Knowledge Training, LLC, was sent via Federal Express to:

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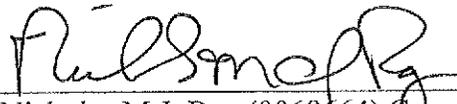
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