

ORIGINAL

IN THE SUPREME COURT OF OHIO

Appeal from the Ohio Board of Tax Appeals

GLOBAL KNOWLEDGE TRAINING LLC,	:	
	:	
Appellant,	:	
	:	Case No. 2009-1543
v.	:	
	:	Appeal from BTA
RICHARD A. LEVIN, TAX	:	Case No. 2006-V-471
COMMISSIONER OF OHIO,	:	
	:	
Appellee.	:	

---

**Merit Brief of Appellee Richard A. Levin, Tax Commissioner of Ohio**

---

NICHOLAS M.J. RAY (0068664)  
 Siegel, Siegel, Johnson & Jennings Co., LPA  
 3001 Bethel Road, Suite 208  
 Columbus, Ohio 43220  
 Telephone: (614) 442-8885  
 Facsimile: (614) 442-8880  
 nray@siegeltax.com

RICHARD CORDRAY  
 Attorney General of Ohio

DAMION M. CLIFFORD (0077777)  
 Assistant Attorney General  
 (Counsel of Record)  
 30 East Broad Street, 25<sup>th</sup> Floor  
 Columbus, Ohio 43215-3428  
 Telephone: (614) 466-5967  
 Facsimile: (614) 466-8226  
 damion.clifford@ohioattorneygeneral.gov

ATTORNEY FOR APPELLANT

ATTORNEYS FOR APPELLEE

**FILED**  
 DEC 23 2009  
 CLERK OF COURT  
 SUPREME COURT OF OHIO

## TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES.....	iv
INTRODUCTION.....	1
STATEMENT OF THE CASE AND FACTS .....	6
A. The BTA made detailed findings of fact rejecting GKT’s contentions under the plain meaning of the relevant statutory terms. ....	6
B. GKT’s services match the statutory definition of “computer services.” .....	7
C. The contested transactions relate to training courses on the operation of specific computer hardware and, therefore, meet the statutory definition of “computer services.”.....	8

### **The Tax Commissioner’s First Proposition of Law:**

<i>Switches and routers are “computer equipment” that constitute integral parts of computer network “systems” and the personnel who operate such equipment are “computer operators” within the meaning of the definition of “computer services” set forth in R.C. 5739.01(Y)(1)(b). Thus, the provision of system-software training to such operators relating to the operation of such equipment constitutes “training of computer operators, provided in conjunction with and to support the sale, lease or operation of taxable computer equipment or systems” within the meaning of the R.C. 5739.01(Y)(1) definition of “computer services.” .....</i>	13
A. Every Enumerated Service provided within the State of Ohio is subject to tax.....	13
B. The Statutory and Administrative Rule Framework of R.C. 5739.01(Y)(1)(b) .....	13
C. Standard of Review .....	14
D. Routers and Switches are “Computer Equipment.”.....	15
E. “Computer services” includes computer programming training.....	18
F. GKT’s training is “computer services.” .....	18

### **The Tax Commissioner’s Second Proposition of Law:**

<i>Appellants’ notice of appeal does not sufficiently set forth “the errors therein complained of” and, therefore, does not comply with R.C. 5717.04 sufficiently enough to confer jurisdiction upon this Court. ....</i>	20
---	----

**The Tax Commissioner’s Third Proposition of Law:**

*The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, [\*\*\*4] even though the Board of Tax Appeals may not declare the statute unconstitutional. Cleveland Gear Co. v. Limbach (1988), 35 Ohio St.3d 229, 520 N.E.2d 188, paragraph three of the syllabus, approved and followed.* .....22

**The Tax Commissioner’s Fourth Proposition of Law:**

*Global Knowledge’s training of computer programmers and operators includes nonspeech elements such as the use of computer equipment and instruction manuals that would be subject to tax under R.C. 5739.01(B)(3)(e) and 5739.01(B)(1), notwithstanding Global Knowledge’s constitutional claims with respect to the remainder of the taxable service.* .....23

**The Tax Commissioner’s Fifth Proposition of Law:**

*GKT’s courses are not protected speech under the First Amendment.* .....25

- A. The U.S. Supreme Court in *Leathers* and *Minneapolis Star Tribune, Inc.* set forth the standard for a First Amendment analysis. ....26
  - 1. R.C. 5739.01 is a generally applicable sales tax. ....27
  - 2. The tax is not directed only at members of the press. ....28
  - 3. The tax is not levied upon a small segment of the same medium. ....29
  - 4. The tax was not enacted in an attempt to suppress computer training in favor of another viewpoint and there is no evidence that the tax has suppressed computer training. ....30
    - a. There are no competing interests between training on systems software and training on application software as application software cannot function without systems software. ....31
    - b. The case law cited by GKT is factually dissimilar from this matter. ....33

**The Tax Commissioner’s Sixth Proposition of Law:**

*R.C. 5739.01(B)(3)(e) bears a rational relation to the state of Ohio’s purpose of enacting an excise tax to raise revenue.* .....35

- A. Standard of Review of a Constitutional Challenge relating to tax matters. ....35

**The Tax Commissioner’s Seventh Proposition of Law:**

*This Court must give great deference to the General Assembly in reviewing the constitutionality of a statute challenged under the Equal Protection Clause. ....*37

A. Standard of Review of an Equal Protection Challenge of a tax statute. ....37

**The Tax Commissioner’s Eighth Proposition of Law:**

*This Court must give great deference to the General Assembly in reviewing the constitutionality of a statute challenged under the Void for Vagueness Doctrine. ....*44

CONCLUSION .....50

CERTIFICATE OF SERVICE .....unnumbered

**APPENDIX**

**Appx. Page**

*Atlas Crankshaft Corp. v. Lindley* (Aug. 15, 1978),  
BTA Case No. E-1816.....1

[http://www.associatedcontent.com/article/1687275/how\\_to\\_find\\_a\\_computer\\_router.html](http://www.associatedcontent.com/article/1687275/how_to_find_a_computer_router.html) .....13

<http://www.microsoft.com/windows/WinHistoryDesktop.msp> .....15

*Mentor Technologies v. Tracy* (Aug. 25, 1995),  
BTA Case No. 94-A-1058.....19

Ohio Department of Taxation Informational Release PP 2003-01.....22

*Tangible or Intangible- Is that the question?* Reinhard, 29 St. Mary’s L. J. 871.....23

*Vanguard, Inc. v. Schaefer* (Nov. 8, 1984),  
Franklin App. No. 84AP-374 .....70

## TABLE OF AUTHORITIES

Cases	Page(s)
<i>3535 Salem Corp. v. Lindley</i> (1979), 58 Ohio St.2d 210.....	16, 19
<i>Alcan Aluminum Corp. v. Limbach</i> (1989), 42 Ohio St.3d 121.....	16
<i>Allied Stores of Ohio, Inc. v. Bowers</i> (1959), 358 U.S. 522.....	40, 41
<i>Arkansas Writers' Project, Inc. v. Ragland</i> (1987), 481 U.S. 221.....	passim
<i>Atlas Crankshaft Corp. v. Lindley</i> (Aug. 15, 1978), BTA Case No. E-1816.....	15
<i>Belgrade Gardens v. Kosydar</i> (1974), 38 Ohio St.2d 135.....	16
<i>Big Mama Rag, Inc. v. U.S.</i> (C.A.D.C. 1980), 631 F.2d 1030.....	50
<i>Buckley v. Wilkins</i> , 105 Ohio St.3d 350, 2005-Ohio-2166.....	46, 50
<i>Burnett v. Motorists Mutual Insurance Co.</i> , 118 Ohio St.3d 493, 2008-Ohio-2751.....	39, 43, 46, 47
<i>Carmichael v. Southern Coal &amp; Coke Co.</i> (1937), 301 U.S. 495.....	38
<i>City of Cincinnati v. Discovery Network, Inc.</i> (1993), 507 U.S. 410.....	36, 37
<i>City of Norwood v. Horney</i> , 110 Ohio St.3d 353, 2006-Ohio-3799.....	46, 48, 50
<i>Cleveland Gear Co. v Limbach</i> (1988), 35 Ohio St.3d 229.....	2, 3, 4
<i>Columbia Gas Transm. Corp. v. Levin</i> , 117 Ohio St.3d 122, 2008-Ohio-511.....	passim
<i>Commodity Futures Trading Commission v. Vartuli</i> (C.A.2 2000), 228 F.3d 94.....	27

<i>Compuserve v. Lindley</i> (1987), 41 Ohio App.3d 260 .....	33, 44
<i>Comtech Systems, Inc. v. Limbach</i> (1991), 59 Ohio St.3d 96.....	29, 38, 45
<i>Deerhake v. Limbach</i> (1989), 47 Ohio St.3d 44.....	21
<i>Department of Revenue v. Magazine Publishers of America, Inc.</i> (Fla. 1992), 604 So.2d 459 .....	33, 35
<i>Fife v. Greene County Bd. of Revisions</i> , 120 Ohio St.3d 442, 2008-Ohio-6786 .....	16
<i>Forsyth County v. The Nationalist Movement</i> (1992), 505 U.S. 123 .....	35, 36
<i>Grosjean v. American Press Co.</i> (1936), 297 U.S. 233 .....	27
<i>Hatchadorian v. Lindley</i> (1986), 21 Ohio St.3d 66.....	16
<i>HealthSouth Corp. v. Levin</i> , 121 Ohio St.3d 282, 2009-Ohio-584 .....	3
<i>Hynes v. Mayor and Council of Borough of Oradell</i> (1976), 425 U.S. 610.....	50
<i>Lawson Milk Co. v. Bowers</i> (1961), 171 Ohio St. 418 .....	20, 21
<i>Leathers v. Medlock</i> (1991), 499 U.S. 439 .....	<i>passim</i>
<i>Lehnhausen v. Lake Shore Auto Parts Co.</i> (1973), 410 U.S. 356 .....	41
<i>Litton Systems, Inc. v. Tracy</i> (2000), 88 Ohio St. 3d 568 .....	20, 21
<i>Mentor Technologies v. Tracy</i> (Aug. 25, 1995), BTA Case No. 94-A-1058 .....	<i>passim</i>
<i>Minneapolis Star &amp; Tribune Co. v. Minnesota Comm’r of Revenue</i> (1983), 460 U.S. 575 .....	28, 30, 31, 32
<i>Nordlinger v. Hahn</i> (1992), 505 U.S. 1 .....	38, 39, 40, 41
<i>Ohio Bell Tel. Co. v. Levin</i> , Slip Opinion, 2009-Ohio-6189 .....	3

<i>Opinion of the Justices to the Senate</i> (Mass. 2002), 764 N.E.2d 343 .....	36
<i>Painesville v. Lake Cty. Budget Comm.</i> (1978), 56 Ohio St.2d 282 .....	20, 21
<i>Park Corp. v. Brook Park</i> , 102 Ohio St.3d 166, 2004-Ohio-2237 .....	38, 42
<i>Plyler v. Doe</i> (1982), 457 U.S. 202 .....	41, 44
<i>Police Dept. of the City of Chicago v. Mosley</i> (1972), 408 U.S. 92 .....	45
<i>Provident Bank v. Wood</i> (1973), 36 Ohio St. 2d 101 .....	18
<i>Queen City Valves v. Peck</i> (1954), 161 Ohio St. 579 .....	21
<i>Regan v. Taxation without Representation of Washington</i> (1983), 461 U.S. 540 .....	33, 37
<i>Richter Transfer Co. v. Bowers</i> (1962), 174 Ohio St. 113 .....	20, 21
<i>Roxane Laboratories, Inc. v. Tracy</i> (1996), 75 Ohio St.3d 125 .....	18
<i>Servi-Clean Industries, Inc. v. Collins</i> (1977), 50 Ohio St.2d 80 .....	16
<i>Shiloh Automotive, Inc. v. Levin</i> , 117 Ohio St.3d 4, 2008-Ohio-68 .....	5, 25
<i>Simon &amp; Schuster, Inc. v. Members of the New York State Crime Victims Bd.</i> (1991), 502 U.S. 105 .....	<i>passim</i>
<i>State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals</i> (1992), 63 Ohio St.3d 354 .....	47, 48, 50
<i>State v. Thompson</i> , 95 Ohio St.3d 264, 2002-Ohio-2124 .....	45
<i>Trans Union Corp. v. FTC</i> (C.A.D.C. 2001), 267 F.3d 1138 .....	36
<i>Turner Broadcasting System, Inc. v. FCC</i> (1994), 512 U.S. 622 .....	32

<i>U.S. Satellite Broadcasting Co., Inc. v. Lynch</i> (E.D. Cal. 1999), 41 F. Supp.2d 1113.....	36
<i>United Food &amp; Commercial Workers Union v. Southwest Ohio Regional Transit Authority</i> (C.A.6 1998) 163 F.3d 341.....	50
<i>Vacco v. Quill</i> (1997), 521 U.S. 793.....	41, 44
<i>Vanguard, Inc. v. Schaefer</i> (Nov. 8, 1984), Franklin App. No. 84AP-374.....	16
<i>Village of Hoffman Estates v. The Flipside</i> (1982), 455 U.S. 489.....	47, 49
<i>Ward v. Rock Against Racism</i> (1989), 491 U.S. 781.....	32

**Constitutional Provisions, Statutes, and Rules**

**Page(s)**

Ohio Admin. Code 5703-9-46.....	<i>passim</i>
R.C. 5717.02.....	22, 23
R.C. 5717.04.....	23, 24
R.C. 5739.01.....	<i>passim</i>
R.C. 5739.02.....	28
R.C. 5741.01.....	14
R.C. 5741.02.....	14

**Other Authorities**

**Page(s)**

<i>Tangible or Intangible- Is that the question?</i> Reinhard, 29 St. Mary's L. J. 871.....	31, 42
Ohio Department of Taxation Informational Release PP 2003-01.....	17, 49

## INTRODUCTION

The appellant, Global Knowledge Training, LLC (“GKT”), commenced this action in response to the appellee Tax Commissioner’s issuance of an out-of-state seller’s use tax assessment to GKT for the four-year period from July, 1997 through June, 2000. The assessment resulted from GKT’s failure to collect use tax from its Ohio customers on their purchases and uses of system-software computer training services. Under R.C. 5739.01(B)(3)(e) and R.C. 5741.02, the Ohio sales and use tax applies to transactions pursuant to which the true object of the Ohio purchaser is the receipt of “computer services.” In turn, R.C. 5739.01(Y)(1)(b) defines “computer services” to include **“\*\*\* training of computer operators, provided in conjunction with and to support the sale, lease or operation of taxable computer equipment or systems.”** (Emphasis added). Finding that GKT’s computer training services met the statutory definition, the Commissioner issued a final determination affirming the assessment in its entirety. GKT Appx. 25-26.

On appeal to the BTA, GKT contended that its provision of computer training services to Ohio customers did not meet the definition of taxable “computer services” as set forth in R.C. 5739.01(Y)(1)(b) for three independent reasons: (1) the Ohio customers’ personnel to whom GKT provided computer training allegedly were not “computer operators” within the meaning of the R.C. 5739.01(Y)(1)(b) definition of “computer services”; (2) the routers and switches operated by its customers’ personnel and which were the subject of GKT’s computer training allegedly were not “computer equipment” within the meaning of that definition; and (3) the computer training provided by GKT to its Ohio customers allegedly related to application

software, rather than systems software and, thus, was outside the scope of the statutory definition.<sup>1</sup>

Upon review, the BTA affirmed the Commissioner's findings in substantial part. *BTA Decision and Order*, GKT Appx. 22-23. The BTA found that the evidentiary record amply supported the Commissioner's determination that GKT's customers' personnel were "computer operators" and that the computer routers and switching equipment used by those operators constituted "computer equipment" within the meaning of the R.C. 5739.01(Y)(1) definition of "computer services." *Id.* Further, except for transactions relating to two particular courses of training offered by GKT, the BTA affirmed the Commissioner's determination that the training of the computer operators related to systems software, rather than applications software. *Id.* Thus, for all but those two limited kinds of transactions the BTA affirmed the Commissioner. *Id.*

GKT only half-heartedly contests the BTA's findings and legal conclusions concerning the assessed transactions in its appeal to this Court. See GKT Br. 26-34. Instead, GKT devotes the vast majority of its initial merit brief filed with this Court to what only can be considered a desperate attempt to avoid the Commissioner's and BTA's application of the plain meaning of the statutory definition of "computer services."

---

<sup>1</sup> In GKT's petition for reassessment and notices of appeal to the BTA and to this Court, GKT also asserted that the true object of the assessed transactions was the receipt of "personal or professional services," rather than taxable "computer services." GKT, however, omitted any mention of that issue in its initial merit brief filed with this Court and, thus, tacitly has abandoned it. *Litton Systems, Inc. v. Tracy* (2000), 88 Ohio St. 3d 568, 573 (dismissing a taxpayer claim that was not the subject of a proposition of law in its initial Supreme Court merit brief); *HealthSouth Corp. v. Levin*, 121 Ohio St.3d 282, 2009-Ohio-584, ¶18, fn.2 (citing and discussing several cases likewise so holding).

GKT's abandonment of its "personal or professional services" contention is quite understandable. On the merits, that contention fails both factually and legally. On the facts, it fails for want of any probative evidence to support it. On the law, GKT erroneously references R.C. 5739.01(B)(5) as the relevant "personal or professional services" provision, rather than R.C. 5739.01(B)(3)(e) and R.C. 5739.01(Y)(2). *Comtech Systems, Inc. v. Limbach* (1991), 59 Ohio St.3d 96, 98-99.

GKT now raises three constitutional challenges to the assessment that it never raised in proceedings before the BTA or the Commissioner. In its notice of appeal to this Court, GKT contended that the BTA's affirmance of the Commissioner's assessment is erroneous because the "computer services" definition allegedly violates GKT's First Amendment rights to freedom of speech. See ¶1 of GKT's notice of appeal to this Court. GKT Appx. 3. Thereafter, in its initial merit brief, GKT added two more constitutional challenges, asserting that the "computer services" statute was unconstitutionally "void for vagueness" and that the assessment of tax on such services denied GKT the equal protection of the laws. GKT Br. 10-26.

All three of these newly minted constitutional challenges fail for both jurisdictional and substantive reasons. GKT's "void for vagueness" and "equal protection" challenges plainly fail to meet the specification of error requirement of R.C. 5717.04 because no mention is made of those claims in GKT's notice of appeal to this Court. GKT does not even advance a vague, general claim concerning any such constitutional challenge, let alone one with the required specificity. Those claims, first raised in GKT's initial merit brief filed with this Court, must be dismissed on that jurisdictional basis alone. *Ohio Bell Tel. Co. v. Levin*, Slip Opinion, 2009-Ohio-6189; *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420.

Even as to GKT's "freedom of speech" claim set forth in ¶1 of its notice of appeal to this Court, only a purely "facial challenge" could be jurisdictionally raised at that late juncture. See *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229, paragraph two of the syllabus. The "freedom of speech" challenge is not a purely "facial challenge" to the constitutionality of Ohio statutes despite GKT's labeling it as such; it does not fit within paragraph two of the syllabus of *Cleveland Gear*. Instead, the allegation of a "freedom of speech" violation challenges the constitutionality of R.C. 5739.01(Y)(1) **as applied to a particular state of facts**. Such "as

applied” challenges “must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning the questions presented \*\*\*.” *Cleveland Gear*, paragraph three of the syllabus.

GKT’s basis for its “free speech” claim is its contention that the Commissioner’s application of the statutory definition of “computer services” is an impermissible “content-based” restriction of its free speech rights. GKT asserts that its First Amendment rights as a provider of “systems software” computer training are violated because computer training services involving “systems software” are subjected to the tax, but computer training services involving “applications software” are not. See Ohio Admin. Code 5703-9-46; GKT Br. 14.<sup>2</sup>

Even if such a dubious proposition were accepted as true, however, that alone would be insufficient to establish any basis for overturning the BTA’s affirmance of the Commissioner’s assessment. GKT also would have to show to what extent the prices it charged for these assessed computer training services were truly for a kind of speech that the Ohio General Assembly has impermissibly taxed. To the extent that the assessed transactions include GKT’s provision of access to and use of computer equipment and GKT’s sales of written materials, the transactions are subject to Ohio sales and use tax regardless of whether they relate to systems-software computer training or applications-software computer training. Paragraph three of the *Cleveland Gear* syllabus would require GKT to establish a “particular state of facts” for each transaction. Only that portion of the prices GKT charges for the oral speech component of the assessed

---

<sup>2</sup> As we detail, *infra*, GKT conveniently fails to note that it is a provider of “applications software” training, as well as “systems software” training. Under its novel theory, the unconstitutionality of the “computer services” assessed here derives from the fact that the latter is subject to the tax while the former is not. So, if both were taxed, GKT would have no cause to complain. Consequently, it is difficult to see how the Commissioner’s exclusion of applications software training from the tax could possibly be a basis for infringing GKT’s rights to freedom of speech because such exclusion actually benefits GKT.

transactions would be constitutionally invalidated. That inquiry would be a transaction-specific, circumstances-specific one. Thus, GKT's "freedom of speech" claim fails for jurisdictional reasons, just as do its "void for vagueness" and equal protection claims.

Finally, as we detail in Propositions of Law 4 through 7, all three of these constitutional challenges are substantively meritless. They fail both because the legal grounds upon which they are based are dubious and because GKT fails to establish the extent to which it would be entitled to a reduction in the assessments as a result of any constitutional infirmity in the challenged statutes.

For substantive reasons, as well as the foregoing jurisdictional grounds, GKT's freedom of speech claim is erroneous. It ignores that GKT provided voluminous computer manuals (see e.g., the 741-page manuals at S. Supp. 118-859 [BTA Ex. 5] and other written materials to its Ohio customers as part of its "computer services" transactions. As noted above, these written materials are subject to Ohio sales and use tax as sales of tangible personal property, separate and apart from the "computer services" provisions in R.C. 5739.01(Y)(1) and R.C. 5739.01(B)(3)(e). Similarly, pursuant to the assessed transactions, GKT ignores that it provided its Ohio customers' personnel with access to and use of computer equipment which likewise are subject to Ohio sales and use tax, independent of the "computer services" provisions. In other words, GKT has failed to separate its "speech" components from the use of tangible personal property in the "price" it charges attendees for the training. As such, it has not met its burden of establishing the manner and extent of the error in the Tax Commissioner's Final Determination, which alone warrants affirmance of the BTA's decision. *Shiloh Automotive, Inc. v. Levin*, 117 Ohio St.3d 4, 2008-Ohio-68 at ¶15.

For all these reasons as further amplified and augmented below, the Court should affirm the BTA's decision and order as reasonable and lawful.

### STATEMENT OF THE CASE AND FACTS

**A. The BTA made detailed findings of fact rejecting GKT's contentions under the plain meaning of the relevant statutory terms.**

The reasonableness and lawfulness of the BTA's decision follows directly from the BTA's detailed factual findings based on its review of the evidentiary record. After an administrative hearing, submission of exhibits and briefing, the BTA affirmed the Tax Commissioner's final determination in virtually all respects, reversing the Commissioner only regarding a limited subset of transactions relating to two particular courses offered by GKT concerning application-software training. GKT Appx. 22-23.

The BTA found that the computers used by its Ohio customers' personnel are necessary to configure and access settings on "routers and switches," *Id.* at 20-21, and that while these routers and switches are not per se "computers," such equipment is "an integral part of a computer network" that "manage the flow of information between computers and other equipment such as printers and telephones. *Id.* (citing to the testimony of GKT's own witness, Michael Fox). As such, the Board held that routers and switches constituted "computer equipment" because routers and switches have no utility outside of a network of computers. *Id.* at 22-23.

Further, the BTA found that GKT's customers' personnel were "computer operators" within the meaning of R.C. 5739.01(Y)(1)'s definition of "computer services." GKT's courses at issue required a high-level of skill and that ordinary computer users would be "clueless, they would lose their money and waste the instructor's time." Supp. 24. As for the remaining courses, the BTA held that the information, although geared toward professionals entering the field, contained materials that are more advanced than what a common computer user would have

knowledge and, hence, that these personnel also qualified as “computer operators.” GKT Appx. 21-22.

Finally, except for the two courses noted above, *id.* at 12-13, the BTA held that the training provided by GKT were “computer services” subject to tax under R.C. 5739.01(Y)(1)(b) and affirmed the Tax Commissioner’s final determination as reasonable and lawful. We supplement the BTA’s detailed findings with the following detailed analysis of the evidentiary record.

**B. GKT’s services match the statutory definition of “computer services.”**

GKT provides training on computer hardware and software. S. Supp. 56. This appeal is a result of an audit that imposed use tax upon GKT for training it provided to businesses located in Ohio from July 1, 1997 through June 30, 2000. S. Supp. 3. The original amount of the assessment was \$91,872.15, but GKT has previously conceded<sup>3</sup> that \$20,703.35 of that amount was taxable. S. Supp. 103-110; Supp. 106, 112-14. Michael Fox testified before the BTA on behalf of GKT.

Mr. Fox began working at GKT in June of 2001 and is the Senior Vice President for Product Management and Enterprise Solutions. Supp. 4. In his position, Mr. Fox develops curriculum and supervises GKT’s commercial sales and marketing departments. *Id.* Although Mr. Fox is responsible for developing GKT’s curriculum, he holds no computer-related certifications. Supp. 18.

The significant majority of the training at issue here involves training on the use of computer equipment, such as routers and switches, while the remaining training is on the use of system software. During the hearing, Mr. Fox explained how routers are used within a typical

---

<sup>3</sup> GKT conceded that nine courses were taxable computer services because “computer programmers and operators” were trained on system software. These courses are: Open VMS Fundamentals; VMS & DCL Command Procedures; Unix I & II; MCSE Boot Camp; Windows 2000 Client Administration; and Windows NT 4.0 Server, Windows NT Workstation; and Advanced Windows NT & NT Troubleshooting.

office network. Mr. Fox stated when a person is at their computer and needs to print a document; he or she presses the print command, which sends data from his or her computer to a router, which relays the request to the printer, which prints the document. Supp. 6. The router acts like a traffic cop to direct the flow of information between computers. Id.

A switch has the same function as a router, but is used in a different manner. Supp. 6-7. Typically, a switch is used in a high-speed single office environment while a router is used over a large geographic area. Id. In these environments, Mr. Fox admitted that switches are directly connected to an individual's computer through hidden wiring. Supp. 7. Routers support switches by deciding where data is actually sent. Supp. 7; S. Supp. 117. Routers and switches can only be accessed and configured by using a computer. Supp. 27-29; GKT Appx. 19-20. Despite this fact, GKT contends that routers and switches are not computer equipment.

Mr. Fox defined "system software" as programs that guide the operation of computer hardware and are not directly manipulated by the end-user. Supp. 9. "Application software" is used by the individual user to perform various work functions. Mr. Fox also testified about the various training courses taught by GKT which are the subject of this appeal.

Although Mr. Fox originally claimed that training did not occur on specific computer equipment, he later admitted that his prior statements were inaccurate. Supp. 27-28. Mr. Fox clarified his prior statements by conceding that training is not limited to one particular piece of equipment and that instruction involves the hands-on training on troubleshooting different types of routers and switches. Id; Supp. 29.

**C. The contested transactions relate to training courses on the operation of specific computer hardware and, therefore, meet the statutory definition of "computer services."**

All of the courses taught by GKT for Cisco, Microsoft or Nortel products have labs that allow students to actually perform tasks taught by the courses on the specific equipment involved

in the class. Supp. 29. We detail the specific equipment involved and the nature of each kind of course entailed in the contested transactions in the following sub-sections.

GKT offers two courses on the PERL programming language. The PERL Scripting course teaches operating system administrators to write programs using PERL while PERL with CGI (common gateway interface) is a more advanced course that teaches students to write CGI programs in PERL to interact with websites. Supp. 15, 26; Supp. 112.

Similarly, in GKT's Cisco Catalyst 5000 course, network administrators are taught how to install and manage the Catalyst 5000, which is a high-speed switch. Supp. 10-11. The course is a hands-on lab which allows students to configure VLAN<sup>4</sup> and use RMON (Remote Network Monitoring) to troubleshoot and reconfigure networks. Supp. 24; ST 32; S. Supp. RMON is a definition used by administrators to send inquiries to devices to determine what is causing the device to malfunction. Id. This is a very hardware intensive course that teaches switch installation, configuration and management along with switch hardware and architecture. Supp. 25; Supp. 109.

GKT's Cisco AS5200 course teaches students how to install, configure and troubleshoot a specific Cisco switch. Supp. 26; Supp. 110. It also allows students to configure a classroom network with multiple servers and troubleshoot live remote access traffic in a simulated networking environment. Supp. 26.

In the Cisco Installation & Maintenance course, professionals are given hands-on instruction how to install, maintain and upgrade all Cisco routers and switches. Supp. 11, 22; Supp. 110. They are also taught the concept of recovery, which enables users to restart a malfunctioning device and return it to normal operation. Supp. 22; ST 26; S. Supp. During the

---

<sup>4</sup> A VLAN is a virtual computer network that allows for end stations to be grouped together even if they are not located on the same network switch.

class, the students actually perform the recovery, upgrade and installation of specific hardware. Supp. 22. This course is required for Cisco certification. Supp. 22-23.

GKT's CISCO Remote Access Networks course is also required in order to become a Cisco Certified Network Professional. Supp. 26. In that course, instructors teach professionals how to configure networked computers and how to connect to a Cisco-based network. Id. Students learn how to build, configure and troubleshoot a remote access network, which allows user to access a corporate network while not at work. Supp. 10, 21 and 109.

Introduction to Cisco Router Configuration is a hands-on course that provides instruction in the installation, configuration and management of Cisco routers. Supp. 21; S. Supp. 26; Supp. 110. Students learn networking protocols, configure routers, and are taught how to address any situation that might occur while using the router. Supp. 110.

Advanced Cisco Router Configuration is an advanced course in which network administrators are taught to prioritize and segment network traffic on Cisco routers. Supp. 21; ST 24; S. Supp. This course teaches administrators how to perform custom queuing with algorithms and teaches the user to setup complex lists as security mechanisms to receive data from other devices. Supp. 22. This course also teaches administrators how to configure special filters for TCP/IP<sup>5</sup> and IPX/SPX<sup>6</sup> along with variable length subnet masking, which is assigning different Ethernet addresses to computers. Supp. 22.

---

<sup>5</sup> TCP/IP is a set of specifications that dictate how data is transmitted throughout the internet or throughout a corporate network that links the internet with a corporate network. Supp. 13. TCP/IP allows employees to access the Internet at their computer. Id.

<sup>6</sup> IPX and SPX are networking protocols used primarily on networks using the Novell NetWare operating systems.

GKT's IBM LAN Switches course teaches students how to install, configure and manage IBM routers, switches and other network hardware that is used in a small office environment. Supp. 12; Supp. 111.

Students in the Nortel Hub Connectivity course are taught to design networks for optimal performance, to manage networks for future growth, and to troubleshoot networks to eliminate performance problems using Nortel switches. Supp. 14; Supp. 112.

The Router Install & Basic Configure course provides a technical review of how to install and configure Nortel routers using system software. Supp. 16. In the Router Configuration & Management course, students are taught how to manage and configure Bay Network routers. ; Supp. 112.

GKT also offers advanced networking courses for computer operators that are the subject to this assessment. These advanced courses provide training in OSPF (open shortest path first) is a set of specifications that dictate how certain routing communication protocols work. Supp. 12. OSPF has seven layers, operates above the ATM and the frame relay, and is a very deep networking communication protocol. Supp. 24. GKT's Cisco OSPF Design and Configuration course is an advanced networking course that teaches computer operators how to prioritize and implement the speed at which data is routed, prioritized and sent to its ultimate destination. It includes a hands-on lab component. Supp. 24; S. Supp. 32.

Similarly, GKT's Internetworking with TCP/IP course teaches computer operators how to understand the large amount of technical specifications that define how TCP/IP behave and what the specifications mean. Supp. 13-14. Participants learn to install and configure TCP and IP protocols as well as run, test and decode them Supp. 27; Supp. 111.

GKT's Troubleshooting TCP/IP Network is another advanced course focused on analyzing and troubleshooting TCP/IP traffic on a network. Supp. 14. This course teaches computer operators how to prepare network communications, improve network security and improve network performance using metering hardware like protocol analyzers and software. Id.; Supp. 111. Protocol analyzers display the network traffic after being hooked to a network wire. Supp. 14.

In GKT's Internetworking Routers and Switches course, computer operators are taught how to use specific commands to communicate with routers and switches. Supp. 23. They also learn how to use protocol analyzers to identify network problems and isolate the problems such that they can be fixed. Supp. 23; S. Supp. 34; Supp. 111. ATM (asynchronous transfer mode) Essentials is a set of specifications that dictate how a high speed data system works over long distances. Supp. 9. Similarly, GKT's ATM Essentials course is designed so computer operators can understand the basic concepts of a high-speed network. Supp. 9.

ATM Internetworking is an advanced course that provides a higher set of technical specifications regarding ATM, the protocols, security, and networking performance issues regarding hubs, routers, and switches. Supp.9-10; Supp. 109. In yet another course, Understanding Network Protocols, a large number of protocols like ATM and OSPF are addressed in this course at a very advanced level. Supp. 16.

GKT also contests that the following five courses are taxable. Building Broad Networks Technology is a course in which system administrators, network engineers and designers learn how information is transported from a LAN to WAN. Supp. 109. The Integrated Curricular course teaches routing and switching for personnel entering the networking profession. Supp. 12-13. In the Internet and Network Communications course, students are taught how the internet

works. Supp. 13. The Telecommunications Fundamentals course teaches the fundamentals of communications, voice switching, telephone networks, and long-distance data networks. Supp. 16. GKT's Understanding Network Fundamentals course teaches students basic networking on the internet. Supp. 16.

## **LAW AND ARGUMENT**

### **The Tax Commissioner's First Proposition of Law:**

*Switches and routers are "computer equipment" that constitute integral parts of computer network "systems" and the personnel who operate such equipment are "computer operators" within the meaning of the definition of "computer services" set forth in R.C. 5739.01(Y)(1)(b). Thus, the provision of system-software training to such operators relating to the operation of such equipment constitutes "training of computer operators, provided in conjunction with and to support the sale, lease or operation of taxable computer equipment or systems" within the meaning of the R.C. 5739.01(Y)(1) definition of "computer services."*

#### **A. Every Enumerated Service provided within the State of Ohio is subject to tax.**

Ohio levies an excise tax upon the benefit realized from the sale of any service provided in this state. R.C. 5741.02(A)(1). "Providing a service" under R.C. 5741.02(A)(1) means providing or furnishing anything described in R.C. 5739.01(B)(3) for consideration. R.C. 5741.01(M); R.C. 5739.01(X). "Sale" includes all transactions for consideration by which: automatic data processing, computer services, or electronic information services are provided for use in business. R.C. 5739.01(B)(3)(c).

#### **B. The Statutory and Administrative Rule Framework of R.C. 5739.01(Y)(1)(b)**

"Computer services" are defined in R.C. 5739.01(Y)(1)(b) and mean "providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems." R.C. 5739.01(Y)(1)(b). The Ohio Department of Taxation (the

“Department”) promulgated Ohio Admin. Code 5703-9-46, which defines “computer services” as follows:

- (a) Specifying computer hardware configurations, which is the service of instructing others in the proper set-up, installation, and start-up of computer hardware;
- (b) Evaluating technical processing characteristics, which is the service of reviewing, testing or otherwise ascertaining the operating capacity or characteristics of computer hardware or systems software. \* \* \*
- (c) Computer *programming*, which is, for purposes of the definition of “computer services,” the service of writing, changing, debugging, or installing *systems software*;
- or
- (d) *Training computer programmers and operators* in the operation and use of *computer equipment and its system software*.

(Emphasis added). Additionally, Ohio Admin. Code 5703-9-46(A)(2) states that “computer services must be provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems to fall within the scope of [the] rule.”

“Programming” means the service of writing, changing, debugging, or installing systems software and does not include application software. Ohio Admin. Code 5703-9-46(A)(5). “Systems software” includes all programming that controls the basic operations of the computer, such as arithmetic, logic, compilation or similar functions whether it is an integral part of the computer hardware or is contained on magnetic media while “application software” includes programs that are intended to perform business functions or control or monitor processes. Ohio Admin. Code 5703-9-46(A)(5)(a) and (b). “Training” is instructing computer programmers and operators in the use of computer equipment and its system software and does not include instruction in the use of application software or other result-oriented procedures. Ohio Admin. Code 5703-9-46(A)(6).

### C. Standard of Review

The Tax Commissioner’s findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful. *Hatchadorian v. Lindley* (1986), 21 Ohio

St.3d 66; *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. The taxpayer bears the burden of rebutting this presumption of validity. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135, 143. Exemptions are a matter of legislative grace and are privileges bestowed by the legislature. *Atlas Crankshaft Corp. v. Lindley* (Aug. 15, 1978), BTA Case No. E-1816. Appx. 1. A taxpayer must not be allowed the privilege of an exemption unless the statute specifically allows it. *Id.*

Moreover, this Court traditionally does not substitute its judgment on factual issues for that of the BTA, and the Court will not overrule a factual determination by the Board unless the record reveals that the determination was unreasonable or unlawful. *Servi-Clean Industries, Inc. v. Collins* (1977), 50 Ohio St.2d 80, 86. While this Court will not hesitate to reverse a BTA decision that is based upon an incorrect legal conclusion, this Court will defer to the BTA's factual determinations if the record contains reliable and probative evidence. *Fife v. Greene County Bd. of Revisions*, 120 Ohio St.3d 442, 2008-Ohio-6786 at ¶10. This Court's statutory mandate in reviewing a decision of the Board is limited to determining whether the Board's decision is reasonable and lawful, and not to act as a trier of fact. *3535 Salem Corp. v. Lindley* (1979), 58 Ohio St.2d 210, 212.

Here, GKT contends that routers and switches are not "computer equipment", the training at issue is on application software and the courses were not taken by "programmers and operators", any of these issues if true, would make the courses not subject to tax under R.C. 5739.01(Y)(1)(b). As will be demonstrated, the courses provided by GKT were "computer services" subject to tax under R.C. 5739.01(Y)(1)(b).

#### **D. Routers and Switches are "Computer Equipment."**

GKT contends that routers and switches are not "computer equipment" and therefore, the training is not taxable. Although a router and a switch may not be considered a computer, they

most certainly are computer equipment. Mr. Fox testified that the switch and routers have physical connections to individual users' computers and routers can only be accessed through a computer to adjust its settings. Supp. 7; Supp. 27-29; GKT Appx. 20-21. Without this equipment, one can surmise that the entire corporate network would fail. Without routers and switches, each computer would have to be physically connected to each other and to their own printer and modem. The costs associated with such an undertaking would be enormous, let alone the amount of space that would be necessary to store all of this equipment. Moreover, the ease and speed at which data is transferred among users would be lethargic at best.

Further, if routers and switches are not "computer equipment", it begs the question as to what they are. Routers and switches can be purchased at computer stores and are located in the same section as computers. By GKT's interpretation of computer equipment, one begins to wonder if an Ethernet card, a modem, a mouse or a monitor satisfies its definition of computer equipment. A more practical application of the term "computer equipment" is broad and if the item is necessary for a computer's use, function and is connected to the computer, it is "computer equipment" under R.C. 5739.01(Y)(1)(b).

The common and ordinary meaning of the word "equipment" means furnishings, apparatus or necessary articles for an undertaking; the implements used in an operation or activity. *Vanguard, Inc. v. Schaefer* (Nov. 8, 1984), Franklin App. No. 84AP-374, Appx. 70. The principles of statutory construction require courts to first look at the specific language contained in the statute, and, if unambiguous, to then apply the clear meaning of the words used. *Provident Bank v. Wood* (1973), 36 Ohio St. 2d 101, 105-106. R.C. 1.42 also provides that words and phrases shall be read in context and construed according to the rules of grammar and common usage. *Roxane Laboratories, Inc. v. Tracy* (1996), 75 Ohio St.3d 125, 127. Here, a router and a

switch are necessary for the basic operation of a computer. Routers and switches connect computers to one another, to printers, to telephones and the internet. They are an integral part of a computer network. Supp. 27-29; GKT Appx. 20-21.

GKT contends that routers and switches do not satisfy the United States Code's definition of "computer", "computer systems" or "peripheral equipment". As stated previously, these statutes are not related to sales tax, but instead are depreciation schedules for businesses of machinery and equipment under the United States Code. Ohio, like the United States Code, has a depreciation schedule for businesses to depreciate machinery and equipment. Ohio's stand-alone computer definition is broader and considers "computers, as well as related hardware and peripheral equipment, used for general business purposes..." Department Informational Release PP 2003-01; Appx. 22.

As such, routers and switches are depreciable under Ohio's stand-alone computer deduction as they are related computer hardware used in business. Despite its two different sources of definitions, GKT has presented no definition of what constitutes "computer equipment". Moreover, although GKT contends that routers and switches are "network equipment", they have provided no definition of that term or indicated why "network equipment" could not be included as a subset of the much broader "computer equipment" umbrella. Further, GKT reliance upon R.C. 5739.01(AA)(1) is misplaced. There is nothing in the record which establishes that (1) a router is used in a telecommunication service (just because the word is mentioned, does not indicate how the information is routed through the process); (2) that if routers are used, there is nothing to disprove the BTA's factual findings that a router is connected to and accessed by a computer to work; and (3) if a router is present, how the router functions within that service. Supp. 27-29; GKT Appx. 11-12.

This is a red herring argument that points to a term in a statute for an inference that does not exist. GKT had its opportunity to prove that routers and switches were not computer equipment before the BTA. The BTA after consideration of the evidence determined that routers and switches were computer equipment under R.C. 5739.01(Y)(1)(b). This Court's statutorily mandated duties in reviewing a decision of the BTA are limited to determining whether the board's decision is reasonable and lawful, and not to act as a trier of fact. *3535 Salem Corp.*, 58 Ohio St.2d at 212. As such, the BTA's decision was reasonable and lawful and must be affirmed.

**E. "Computer services" includes computer programming training.**

GKT contends that its PERL and PERL with CGI courses are training in application software and therefore, are not taxable computer services under R.C. 5739.01(Y)(1)(b). Nothing could be further from the truth, as PERL is a programming language that is used by operating systems administrators to write their own programs. Supp. 15, 26. PERL with CGI (common gateway interface) is a more advanced course that teaches students to write CGI programs in the PERL programming language such that the new programs can interact with websites. Supp. 15; Supp. 112. Computer programming is also a taxable service under R.C. 5739.01(Y)(1)(b). Courses that teach students to write and administer their own programs satisfies R.C. 5739.01(Y)(1)(b) as computer programming or training in systems software. In either instance, PERL and PERL with CGI are "computer services" under the statute.

**F. GKT's training is "computer services."**

Finally, GKT contends that the students who took courses were not "computer programmers or operators." The only decision addressing these terms was by the BTA in *Mentor Technologies*, BTA Case No. 94-A-1058. Appx. 19. Therefore, this Court is free to approve or disapprove of the BTA's statutory construction of these terms. According to the

BTA, a “computer operator<sup>7</sup>” indicates a specialized position within the computer science industry with a level of specificity and technicality in job duties, above and beyond what an individual who generally uses a computer in his or her everyday job duties would require. The BTA continued that a “computer operator” who meets this standard has a high level of training and understanding of the computer; understands the operations of the computer and is able to not only utilize the computer to compete his or her job effectively, but also is aware of methods by which problems with the equipment can be corrected.

A large portion of the training at issue here involves complex concepts regarding computer networking. Statement of Fact at 6-14. Typical course attendants are network administrators that are given a hands-on experience in the installation, administration and troubleshooting of routers and switches. GKT Appx. at 20-22. Unlike in *Mentor Technologies*, the individuals taking GKT’s courses are advanced persons with a great depth of knowledge that is necessary to understand all the network protocols and specifications to run a highly successful network.

GKT’s services satisfy the conditions of R.C. 5739.01(Y)(1)(b) because “computer services” includes courses that teach computer programming and train computer operators on the operation of computer equipment. Here, the courses at issue consist of training on system software, installation, maintenance and administration of specific computer equipment or highly advanced technical courses that require a computer to interface and administer computer specifications. Supp. 27-29.

---

<sup>7</sup> The Commissioner notes that the BTA’s interpretation of “computer operators” may be more restrictive than that term’s plain meaning, so that the high level of computer expertise held by the computer operators to whom GKT provided its training is not an essential condition to satisfy the “computer operator” requirement. In other words, given this high level of expertise, this case presents a particularly easy one for affirmance.

Mr. Fox admitted that an ordinary person with no experience in computer networking would be “clueless, they would lose their money and waste the instructor’s time.” Supp. 24. GKT contends that Mr. Fox’s answer was in reference only to the more advanced courses taught by GKT, but the question was directed at the courses that had been discussed throughout the administrative hearing. *Id.* Regardless of this attempted do-over, the BTA held that the information being taught, although some courses may be geared toward professionals entering the field, contains material that is more advanced than what a common computer user would have. GKT Appx. at 21-22.

The BTA refined its definition of “computer programmers and operators” from *Mentor Technologies* in this case. The BTA held that the terms “computer programmers and operators” means training that requires a high-level of skill or training that is provided to individuals that is above and beyond what a typical computer user would know. *Id.* As such, the BTA reasonably and lawfully held that the training was attended by “computer programmers and operators” and satisfied the definition of “computer services” under R.C. 5739.01(Y)(1)(b).

**The Tax Commissioner’s Second Proposition of Law:**

*Appellants’ notice of appeal does not sufficiently set forth “the errors therein complained of” and, therefore, does not comply with R.C. 5717.04 sufficiently enough to confer jurisdiction upon this Court.*

The procedure for filing appeals to this Court from the Board of Tax Appeals is governed by R.C. 5717.04. The statute provides that “[a] notice of appeal shall set forth the decision of the board appealed from and the errors therein complained of.” Even if this Court determines that its exercise of jurisdiction would otherwise be appropriate, it may not exercise jurisdiction unless Appellants “strictly comply with the statutes providing for appeals” under Chapter 5717. *Canton v. Stark Cty. Budget Comm.* (1988), 40 Ohio St.3d 243; see also *Lawson Milk Co. v. Bowers* (1961), 171 Ohio St. 418, (rejecting the use of “language so broad and general that it might be

employed in nearly any case” and noting that R.C. 5717.04 is “very similar” to R.C. 5717.02 which this Court interpreted in *Queen City Valves v. Peck* (1954), 161 Ohio St. 579; *Richter Transfer Co. v. Bowers* (1962), 174 Ohio St. 113; *Deerhake v. Limbach* (1989), 47 Ohio St.3d 44; *Painesville v. Lake Cty. Budget Comm.* (1978), 56 Ohio St.2d 282, 286, (noting that R.C. 5717.02 and R.C. 5717.04 “require appellants to set forth ‘specifically’ the grounds complained of, and to ‘specify’ and ‘set forth’ the errors complained of.”).

This Court has found a notice of appeal to lack the requisite specificity to confer jurisdiction under R.C. 5717.04 when appellants use “general language which could be used in nearly any case.” *Deerhake*, 47 Ohio St.3d 44, 45; see also *Queen City*, 161 Ohio St. 579, paragraph one of the syllabus; *Lawson Milk*, 171 Ohio St. 418, 420. In *Canton*, a notice of appeal filed pursuant to R.C. 5717.04 “\* \* \* listed errors that were general in nature. Because the notice did not state in definite and specific terms the precise errors claimed, [the] court concluded it was without jurisdiction and dismissed the appeal.” *Canton*, 40 Ohio St.3d at 246.

In *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420, this Court was confronted with language in notices of appeal before the Board of Tax Appeals and the Supreme Court similar to the language used by Appellants here. The notices stated, without further elaboration: “The imposition of the use tax on Castle’s purchases described in paragraph 1 violates the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and the Equal Protection Clause of the Ohio Constitution, Article I, § 2.” *Id.* at ¶31. The Court noted that the language “\* \* \* did not state which provision of the use tax violated the Equal Protection Clauses or how the application of the use tax violated its right to equal protection.” *Id.* at ¶40. The Court dismissed the case on the grounds that the appellants failed to meet the requirements of R.C. 5717.02. However, the Court concluded that “[t]he wording of

Castle's constitutional claim is so general that it could be used in almost every use tax case." Id. at ¶41.

Measured against the foregoing "strict" specification of error requirement, GKT's "void for vagueness" and equal protection challenges clearly fail. The only constitutional challenge raised in its notice of appeal to this Court is set forth in ¶ 1 thereof, and that contention does not mention any violation of equal protection or any "void for vagueness" claim. Instead, that allegation of error, at best, pertains solely to a First Amendment freedom of speech claim.

### **The Tax Commissioner's Third Proposition of Law:**

*The question of whether a tax statute is unconstitutional when applied to a particular state of facts must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning this question if presented, [\*\*\*4] even though the Board of Tax Appeals may not declare the statute unconstitutional. Cleveland Gear Co. v. Limbach (1988), 35 Ohio St.3d 229, 520 N.E.2d 188, paragraph three of the syllabus, approved and followed.*

The "freedom of speech" challenge is not a purely "facial challenge" to the constitutionality of Ohio statutes despite GKT's labeling it as such; it does not fit within paragraph two of the syllabus of *Cleveland Gear*. Instead, the allegation of a "freedom of speech" violation challenges the constitutionality of R.C. 5739.01(Y)(1) **as applied to a particular state of facts**. Such "as applied" challenges "must be raised in the notice of appeal to the Board of Tax Appeals, and the Board of Tax Appeals must receive evidence concerning the questions presented \*\*\*." *Cleveland Gear*, paragraph three of the syllabus.

GKT's basis for its "free speech" claim is its contention that the Commissioner's application of the statutory definition of "computer services" is an impermissible "content-based" restriction of its free speech rights. GKT asserts that its First Amendment rights as a provider of "systems software" computer training are violated because computer training

services involving “systems software” are subjected to the tax, but computer training services involving “applications software” are not. See Ohio Admin. Code \_\_\_\_\_; and GKT Br. \_\_\_\_.<sup>8</sup>

Even if such a dubious proposition were accepted as true, however, that alone would be insufficient to establish any basis for overturning the BTA’s affirmance of the Commissioner’s assessment. GKT also would have to show to what extent the prices it charged for these assessed computer training services were truly for a kind of speech that the Ohio General Assembly has impermissibly taxed. To the extent that the assessed transactions include GKT’s provision of access to and use of computer equipment and GKT’s sales of written materials, the transactions are subject to Ohio sales and use tax regardless of whether they relate to systems-software computer training or applications-software computer training. Paragraph three of the *Cleveland Gear* syllabus would require GKT to establish a “particular state of facts” for each transaction. Only that portion of the prices GKT charges for the oral speech component of the assessed transactions would be constitutionally invalidated. That inquiry would be a transaction-specific, circumstances-specific one. Thus, GKT’s “freedom of speech” claim fails for jurisdictional reasons, just as do its “void for vagueness” and equal protection claims.

**The Tax Commissioner’s Fourth Proposition of Law:**

*Global Knowledge’s training of computer programmers and operators includes nonspeech elements such as the use of computer equipment and instruction manuals that would be subject to tax under R.C. 5739.01(B)(3)(e) and 5739.01(B)(1), notwithstanding Global Knowledge’s constitutional claims with respect to the remainder of the taxable service.*

---

<sup>8</sup> As we detail, *infra*, GKT conveniently fails to note that it is a provider of “applications software” training, as well as “systems software” training. Under its novel theory, the unconstitutionality of the “computer services” assessed here derives from the fact that the latter is subject to the tax while the former is not. So, if both were taxed, GKT would have no cause to complain. Consequently, it is difficult to see how the Commissioner’s exclusion of applications software training from the tax could possibly be a basis for infringing GKT’s rights to freedom of speech because such exclusion actually benefits GKT.

The First Amendment provides that “Congress shall make no law \* \* \* abridging the freedom of speech \* \* \*.” The limitation of the First Amendment is applicable to the states by virtue of the Fourteenth Amendment. *City of Painesville Bldg. Dep’t v. Dworken & Bernstein Co., L.P.A.* (2000), 89 Ohio St. 3d 564, 566 citing *Gitlow v. New York* (1925), 268 U.S. 652, and *Lovell v. Griffin* (1938), 303 U.S. 444. However, “nonspeech” elements of communication are not subject to the First Amendment’s protections. See *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124 at ¶15. As a result, “when ‘speech’ and ‘nonspeech’ elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms. *U.S. v. O’Brien* (1968), 391 U.S. 367, 376.

GKT argues that it cannot be taxed pursuant to R.C. 5739.01(Y)(1)(b) because such statute imposes a tax upon protected “speech” and, therefore, violates the First and Fourteenth Amendments. GKT Br. at 1. Such argument fails however because, GKT’s training courses consist of both speech and nonspeech elements. Specifically, in its training courses, GKT provides its students with not only oral instruction but also tangible personal property (training manuals) and the use of GKT’s computer equipment during the course. Supp. 6, 27-29.

R.C. 5739.01(B)(3)(e) imposes a tax not only upon any “speech” provided in the training courses but also upon the “training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.” Similarly, R.C. 5739.01(B)(1) subjects to sales tax all transactions by which title or possession or both of tangible personal property is transferred or a license to use tangible personal property is granted. GKT has not presented any evidence establishing what portion of the price it charges for its training courses is attributable to the “speech” component of such

courses and what portion is attributable to the student's use of computer equipment. As a result, it has failed to satisfy its burden of proving the manner and extent of the Tax Commissioner's error. See *Shiloh Automotive, Inc.*, 117 Ohio St.3d 4, 2008-Ohio-68 at ¶15.

**The Tax Commissioner's Fifth Proposition of Law:**

*GKT's courses are not protected speech under the First Amendment.*

GKT claims because R.C. 5739.01(Y)(1)(b) imposes a tax upon 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"; the statute places "a 'financial disincentive' upon protected speech of only a particular content, i.e. instruction in the use of computer equipment and its system software." GKT Br. at 14. However, the U.S. Supreme Court has held that "a tax that discriminates among speakers is constitutionally suspect only in certain circumstances" and "the government is not required to exempt speech from a generally applicable tax." *Leathers v. Medlock* (1991), 499 U.S. 439, 444, 451.

Therefore, not all regulations that may affect an aspect of speech violate the First Amendment. *Commodity Futures Trading Commission v. Vartuli* (C.A.2 2000), 228 F.3d 94, 111 (holding "language serves a variety of functions, only some of which are covered by the special reasons for freedom of speech."); *O'Brien*, 391 U.S. at 376 (holding "we cannot accept the view that an apparently limitless variety of conduct can be labeled 'speech' whenever the person engaging in the conduct intends thereby to express an idea").

As previously discussed, GKT has not indicated what portion of the "price" it charges for its training is "speech" so as to be protected under the First Amendment. This fact alone, dictates that the GKT's First Amendment claim fails as a matter of law. Regardless, the applicable case law does not indicate that R.C. 5739.01(B)(3)(c) violates the First Amendment. The case law dictates that if a tax is generally applicable to all entities, is not aimed at the press,

does not single out a small number of taxpayers within a specific medium, and is not an attempt to suppress an unfavorable message to support a favorable group within the same medium, the statute does not violate the First Amendment. *Leathers*, 499 U.S. at 447-449. As will be demonstrated, R.C. 5739.01(B)(3)(e) does not violate protections afforded under the First Amendment.

**A. The U.S. Supreme Court in *Leathers* and *Minneapolis Star Tribune, Inc.* set forth the standard for a First Amendment analysis.**

The history behind *Arkansas Writers' Project, Inc. v. Ragland* (1987), 481 U.S. 221, is instructive in illustrating the differences between 5739.01(B)(3)(e) and those taxes aimed at a small portion of the press. In *Grosjean v. American Press Co.* (1936), 297 U.S. 233, the U.S. Supreme Court struck as unconstitutional a privilege tax imposed upon advertising revenue of newspapers that had a weekly circulation over 20,000 copies. *Grosjean*, 297 U.S. at 240. The Court found that the tax was imposed only upon 13 of the applicable 120 newspaper circulations and acted with the “plain purpose of penalizing the publishers and curtailing the circulation of a select group of newspapers.” *Id.* at 241, 251. In *Grosjean*, the tax violated the First Amendment because it was imposed only on the press and upon a small number of business within the press.

In *Minneapolis Star & Tribune Co. v. Minnesota Comm’r of Revenue* (1983), 460 U.S. 575, 577, the U.S. Supreme Court struck as unconstitutional a special use tax imposed by Minnesota upon the paper and ink consumed in the production of a newspaper. The Court held “that recognizing a power in the State not only to single out the press but also to tailor the tax so that it singles out a few members of the press presents such a potential for abuse that no interest suggested by Minnesota can justify the scheme.” *Id.* at 592. Consistent with *Grosjean*, the Court found that only 11 of the 388 circulations were subject to the tax (with the Minneapolis Star & Tribune Co. alone paying two-thirds of the tax), the tax was unique to newspapers, and

the tax was imposed upon an intermediate step in the publication process and therefore, imposed a tax regardless of whether the ultimate sale was subject to sales tax. *Minneapolis Star & Tribune Co.*, 460 U.S. at 581-82.

However, the Court was quick to recognize that if Minnesota had imposed its general sales tax on newspapers, did not impose a special tax upon the press and if the use tax was complimentary to the state's sales tax, the statute could have passed constitutional muster. *Id.* at 581-82. "When the State imposes a generally applicable tax, there is little cause for concern. We need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." and "the State could raise the revenue by taxing businesses generally, avoiding the censorial threat implicit in a tax that singles out the press." *Id.* at 585-86.

After *Arkansas Writers Project, Inc.* was decided the U.S. Supreme Court decided *Leathers*, in which cable companies argued that the imposition of Arkansas' sales tax violated its First and Fourteenth Amendment rights because the tax was not uniformly imposed upon other members of the media like satellite companies, newspapers and magazines. *Leathers*, 499 U.S. at 441. Contrary to its other cases, the Court held that the Arkansas sales tax was constitutional because it was (1) a general tax; (2) did not single out the press; (3) did not impose the tax upon a small segment of the same medium; and (4) was not a purposeful attempt to interfere with the cable companies protected speech. *Id.* at 447-49. Here, like in *Leathers*, R.C. 5739.01(B)(3)(e) does not violate GKT's First Amendment rights.

**1. R.C. 5739.01 is a generally applicable sales tax.**

On July 1, 1983, the General Assembly enacted R.C. 5739.01(B)(3)(e) as part of the state's budget bill which levied a sales tax upon automatic data processing and computer services. *Comtech Systems, Inc. v. Limbach* (1991), 59 Ohio St.3d 96, 97. The budget bill was an

appropriations bill that funded Ohio's government operations. Id. at 99. R.C. 5739.01(B)(3)(e) is a subset of R.C. 5739.01 which defines what transactions constitute a taxable sale within Ohio.

The state's sales tax was enacted:

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

R.C. 5739.02. The use tax like the sales tax is levied upon the storage, use, or consumption of tangible personal property or the benefit of any service realized within the state. R.C. 5741.02(A)(1). The sales tax applies to all industries that sell tangible personal property or permits the use of tangible personal property for consideration. R.C. 5739.01(B)(1)-R.C. 5739.01(B)(3). Computer services are but one of many transactions that are subject to Ohio's sales tax.

The U.S. Supreme Court in *Minneapolis Star & Tribune Co.* held that another factor which helped in determining whether a tax violated the First Amendment was by reviewing the format of the tax (i.e. was the tax complimentary with the sales or use tax). *Minneapolis Star & Tribune Co.*, 460 U.S. at 581-82. R.C. 5741.02 does not impose a use tax upon transactions in which the sales tax has already been paid or if the transaction was exempt from sales tax under R.C. 5739.01. R.C. 5741.02(C)(1)-R.C. 5741.02(C)(2). As such, R.C. 5739.01 is not a special tax imposed only upon one group, but instead applies evenly to all businesses that sell or allow the use of tangible personal property for consideration.

**2. The tax is not directed only at members of the press.**

There can be no dispute that computer services under R.C. 5739.01(B)(3) is not aimed at members of the press which again brings into question, GKT's reliance upon such cases as

*Arkansas Writers Project, Inc. and Simon & Schuster, Inc. v. Members of the New York State Crime Victims Bd.* (1991), 502 U.S. 105. Members of the press are subject to the state's sales tax by selling tangible personal property, but the tax applies to almost all entities that sell tangible personal property for consideration something that the Court said was appropriate in *Minneapolis Star & Tribune Co.* R.C. 5739.01(B)(1). As such, the tax is not levied solely upon members of the press.

**3. The tax is not levied upon a small segment of the same medium.**

GKT contends that R.C. 5739.01(Y)(1)(b) is the only tax imposed upon training in R.C. 5739.01. GKT Br. at 14. However, nothing could be further from the truth. Although R.C. 5739.01 does not list many specific activities subject to the sales tax, a plain reading of the entire statute demonstrates that GKT's contention is completely baseless. R.C. 5739.01(B)(3)(i), R.C. 5739.01(B)(3)(n), and R.C. 5739.01(B)(3)(o) all impose an excise tax upon some form of instruction or advice.

R.C. 5739.01(B)(3)(i) imposes a tax upon consultation or advice received from a 900 telephone call, while R.C. 5739.01(B)(3)(n) imposes a tax upon any service received from a physical fitness facility which includes personal weight training, group instruction in yoga, spinning, swimming, racquetball or other health related services. Moreover, R.C. 5739.01(B)(3)(o) imposes a tax upon all recreation or sports club services which includes instruction in golf, tennis, basketball, and any other sports activity.

Further, R.C. 5739.01(B)(1) would also include instruction provided in conjunction with the purchase of tangible personal property, where the instruction was incidental to the purchase of the tangible personal property. A prime example of this would be a student who purchases college-prep courses from Kaplan or Princeton Review. The instruction is integral with the course booklets and practice exams a student pays for in taking the prep course. As stated

previously, there is no dispute that the course booklets are tangible personal property subject to sales tax under R.C. 5739.01(B)(1).

Another example is someone who purchases golf clubs from a retail establishment that offers instruction as a portion of the cost of the clubs. In this instance, the instruction is subject to tax as it is a portion of the price paid for the transfer of tangible personal property. These are just a few examples of the many other forms of instruction subject to tax under R.C. 5739.01. R.C. 5739.01(B)(3)(e) stands in stark contrast to the taxes held to be unconstitutional by the Court in *Arkansas Writers Project, Inc.*, *Simon & Schuster, Inc.* and *Minneapolis Star & Tribune Co.*

In these cases, a small segment within a given medium paid a substantial portion of the tax. (11 of 388 circulators in *Minneapolis Star & Tribune Co.*, 460 U.S. at 581-82; 13 of 120 newspapers in *Grosjean*, 297 U.S. at 241, 251; and “only a few Arkansas magazines pay any sales tax” in *Arkansas Writers’ Project, Inc.*, 481 U.S. at 229). GKT has presented no evidence that indicates that a small number of companies bear the incidence of the sales tax while other companies that provide the same computer training are absolved from the tax. For example there has been no showing that the tax was imposed upon GKT and not other entities that provided computer training like Apple or CompuUSA or any big-box retailer like Best Buy or HH Gregg. As such, R.C. 5739.01(B)(3)(e) is not the only training subject to tax and it is not imposed upon a small segment of the same medium.

**4. The tax was not enacted in an attempt to suppress computer training in favor of another viewpoint and there is no evidence that the tax has suppressed computer training.**

The “principal inquiry in determining content-neutrality is whether the government has adopted a regulation of speech because of [agreement or] disagreement with the message it conveys.” *Ward v. Rock Against Racism* (1989), 491 U.S. 781, 791. “Speaker based laws

demand strict scrutiny [only] when they reflect the Government's preference for the substance of what the favored speakers have to say (or aversion to what the disfavored speakers have to say.)" *Turner Broadcasting System, Inc. v. FCC* (1994), 512 U.S. 622, 658. GKT claims because R.C. 5739.01(Y)(1)(b) imposes a tax upon the "use of computer equipment and its systems software," and does not tax "instruction in the use of application software," it violates the First Amendment. GKT Br. at 14. However, imposition of the sales tax upon computer training in systems software alone does not violate the First Amendment as "it is mistaken to believe that all regulations distinguishing between speakers warrant strict scrutiny." *Turner Broadcasting System, Inc.*, 512 U.S. at 657.

There must also be a showing that the content based regulation favors one aspect of speech over another competing interest and the speech is suppressed by the regulation. *Regan v. Taxation without Representation of Washington* (1983), 461 U.S. 540, 549 (the U.S. Supreme Court has looked to whether the regulation was intended to or did suppress any ideas to determine whether it violated the First Amendment). Failure to demonstrate a content preference over competing interests and/or suppression of that type of speech does not violate the First Amendment. GKT has not presented any evidence of a content preference by the General Assembly in enacting R.C. 5739.01(B)(3)(e) or suppression of the training by its enactment.

- a. **There are no competing interests between training on systems software and training on application software as application software cannot function without systems software.**

Systems software is used to instruct the computer on how to operate. *Compuserve v. Lindley* (1987), 41 Ohio App.3d 260, 262. System software controls the overall direction of the computer system and tells the computer how to start programs, how to communicate with various hardware devices, and how to perform other basic operational functions. *Tangible or Intangible- Is that the question?* Reinhard, 29 St. Mary's L. J. 871, 889-90; Appx. 23. System

software is fundamental to the operation and maintenance of the computer system and is perceived as a permanent and necessary component of the computer. *Id.* Computer hardware cannot function without system software. *Compuserve*, 41 Ohio App.3d 260 at paragraph one of the syllabus. System Software would include Windows or Apple's Snow Leopard operating system.

Application software is designed to solve a particular problem or perform a particular task and is dependent upon system software to function. *Compuserve*, 41 Ohio App.3d at 263. Unlike system software, application software is not essential to the computer's operation. *Id.* Application software would include Microsoft Word or Excel. Moreover, the Tenth District has held that systems software increases the value of the computer hardware while application software does not. *Id.* The failure of a computer to have systems software prevents a medium for application software to exist.

The argument presented by GKT that the General Assembly in enacting R.C. 5739.01(B)(3)(c) is favoring training in system software over training in application software is absurd. These are not two competing interests. An item that is entirely dependent upon another item to function cannot be a competing interest under a First Amendment analysis. Again, a review of the applicable case law requires favoritism of an idea over another competing interest. This is not present here. To demonstrate the absurdity of GKT's argument would be to claim that a radio or cd player or leather seats are just as essential to the operation of a car as would be gasoline, a car battery or tires. Clearly, the latter are necessary for the operation of a motor vehicle, while the others are purely discretionary based upon the whims of a car owner. In the same fashion, systems software is essential for the operation of the computer, whereas

application software, is subject to the discretion and individuals needs of the taxpayer and the computer will operate without it.

To claim that system software is competing with application software under a First Amendment analysis is a farce and is not supported by any case law. Moreover, GKT has presented no evidence that R.C. 5739.01(B)(3)(e) was enacted to suppress GKT's "speech" or that R.C. 5739.01(B)(3)(e) has suppressed any of GKT's "speech". Therefore, GKT has not demonstrated that R.C. 5739.01(B)(3)(e) is a content-based restriction protected by the First Amendment. As such, a rational basis is the appropriate standard of review.

**b. The case law cited by GKT is factually dissimilar from this matter.**

It is important to recognize that the U.S. Supreme Court has held that "the press plays a unique role as a check on government abuse, and a tax limited to the press raises concerns about censorship of critical information and opinion." *Leathers*, 499 U.S. at 447; *Grosjean*, 297 U.S. at 245-51 (providing a history of the freedom of the press). Despite the extra significance the press plays in disseminating useful information to the masses, GKT relies almost exclusively on freedom of the press cases. In support of its contentions, GKT cites *Arkansas Writers' Project, Inc.*; *Simon & Schuster, Inc.*; *Forsyth County v. The Nationalist Movement* (1992), 505 U.S. 123; *Opinion of the Justices to the Senate* (Mass. 2002), 764 N.E.2d 343; *U.S. Satellite Broadcasting Co., Inc. v. Lynch* (E.D. Cal. 1999), 41 F. Supp.2d 1113; and *Department of Revenue v. Magazine Publishers of America, Inc.* (Fla. 1992), 604 So.2d 459. GKT Br. at 11-15.

*Arkansas Writers' Project, Inc.*; *Simon & Schuster, Inc.* and *Forsyth County* are the only cases from the U.S. Supreme Court. The remaining cases are persuasive authority at best. *State v. Burnett* (2001), 93 Ohio St. 3d 419, 424 (holding "we therefore conclude that we are not bound by rulings on federal statutory or constitutional law made by a federal court other than the

United States Supreme Court. We will, however, accord those decisions some persuasive weight.”).

In *Arkansas Writers' Project, Inc.*, 481 U.S. at 223, the Court struck as unconstitutional an Arkansas sales tax that exempted newspapers and trade, religious, professional or sport magazines. The Court stated that the fundamental question from this case “is not whether the tax singles out the press as a whole, but whether it targets a small group within the press.” *Id.* at 229. The Court noted that “the Arkansas sales tax cannot be characterized as nondiscriminatory, because it is not evenly applied to all magazines” and “only a few Arkansas magazines pay any sales tax.” *Id.* The small number of the press subject to the tax and the fact that the tax is content based resulted in the tax being held as unconstitutional. *Id.*

In *Simon & Schuster, Inc.*, the Court held unconstitutional a Son of Sam law imposed upon a member of the media that “singles out income derived from expressive activity for a burden the State places on no other income, and it is directed only at works with a specified content.” *Simon & Schuster, Inc.*, 502 U.S. at 117. The holding in *Simon & Schuster, Inc.* does not stand for the proposition that a content based regulation automatically is subject to a strict scrutiny analysis.

In fact, the U.S. Supreme Court in *City of Cincinnati v. Discovery Network, Inc.* (1993), 507 U.S. 410, held “the fact that a restriction is content-based cannot alone trigger strict scrutiny.” *Trans Union Corp. v. FTC* (C.A.D.C. 2001), 267 F.3d 1138, 1141 citing *City of Cincinnati*, 507 U.S. 410. The Son of Sam law was stricken by the court because of three concerns: (1) it was directed at a member of the media; (2) it was imposed only upon criminals who wrote about their past transgressions; and (3) it was an attempt to suppress the criminal’s message to ensure that felons were not able to profit from their past.

*Forsyth County* was a permit case which allowed the town's administrator to dictate how much or even to what extent groups would have to pay to demonstrate in the town's square. *Forsyth County*, 505 U.S. at 133. *Opinion of the Justices to the Senate* is a state supreme court decision which held unconstitutional a Massachusetts state law that mimicked New York's Son of Sam law. *Opinion of the Justices to the Senate*, 436 Mass. at 1205, 764 N.E.2d at 347. *U.S. Satellite Broadcasting Co., Inc.* is a federal district court decision which held unconstitutional a California state law that was specially enacted to tax only the broadcast of boxing related events and not other telecast events. *U.S. Satellite Broadcasting Co., Inc.*, 41 F. Supp.2d at 1120-21.

Finally, *Magazine Publishers of America, Inc.* is a Florida state supreme court case in which magazines were taxed but newspapers were not. *Magazine Publishers of America, Inc.*, 604 So.2d at 462. The Florida supreme court held that the differing treatment of members of the press violated the First Amendment. *Id.* *Magazine Publishers of America, Inc.* was incorrectly decided as it conflicts with U.S. Supreme Court cases like *Arkansas Writers' Project, Inc.*; *Simon & Schuster, Inc.*; and *City of Cincinnati*. As such, these cases are factually dissimilar from this matter and provide little or no support for GKT's contentions.

#### **The Tax Commissioner's Sixth Proposition of Law:**

*R.C. 5739.01(B)(3)(e) bears a rational relation to the state of Ohio's purpose of enacting an excise tax to raise revenue.*

#### **A. Standard of Review of a Constitutional Challenge relating to tax matters.**

Statutory classifications are valid if they bear a rational relation to a legitimate governmental purpose. *Regan*, 461 U.S. at 547. Legislatures have especially broad latitude in creating classifications and distinctions in tax statutes. *Id.* Inherent in the power to tax is the power to discriminate in taxation. In *Regan*, the U.S. Supreme Court held a tax scheme does not become suspect because it exempts only some types of speech and reiterated that in the First

Amendment context there is a strong presumption of constitutionality of duly enacted tax statutes. *Leathers*, 499 U.S. at 451. The U.S. Supreme Court continued by holding “where governmental provisions of subsidies are not ‘aimed at the suppression of dangerous ideas’, its ‘power to encourage actions deemed to be in the public interest are necessarily far broader.’” *Regan*, 461 U.S. at 550. The Court also held “a legislature’s decision not to subsidize the exercise of a fundamental right does not infringe the right, and thus is not subject to strict scrutiny.” *Id.* at 549.

This Court like the U.S. Supreme Court has been deferential to the General Assembly when reviewing the constitutionality of taxation statutes. A court’s power to invalidate a statute “is a power to be exercised only with great caution and in the clearest of cases.” *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511 at ¶41. Laws are entitled to a “strong presumption of constitutionality,” and the party challenging the constitutionality of a law “bears the burden of proving that the law is unconstitutional beyond a reasonable doubt.” *Id.*

Taxes are fundamentally a legislative responsibility and a taxpayer challenging the constitutionality of a taxation statute bears the burden to negate every conceivable basis that might support the legislation. *Id.* citing *Lyons v. Limbach* (1988), 40 Ohio St.3d 92, 94; *GTE North, Inc.*, 96 Ohio St.3d 9, 2002-Ohio-2984 at ¶ 21. Moreover, “[t]his already deferential standard ‘is especially deferential’ in the context of classifications arising out of complex taxation law.” *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶92 citing *Park Corp. v. Brook Park*, 102 Ohio St.3d 166, 2004-Ohio-2237 at ¶23 quoting *Nordlinger v. Hahn* (1992), 505 U.S. 1, 11. Under the rational-basis standard, a state has no obligation to produce evidence to sustain the rationality of a statutory classification. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-

Ohio-511 at ¶91 citing *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter v. Cent. State Univ.* (1999), 87 Ohio St.3d 55, 58, 60.

Here, R.C. 5739.01(B)(3)(e) was enacted by the General Assembly as a portion of the state's appropriations bill to support and fund Ohio's government. *Comtech Systems, Inc.*, 59 Ohio St.3d at 97, 99. R.C. 5739.01(B)(3)(e) is an excise tax imposed upon computer services, automatic data processing and electronic information services sold within the state. R.C. 5739.01(B)(3)(e) collects sales tax from the sale of computer services which thereby fulfills the purpose of the enactment to help fund governmental operations. GKT bears the burden of establishing beyond a reasonable doubt that R.C. 5739.01(B)(3)(e) is unconstitutional. Because GKT raised its constitutional claims for the first time before this Court, the record is devoid of any evidence to support its contention. As such, it cannot meet its burden and its claims must fail as a matter of law. Therefore, R.C. 5739.01(B)(3)(e) is rationally related to a legitimate governmental purpose (i.e., sustainability) and the BTA's decision must be affirmed as reasonable and lawful.

**The Tax Commissioner's Seventh Proposition of Law:**

*This Court must give great deference to the General Assembly in reviewing the constitutionality of a statute challenged under the Equal Protection Clause.*

**A. Standard of Review of an Equal Protection Challenge of a tax statute.**

GKT contends R.C. 5739.01(B)(3)(e) violates the Equal Protection Clause because it imposes a sales tax only upon companies that provide computer training in systems software and not application software. GKT Br. at 17. GKT alleges that it is similarly situated to other for-profit companies that provide technical instruction to corporate personnel within Ohio and R.C. 5739.01(B)(3)(e) is a content-based regulation in violation of the First Amendment which must be reviewed under a strict scrutiny standard. *Id.* GKT has presented no evidence of other

similarly situated companies that are not taxed in Ohio. Regardless, these hypothetical companies are not similarly situated for Equal Protection purposes. Further, as discussed supra (Prop. II, p. 16-23), tax upon “computer services” under R.C. 5739.01(B)(3)(e) is not a content-based regulation that is subject to strict scrutiny under the Equal Protection Clause. Finally, system software and application software are not similarly situated for Equal Protection purposes.

The Equal Protection Clause commands that no State shall deny to any person the equal protection of the laws. *Nordlinger*, 505 U.S. at 10. The limitations placed upon governmental action by the federal and state Equal Protection Clauses are essentially the same. *Burnett v. Motorists Mutual Insurance Co.*, 118 Ohio St.3d 493, 2008-Ohio-2751 at ¶30.

Most laws differentiate in some fashion between classes of persons and the Equal Protection Clause does not forbid classifications. *Id.* The Equal Protection Clause ensures that governmental regulators do not treat differently businesses that are in all relevant respects alike. *Id.* Legislatures are presumed to have acted within their constitutional power despite the fact that their laws may result in some form of inequality. *Nordlinger*, 505 U.S. at 11; *Allied Stores of Ohio, Inc. v. Bowers* (1959), 358 U.S. 522, 526. In structuring taxation schemes, states have a large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation. *Nordlinger*, 505 U.S. at 11.

The U.S. Supreme Court has consistently recognized that the public purpose of a state, for which it may raise funds by taxation, embrace expenditures for its general welfare. *Carmichael v. Southern Coal & Coke Co.* (1937), 301 U.S. 495, 515. It is inherent in the exercise of the power to tax that a state be free to select the subjects of taxation and to grant exemptions. *Id.* at 509. The Equal Protection Clause does not impose upon a state any rigid rule of equality of

taxation. *Id.*; *Allied Stores of Ohio, Inc.*, 358 U.S. at 526 (holding the same). The U.S. Supreme Court has repeatedly held that inequalities which result from the singling out of one particular class for taxation or exemption, infringes no constitutional right. *Id.* A legislature is not bound to tax every member of a class. *Id.* A state may impose different taxes upon different trades and professions and may vary the rate imposed upon various products. *Allied Stores of Ohio, Inc.*, 358 U.S. at 527.

If the selection or classification is neither capricious, nor arbitrary, and rests upon some reasonable consideration of difference or policy, there is no denial of the Equal Protection Clause. *Allied Stores of Ohio, Inc.*, 358 U.S. at 528; *Nordlinger*, 505 U.S. at 11 citing *United States Railroad Retirement Bd. v. Fritz* (1980), 449 U.S. 166, 174, 179 and *Minnesota v. Clover Leaf Creamery Co.* (1981), 449 U.S. 456, 464. Moreover, a state legislature need not explicitly declare the purpose of a tax classification. *Allied Stores of Ohio, Inc.*, 358 U.S. at 528; *Nordlinger*, 505 U.S. at 15-16. Legitimate state purposes may be ascertained even when the legislative or administrative history is silent. *Nordlinger*, 505 U.S. at 16.

The U.S. Constitution presumes that, absent some reason to infer antipathy, even improvident decisions will eventually be rectified by the democratic process and that judicial intervention is generally unwarranted no matter how unwisely a court may think a political branch has acted. *Id.* at 17-18. The test is whether the difference in treatment is an invidious discrimination. *Lehnhausen v. Lake Shore Auto Parts Co.* (1973), 410 U.S. 356, 359. The basis for the presumption of constitutionality of tax statutes was stated in *Madden v. Kentucky* (1940), 309 U.S. 83, 87-88:

The broad discretion as to classification possessed by a legislature in the field of taxation has long been recognized. . . . The passage of time has only served to underscore the wisdom of that recognition of the large area of discretion which is needed by a legislature in formulating sound tax policies. Traditionally classification

has been a device for fitting tax programs to local needs and usages in order to achieve an equitable distribution of the tax burden. It has, because of this, been pointed out that in taxation, even more than in other fields, legislatures possess the greatest freedom in classification. Since the members of a legislature necessarily enjoy a familiarity with local conditions which this Court cannot have, the presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.

*Leathers*, 499 U.S. at 451-52 quoting *Madden v. Kentucky* (1940), 309 U.S. 83, 87-88.

“[T]he fact that one business competes with another does not, of itself, mean that the two companies are similarly situated for purposes of equal protection.” *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶95 citing *GTE North, Inc.*, 96 Ohio St.3d 9, 2002-Ohio-2984 at ¶ 39. *Vacco v. Quill* (1997), 521 U.S. 793, 799 (noting that Equal Protection “embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.”) and *Plyler v. Doe* (1982), 457 U.S. 202, 216 (“the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”)

This Court’s job is simply to determine, with great deference, whether there is a rational basis for the General Assembly’s taxation decisions. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶96 citing *Park Corp.*, 102 Ohio St.3d 166, 2004-Ohio-2237 at ¶36. This already deferential standard “is especially deferential” in the context of classifications arising out of complex taxation law. *Park Corp.*, 102 Ohio St.3d 166, 2004-Ohio-2237 at ¶23; *Lehnhausen*, 410 U.S. at 360 (holding “when it comes to taxes on corporations and taxes on individuals, great leeway is permissible so far as equal protection is concerned.”).

Moreover, it is the burden of the entity challenging the tax scheme to present evidence of other similarly situated companies for an Equal Protection analysis. Failure to do so results in dismissal of that claim. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶96 (holding “because the record is not factually sufficient to make a valid comparison between the

transportation and uses of alternative fuels and those services provided by interstate-pipeline companies, we may reject Columbia’s claim on that ground alone.”); *Lyons*, 40 Ohio St.3d at 94 (holding the same).

In a case where the law distinguishes for tax purposes among revenues obtained within a jurisdiction by two enterprises doing business in that jurisdiction, the law being challenged is reviewed under the rational-basis standard. *Park Corp.*, 102 Ohio St.3d 166, 2004-Ohio-2237 at ¶21. Under the rational-basis standard, a state has no obligation to produce evidence to support the rationality of a statutory classification. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶91 citing *Am. Assn. of Univ. Professors, Cent. State Univ. Chapter*, 87 Ohio St.3d at 58, 60. All statutes enjoy a presumption of constitutionality and the court must be convinced beyond a reasonable doubt that the legislation and constitutional provisions are clearly incompatible. *Burnett*, 118 Ohio St.3d 493, 2008-Ohio-2751 at ¶28.

However, the first step under an equal protection challenge is to examine the classifications created by the statute in question. *Id.* at ¶31. Here, GKT contends that the imposition of tax based upon a business that trains individuals in systems software versus application software violates the Equal Protection Clause. System software and application software are not competing classifications that warrant an Equal Protection analysis. In the absence of a sufficient legal classification, an Equal Protection analysis is not required. *Id.* at ¶¶37, 43. There is no evidence that businesses train individuals only in application software. These competing businesses must exist to enable this Court to perform a proper Equal Protection analysis. The only evidence in the record demonstrates that GKT would violate its own Equal Protection rights as it trains individuals in both application and system software. GKT Br. at 6. As such, it would be competing with itself.

The General Assembly in enacting R.C. 5739.01(B)(3)(e) decided to impose a tax upon training relating to systems software. Just like many tax classifications, there are certain criteria for an item or an entity to be subject to tax or to be exempt. If GKT were correct, the Equal Protection Clause would prohibit the imposition of a tax by any statute that had more than one criterion. Some examples of statutes that would violate the Equal Protection Clause under GKT's assertion would include the "for storage only exemption" (R.C. 5701.08(B)), the "charitable use exemption" (R.C. 5709.121), the "public schools exemption" (R.C. 5709.07), the "used in business" provision (R.C. 5701.08(A)) and the "charitable purpose exemption" (R.C. 5709.12). All of these statutes have more than one component where if two of three or one of two prongs are satisfied, the property or item is exempt from taxation or is subject to tax. The fact that the entire statute is or is not satisfied does not violate the Equal Protection Clause.

Regardless, systems software and application software are not similarly situated under the Equal Protection Clause. As stated previously, computers need system software to function. *Compuserve*, 41 Ohio App.3d at paragraph one of the syllabus. Application software is entirely dependent upon systems software to work. *Id.* A computer without system software prevents a medium for application software to operate and exist. Because application software is entirely dependent upon systems software to function, it is not similarly situated under the Equal Protection Clause.

Another reason systems software and application software are not similarly situated under the Equal Protection Clause is because they have different functions and perform different tasks. System software controls the overall direction of the computer system and tells the computer how to start programs, how to communicate with various hardware devices, and how to perform other operational functions. *Tangible or Intangible- Is that the question?* Reinhard, 29 St.

Mary's L. J. 871, 889-90; Appx. 23. Application software is designed to solve a particular problem or perform a particular task. *Compuserve*, 41 Ohio App.3d at 263. These two types of programs that perform different tasks and have different functions cannot be similarly situated under an Equal Protection analysis. *Vacco*, 521 U.S. at 799 (holding that Equal Protection “embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly.”) and *Plyler*, 457 U.S. at 216 (holding “the Constitution does not require things which are different in fact or opinion to be treated in law as though they were the same.”).

Therefore, R.C. 5739.01(B)(3)(e) is constitutional so long as it has a rational basis for its implementation by the General Assembly. R.C. 5739.01(B)(3)(e) was enacted as a portion of the state's appropriations budget. *Comtech Systems, Inc.*, 59 Ohio St.3d at 97. The function of the sales tax is to raise money for the support of the government's operation. R.C. 5739.01(B)(3)(c) satisfies the purpose of the sales tax by imposing it upon sales that satisfy the statute. Moreover, the statute was enacted in 1983 at a time when the internet and the Windows operating system were in their infant stages.<sup>9</sup> Based upon the timing of the implementation of R.C. 5739.01(B)(3)(e), it can be surmised that the statute was an attempt to raise revenue from a new source of business activity predominated by training in systems software.

GKT refers this Court to *Police Dept. of the City of Chicago v. Mosley* (1972), 408 U.S. 92, 101, and *State v. Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124, in support of its contention. Because systems software and application software are not competing interests and are not similarly situated, there can be no Equal Protection violation. *Burnett*, 118 Ohio St.3d 493, 2008-Ohio-2751 at ¶¶37, 43. Moreover, there must be a demonstration that the act violates the First Amendment as a content-based regulation to be subject to strict scrutiny under the Equal

---

<sup>9</sup> See <http://www.microsoft.com/windows/WinHistoryDesktop.msp>. Appx. 15.

Protection Clause. *Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124 at ¶12 (holding “the statute is facially invalid as a content-based restriction on speech, which by extension violates the Equal Protection guarantees”).

GKT has failed to prove that R.C. 5739.01(B)(3)(e) is a content-based regulation that violates the First Amendment. Notwithstanding this, *Police Dept. of the City of Chicago* and *Thompson* provide no guidance as each case illegally restricted legal conduct and promoted one viewpoint over another. *Police Dept. of the City of Chicago*, 408 U.S. at 95; *Thompson*, 95 Ohio St.3d 264, 2002-Ohio-2124 at ¶14. As such, there is a rational basis for R.C. 5739.01(B)(3)(e) implementation by the General Assembly.

**The Tax Commissioner’s Eighth Proposition of Law:**

*This Court must give great deference to the General Assembly in reviewing the constitutionality of a statute challenged under the Void for Vagueness Doctrine.*

GKT contends that the terms “computer equipment” and “computer systems” within R.C. 5739.01(Y)(1)(b) and Ohio Admin. Code 5703-9-46(A)(6) violate the Due Process Clause of the Fourteenth Amendment and the free speech clause of the First Amendment because each term is vague. GKT Br. at 19. GKT alleges that the terms are vague under the Due Process Clause because these terms do not provide notice of what training is taxable and claims that the statute invites arbitrary application of the tax. GKT also contends that the First Amendment is violated because the statute regulates protected speech which requires statutes to be drafted with a narrow specificity, something it contends R.C. 5739.01(Y)(1)(b) does not do.

The Due Process Clause of the Constitution provides the foundation for the void for vagueness doctrine. *Buckley v. Wilkins*, 105 Ohio St.3d 350, 2005-Ohio-2166 at ¶17. When a statute is challenged under the Due Process doctrine prohibiting vagueness, the court must determine whether the enactment (1) provides sufficient notice of its proscriptions to facilitate

compliance by persons of ordinary intelligence and (2) is specific enough to prevent official arbitrariness or discrimination in its enforcement. *City of Norwood v. Horney*, 110 Ohio St.3d 353, 2006-Ohio-3799 at ¶84 citing *Kolender v. Lawson* (1982), 461 U.S. 352, 357. The determination of whether a statute is impermissibly imprecise, indefinite, or incomprehensible, must be made in light of the facts presented in the given case and the nature of the enactment challenged. *City of Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799 at ¶84.

Laws must give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he or she may act accordingly, and laws must also provide explicit standards for police officers, judges, and jurors to enforce and apply the laws. *Buckley*, 105 Ohio St.3d 350, 2005 2166 at ¶17. An individual or business that engages in some conduct that is clearly proscribed cannot complain of the vagueness of the law. *Village of Hoffman Estates v. The Flipside* (1982), 455 U.S. 489, 494-95. A court should therefore examine the complainant's conduct before analyzing other hypothetical applications of the law. *Id.* at 494-95. To succeed, the complainant must demonstrate that the law is impermissibly vague in all of its applications and no standard of conduct is specified at all. *Id.* at 496-97; *Buckley*, 105 Ohio St.3d 350, 2005-Ohio-2166 at ¶19 (holding the same).

The degree of vagueness that the U.S. Constitution tolerates -- as well as the relative importance of fair notice and fair enforcement -- depends in part on the nature of the enactment. *Village of Hoffman Estates*, 455 U.S. at 498. Economic regulations are subject to a less strict vagueness test because its subject matter is often more narrow, and because businesses, which face economic demands to plan behavior carefully, can be expected to consult relevant legislation in advance of their action. *Id.*; *State ex rel. Rear Door Bookstore v. Tenth District Court of Appeals* (1992), 63 Ohio St.3d 354, 358 (holding the same).

The regulated enterprise has the ability to clarify the meaning of a regulation by its own inquiry, or by resorting to an administrative process. *Village of Hoffman Estates*, 455 U.S. at 498. The U.S. Supreme Court has also expressed greater tolerance of enactments with civil rather than criminal penalties because the consequences of imprecision are qualitatively less severe. *Id.* at 498-99.

The void for vagueness doctrine does not require statutes to be drafted with scientific precision and the legislature is not required to define every word. *State ex rel. Rear Door Bookstore*, 63 Ohio St.3d at 358; *Buckley*, 105 Ohio St.3d 350, 2005-Ohio-2166 at ¶19. A statute is not void simply because it could be worded more precisely or with additional certainty. *City of Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799 at ¶86. The Constitution permits a statute's certainty to be ascertained by application of commonly accepted tools of judicial construction, with courts indulging every reasonable interpretation in favor of finding the statute constitutional. *Buckley*, 105 Ohio St.3d 350, 2005-Ohio-2166 at ¶19.

The fact that some exercise of discretion is involved in deciding the applicable limits does not cause the legislation to fail under the vagueness doctrine. *State ex rel. Rear Door Bookstore*, 63 Ohio St.3d at 360. The availability of administrative remedies and appellate review acts to check any threat of arbitrary or discriminatory enforcement. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶48.

This Court has held that legislative enactments are entitled to all reasonable presumptions, interpretations, and rules of construction consistent with the constitutionality of the statute. *State ex rel. Rear Door Bookstore*, 63 Ohio St.3d at 360. This principle is especially applicable when the exercise of the state's police power is in the area of civil law. *Id.* The party challenging the constitutionality of a statute bears the burden of overcoming its presumption of constitutionality

and must prove that the law is unconstitutional beyond a reasonable doubt. *Id.*; *Buckley*, 105 Ohio St.3d 350, 2005-Ohio-2166 at ¶18.

A court's power to invalidate a statute is a power to be exercised only with great caution and in the clearest of cases. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶43. The fact that the fertile legal imagination can conjure up hypothetical cases in which the meaning of disputed terms could be questioned does not render the provision unconstitutionally vague. *Buckley*, 105 Ohio St.3d 350, 2005-Ohio-2166 at ¶19. A court examining a facial-vagueness challenge to a statute that implicates no constitutionally protected conduct will uphold that challenge only if the statute is impermissibly vague in all of its applications. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶43.

Just like in the Equal Protection context, GKT must first demonstrate that R.C. 5739.01(B)(3)(e) regulates protected speech before the void for vagueness doctrine under the First Amendment applies. As discussed before, GKT has failed to prove that R.C. 5739.01(B)(3)(e) is a content-based regulation that violates the First Amendment. As such, without demonstrating that R.C. 5739.01(B)(3)(e) infringes upon protected speech, the void for vagueness doctrine under the First Amendment does not apply.

As for the Due Process Clause, there has been no showing that R.C. 5739.01(Y)(1)(b) has not provided fair notice of what constitutes a taxable sale of computer services within Ohio or that there has been any arbitrary application of the statute. GKT contends because it cannot know what is taxable under the statute until such time as the Tax Commissioner has issued an assessment and the matter is resolved through the administrative and appellate process, the Due Process Clause is violated. GKT Br. at 19. However, the U.S. Supreme Court and this Court have held that the availability of an administrative remedy to contest a tax assessment is sufficient to

satisfy the void for vagueness doctrine applicable to economic regulations. *Village of Hoffman Estates*, 455 U.S. at 498; *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶48. Moreover, this Court has held that the availability of an administrative remedy satisfies due process concerns of arbitrary application. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶48.

Although the terms “computer equipment” and “computer systems” are in dispute in this case, the statute was enacted in 1983 and there are no other sales tax cases in Ohio that have questioned these same terms. Twenty-seven years of silence in the case law implies that other taxpayers have not been surprised in understanding what the terms “computer equipment” and “computer systems” mean under the statute. GKT also claims that the Due Process Clause requires precise statutory definitions to pass constitutional muster.

However, nothing could be further from the truth as the U.S. Supreme Court and this Court have held the exact opposite. GKT Br. at 23; *State ex rel. Rear Door Bookstore*, 63 Ohio St.3d at 358; *Buckley*, 105 Ohio St.3d 350, 2005-Ohio-2166 at ¶19 (holding that “the void for vagueness doctrine does not require statutes to be drafted with scientific precision.”); *City of Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799 at ¶86 (holding “a statute is not void simply because it could be worded more precisely or with additional certainty.”).

Because R.C. 5739.01(Y)(1)(b) could be more precisely worded does not mean that the statute violates the void for vagueness doctrine. *State ex rel. Rear Door Bookstore*, 63 Ohio St.3d at 358; *Buckley*, 105 Ohio St.3d 350, 2005-Ohio-2166 at ¶19; *City of Norwood*, 110 Ohio St.3d 353, 2006-Ohio-3799 at ¶86. GKT has not presented any evidence of an arbitrary application of R.C. 5739.01(Y)(1)(b). *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶48. Further, the fact that a tax dispute has arisen does not violate the void for vagueness doctrine as the statute is an economic regulation that has a low threshold for review. *Village of*

*Hoffman Estates*, 455 U.S. at 498 (R.C. 5717.02 and R.C. 5717.04 provide an administrative right of appeal to the BTA and this Court). GKT has not demonstrated beyond a reasonable doubt that R.C. 5739.01(Y)(1)(b) is vague in all of its applications. *Columbia Gas*, 117 Ohio St. 3d 122, 2008-Ohio-511 at ¶43.

GKT points to the IRS' definitions of a "computer" and "peripheral equipment" to demonstrate that R.C. 5739.01(Y)(1)(b) is vague. These statutes are not related to sales taxes, but instead are depreciation schedules for businesses of machinery and equipment under the United States Code. Ohio like the United States Code has a depreciation schedule for businesses to depreciate machinery and equipment. Ohio allows a stand-alone computer depreciation that is broadly defined as "computers, as well as related hardware and peripheral equipment, used for general business purposes..." Informational Release PP 2003-01; S. Supp.

As such, routers and switches would be depreciable under Ohio's stand-alone computer deduction as they are related computer hardware used in business. Despite its two different sources of definitions, GKT has presented no definition of what constitutes "computer equipment". A cursory review of the Internet indicates that routers are in fact computer equipment.<sup>10</sup> Moreover, although GKT contends that routers and switches are network equipment, they have not provided a definition of that term. Further, even if routers and switches were network equipment, there is no evidence that network equipment is not a subset of the more general term "computer equipment."

GKT cites *United Food & Commercial Workers Union v. Southwest Ohio Regional Transit Authority* (CA6 1998) 163 F.3d 341, and *Big Mama Rag, Inc. v. U.S.* (C.A.D.C. 1980), 631 F.2d 1030 in support of its claim, but those cases are not binding U.S. Supreme Court precedent upon

---

<sup>10</sup> [http://www.associatedcontent.com/article/1687275/how\\_to\\_find\\_a\\_computer\\_router.html](http://www.associatedcontent.com/article/1687275/how_to_find_a_computer_router.html). Appx. 13.

this Court. *Burnett*, 93 Ohio St. 3d at 424. Further, *Big Mama Rag, Inc.* conflicts with the U.S. Supreme Court's decision in *Regan*, which was decided three (3) years after *Big Mama Rag, Inc.* and held "a legislature's decision not to subsidize the exercise of a fundamental right does not infringe the right, and is not subject to strict scrutiny." *Regan*, 461 U.S. at 549.

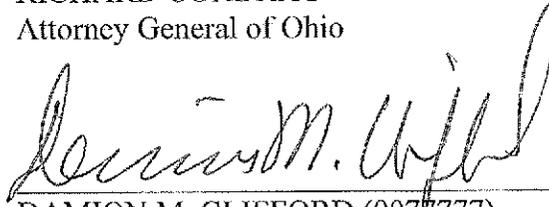
*United Food & Commercial Union* was an attempt by the local government to silence disfavored content and vested unfettered discretion with the government official to define what it deemed to be "controversial", while *Hynes v. Mayor and Council of Borough of Oradell* (1976), 425 U.S. 610, was a statute which required police notification before individuals could campaign door-to-door. *United Food & Commercial Workers Union*, 163 F.3d at 359. In *Hynes*, the US Supreme Court held that there was no notice of who was required to notify the police and what was satisfactory notification to prevent the imposition of a \$500 fine or a 90-day jail sentence. *Hynes*, 425 U.S. at 611, 621-22. Again, none of these cases are economic regulations and none provide an administrative remedy to resolving a dispute. As such, they provide no guidance in this matter. Therefore, GKT has failed to meet its burden and the terms "computer equipment" and "computer systems" within R.C. 5739.01(Y)(1)(b) and Ohio Admin. Code 5703-9-46(A)(6) do not violate the void for vagueness doctrine under the First and Fourteenth Amendments.

### CONCLUSION

Based on the foregoing analysis, the Tax Commissioner seeks an order affirming the BTA's decision as reasonable and lawful.

Respectfully submitted,

RICHARD CORDRAY  
Attorney General of Ohio



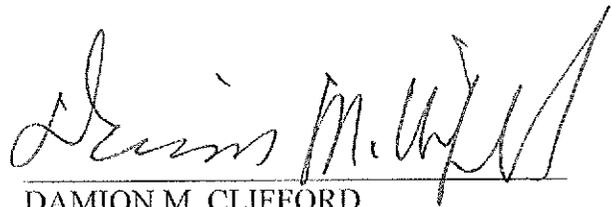
DAMION M. CLIFFORD (0077777)

Assistant Attorney General  
30 East Broad Street 25<sup>th</sup> Floor  
Columbus, Ohio 43215-3428  
Telephone: (614) 466-5967  
Facsimile: (614) 466-8226

Attorneys for Appellee Richard A. Levin, Ohio Tax  
Commissioner

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of Appellee's Merit Brief was sent by regular U.S. mail to Nicholas M. J. Ray, Siegel, Siegel, Johnson & Jennings Co., LPA, 3001 Bethel Road, Suite 208, Columbus, Ohio 43220, counsel for Appellee, on this 23<sup>rd</sup> day of December 2009.



DAMION M. CLIFFORD  
Assistant Attorney General