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In the
Supreme Court of Ohio

10-0866

FREUDENBERG NOK GENERAL PARTNERSHIP,	:	
Appellee,	:	Appeal from BTA Case Nos. 2006-K-1556 2006-K-1558
v.	:	
WILLIAM W. WILKINS, TAX COMMISSIONER OF OHIO, [RICHARD A. LEVIN]	:	
Appellant.	:	

NOTICE OF APPEAL

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SUPREME COURT OF OHIO

NOTICE OF APPEAL

Richard A. Levin (as successor to William W. Wilkins), Tax Commissioner of Ohio ("Commissioner"), hereby gives notice of his appeal as of right, pursuant to R.C. 5717.04, to the Supreme Court of Ohio from the Decision and Order of the Ohio Board of Tax Appeals ("BTA") dated April 13, 2010 in BTA Cases No. 2006-K-1556 and 2006-k-1558, entered on the journal of the proceedings on April 13, 2010. This appeal is filed in accordance with Section 5717.04, Ohio Revised Code, and Section 3(A)(1), S. Ct. Prac. R. II. A true copy of the Decision and Order of the BTA from which appeal is sought is attached hereto as Ex. A and incorporated herein by reference. This notice of appeal is being filed within thirty days of the entry of the attached BTA decision and order as required by statute and rule.

The errors in the Decision and Order of the BTA of which the Commissioner complains are as follows:

1. The BTA erred in reversing in part the Final Determinations of the Commissioner in which the Commissioner upheld the denial of a sales tax refund (regarding BTA Case No. 2006-K-1558) and upheld a use tax assessment (regarding BTA Case No. 2006-K-1556). The BTA should have affirmed the Commissioner's Final Determinations in their entirety and denied exemption for any of the transactions which were the subject of the subject sales tax refund and use tax assessment (the "transactions at issue").

2. The BTA erred as a matter of fact and law in concluding that any of the transactions at issue qualified for exemption from sales and use taxation under R.C. 5739.02(B)(42)(j).

3. The BTA erred as a matter of fact and law in concluding that Freudenberg NOK General Partnership ("Freudenberg") satisfied the requirements for exemption set forth in R.C. 5739.02(B)(42)(j) as relating to the transactions at issue.

4. The BTA erred as a matter of fact and law in concluding that the transactions at issue qualified for exemption from sales and use taxation under R.C. 5739.02(B)(42)(j) because, with respect to its use of the tangible personal property at issue, Freudenberg did not engage in "direct marketing" as that term is used and defined in R.C. 5739.02(B)(35).

5. The BTA erred as a matter of fact and law in determining that Freudenberg was engaged in "direct marketing" when Freudenberg is only incidentally, if at all, engaged in making retail sales to end-user consumers but, instead, is almost exclusively engaged in making sales to wholesalers and retailers, who, in turn, resell the items purchased from Freudenberg to others.

6. The BTA erred as a matter of law in concluding that Freudenberg satisfies R.C. 5739.02(B)(42)(j) because to be engaged in "direct marketing" a seller must be engaged in making retail sales directly to the ultimate consumer.

7. The BTA erred as a matter of law in misinterpreting the word "consumers" in the last paragraph of R.C. 5739.02(B)(35) (defining "direct marketing" for purposes of division (B)(35)). The BTA's erroneously interprets the term "consumers" to by synonymous with the BTA's interpretation of the definitions of "consumer" in R.C. 5741.01(F) (use tax) and R.C. 5739.01(D)(1) and (E) (sales tax).

8. The BTA's erroneous interpretation of "consumer" would unreasonably and

unlawfully conflict with and render meaningless a substantial portion of R.C. 5739.02(B)(35)(b). Specifically, because the definitions of "consumer" in R.C. 5741.01(F) and R.C. 5739.01(D) exclude persons who receive tangible personal property or services **without charge**, i.e., free, the BTA's erroneous interpretation would directly conflict with and render meaningless the language of R.C. 5739.01(B)(35)(b)(2) that refers to "direct marketing vendors" as encompassing persons making sales to consumers of "free merchandise."

9. The BTA should have interpreted the term "consumers" as used in the definition of "direct marketing" to mean purchasers in retail sales. Such reasonable and lawful interpretation of "consumers" gives full meaning to R.C. 5739.02(B)(35)(b) under the most basic rules of statutory interpretation.

10. In addition to giving full meaning to R.C. 5739.02(B)(35)(b), the Commissioner's interpretation of the term "consumers" as set forth in R.C. 5739.01(B)(35)'s definition of "direct marketing" is compelled when that definition is read in *pari materia* with R.C. 5739.01(B)(35)(a) (providing exemption for "newspaper inserts, catalogues, coupons, flyers, gift certificates or other advertising material" that is used "**in making retail sales**") (emphasis added), and R.C. 5739.01(B)(35)(b) (providing exemption for various kinds of personal property used to accept orders for "direct marketing **retail** sales") (emphasis added).

11. BTA further erred in its interpretation of "direct marketing" and the term "consumers" used therein by failing to limit the term "consumers" to only those

persons who use or consume the item purchased for their own consumption, and not for resale to others because such limitation accords with the usage of the term "consumer" throughout the Ohio sales and use tax law. See, e.g., R.C. 5741.02 (levying the Ohio use tax on all "consumers" "storing, using or otherwise consuming in this state tangible personal property or realizing in this state the benefit of any service provided"); R.C. 5739.03(A) (providing that the Ohio sales tax "shall be paid by the consumer").

12. The BTA independently erred in its interpretation of the sales and use tax exemption set forth R.C. 5739.02(B)(42)(j) by failing to read the phrase "by means of direct marketing" in *pari materia* with the remainder of that statute.

Specifically, R.C. 5739.02(B)(42)(j) provides exemption for three kinds of purchases that are used or consumed primarily in storing, transporting, mailing, or otherwise handling "purchased sales inventory" in a warehouse: (a) when the inventory is primarily distributed outside the state to **retail stores** of the warehouse owner (i.e., the person seeking the exemption); (b) when the inventory is primarily distributed to **retail stores** of an affiliate of such warehouse owner; and (c) when the inventory is primarily distributed by means of direct marketing.

The BTA's erroneous interpretation of the third exemption category would "swallow up" and render meaningless the first two kinds of exemptions, i.e., categories (a) and (b) above. That is, there would be no purpose or effect to the first two categories, if "direct marketing" encompasses distribution of merchandise to all persons (i.e., whether ultimate consumers or purchasers for

resale).

13. Assuming arguendo that the BTA decision was otherwise reasonable and lawful, the BTA erred as a matter of fact and law in concluding that Freudenberg met its affirmative burden of establishing that certain of the purchased tangible personal property at issue qualified as used or consumed "primarily in storing, transporting, mailing or otherwise handling purchased sales inventory." Specifically, the BTA erred by exempting the following transaction (as listed in the BTA's Decision and Order) within the meaning of R.C. 5739.02(B)(42)(j):

- Forklift Battery/Charger;
- Structural Column Protection from C & H Distributors;
- 460' of 1-inch air line to existing column #18 from Johnson Plumbing, Heating & AC;
- Progressive Billing for Corteco Mezzanine Sprinkler from S A Comunale Co. Inc.;
- Maintenance, terminals, and manual from Tempus Systems, Inc.;
- Crown Batteries Charger Stands and Sackett Battery Han from Total Fleet Solutions;
- Sample-Engine Sales Ford 4.6L F-4 from Parker Powertrain;
- Samples 1-Oil Ring, oil Seal, O Ring, Water Seal, and O Ring Kit from Sandusky Toyota Chrysler Plymo from R & D Equipment, Inc.
- sample gaskets from Interstate Billing Services;
- 1U-Steering Gear Rack, 1U Power Steering Pump, 1Y-Engine

Assembly Chevy 350 Motor Parts 2 Piece Rear Main SE, and 1Y-Engine Assembly from Fireside Auto Services, Inc.;

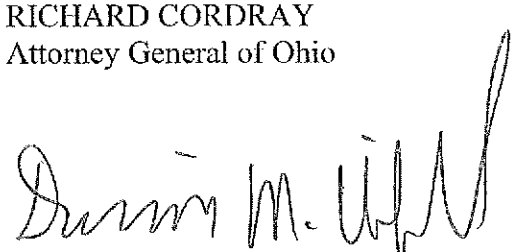
- Sample-2-Seal Kit-S from Ganley East, Inc.;
- Samples, Samples-1-Specl Seal Set, Samples -1-Specl Boot, and Rac from Ganley Mazda;
- Sample Gasket Kit from Metro Toyota, Inc.;
- Samples-1 Seal Kit Power, 1 Seal kit Housin, Samples-1-1 Oil Seal Kit, and 1 Seal Kit RR HS from Zarzour Nissan, Inc.;
- 4 Samples 2# from Acadia Polymers;
- Samples-2 EGR Pipe Kits, Samples-1 Hose Set, Samples-1 Brake Hose Clip (multiple), RR Brake Hose, Gasket B Oil Bolt, Samples -1 Brake Hose Clip, FR Brake R (multiple), FR Brake L (multiple), Fr Brake, RR Brake R, Gasket B, Oil Bolt, Samples-Speaker Assy, and Tweeter from American Honda Motor Co., Inc.;
- Samples-1 Renault Piston Kit, and Samples-1 Spx #27602 from ATC Distribution Group;
- Samples 2-Converter Seal Installers, Samples Update Kits, Hi Perf Bands, Pump Vane, and Gear Kit Governor from Transtar Industries
- Samples-Pan Assy Oil, Samples-Bolt, Samples-1 Resistor Assy-A, Samples-Retainer Assy-Oil, Seal-Oil Cranks, Gaskets, and Gasket Reta from Zarzour Nissan, Inc.;
- World Samples-2 Trans Seals from Parts Distributors, Inc.;

- 1-World Seal B Samples from Sandusky Motors, Inc.; and
- Sample 1-Gasket-Cyl, Sample 1-Gasket Thr, and O Ring ELT from Sandusky Toyota Chrysler Plymo.

14. Because sales tax exemptions are a matter of legislative grace and in derogation of the rights of all other taxpayers, the Board erred in failing to strictly construe the exemption under R.C. 5739.02(B)(42)(j) against Freudenberg.

Respectfully submitted,

RICHARD CORDRAY
Attorney General of Ohio



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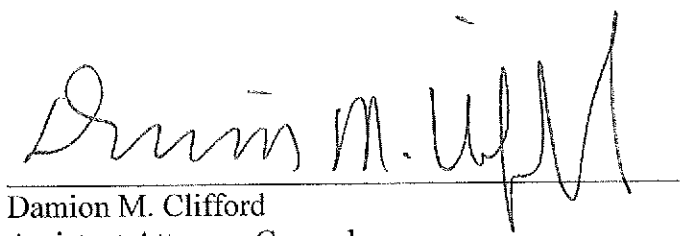
CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true copy of the Notice of Appeal was filed by hand delivery with the Ohio Board of Tax Appeals, 30 E. Broad St., 24th Floor, Columbus, Ohio 43215 and was served by certified mail, return receipt requested upon J. Donald Motley, Taft, Stettinius & Hollister, LLP, 21 E. State Street, Suite 1200, Columbus, Ohio 43215-4221, counsel for Appellee, on this 13th day of May 2010.



Damion M. Clifford
Assistant Attorney General

OHIO BOARD OF TAX APPEALS

Freudenberg NOK General Partnership,	)	CASE NOS. 2006-K-1556
	)	2006-K-1558
Appellant,	)	
	)	(SALES AND USE TAX)
vs.	)	
	)	DECISION AND ORDER
William W. Wilkins, Tax Commissioner of Ohio,	)	
	)	
Appellee.	)	

APPEARANCES:

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Entered APR 13 2010

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

Through these appeals, appellant challenges two final determinations of the Tax Commissioner, both of which arise from business activities conducted at appellant's Milan, Ohio facility. In BTA No. 2006-K-1556, the commissioner denied appellant's application for a refund of sales tax claimed to have been illegally or erroneously collected and paid for the period of January 1, 2001 to December 8, 2004,[1] while in BTA No. 2006-K-1558, the commissioner denied appellant's petition for reassessment challenging a use tax

[1] Through its application, appellant sought a refund of $65,965.22.

EXHIBIT A

assessment on its purchases during the period of January 1, 2000 to December 31, 2002.[2] We proceed to consider these matters collectively[3] upon appellant's notices of appeal, the transcripts certified by the Tax Commissioner pursuant to R.C. 5717.02, the record of this board's hearing,[4] and the post-hearing written arguments on behalf of the parties. The sole witness to testify at this board's hearing was Jason E. Meier, the chief financial officer for the Corteco division, appellant's aftermarket division which operates at the Milan facility.

The parties agree that the majority of the facts involved in these appeals are not in dispute. Although appellant is also a manufacturer of assemblies which are incorporated into automobiles, its Milan facility is used to facilitate its "[w]arehousing, purchasing, ***, kitting, *** and distribution of product into the aftermarket of the automobile industry." H.R. at 14. Initially describing appellant's purchase and use of several of the individual items subject to its refund application and the commissioner's assessment, appellant's witness proceeded to discuss its business operations, testifying that appellant's customers place orders "primarily through electronic means, direct mail, faxes, e-mail, [and] telephone communication," H.R. at 14, and that appellant's kits and subcomponents are "distributed to the respective customer orders through means of if you want to say regular transportation, Conway, UPS, Federal Express, that type of thing." H.R. at 15.

Meier then discussed its customer interactions, indicating that product sales/distributions are effected through six different "customer channels:" (1) Original

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[2] The use tax assessment in issue, inclusive of preassessment interest, totaled $107,966.78.

[3] Although these appeals were not formally consolidated by this board, they were heard and briefed collectively. Accordingly, pursuant to Ohio Adm. Code 5717-1-08, they are hereby consolidated for purposes of resolution.

[4] Appellant moved this board to effect various corrections to the original hearing record filed with this board. Upon review of the proposed corrections, said request was ultimately granted with a corrected transcript having been submitted.

Equipment ("OE") Service– appellant distributes product kits to the service divisions or distribution centers of automobile manufacturers, e.g., Jeep, Ford, and Chrysler, which redistribute product kits to their automobile dealerships for use in needed repairs; (2) Retail/Do It Yourself ("DIY") –kits are sold to individual automotive repair shops which use the parts purchased in automotive repair; (3) Professional Engine Rebuilders ("PER") – kits or single point bulk items are distributed to companies which rebuild engines, transmissions or power steering segments/systems which are then sold to the ultimate market; (4) Distributor Subkit – appellant's "soft kit" is sent to Transtar, a wholesaler and appellant's largest customer through this channel, which combines appellant's soft kit with other hard parts for an overall master transmission kit which is then offered on the market; (5) Distributor Pass Through – appellant's kit is sold to wholesale distributors, commonly exporters, which sell the product in its original shape/form in their respective countries; and (6) OE – appellant distributes product to engine manufacturers which incorporate the items into finished product, e.g., engines, oil pans, assembly systems, etc., which is then sold on the open marketplace. Relying upon 2003 data, appellant indicated that its Milan facility had sales totaling approximately $132 million, approximately 16% of which were to Ohio customers while the remaining 84% of the sales were outside the state. Among its different customer channels, the majority of sales, i.e., 48%, were made as Distributor Pass Through, followed by Distributor Subkit at 26% of total sales, OE at 13%, PER at 12%, Retail/DIY at 1%, and OE Service at apparently less than .5%.

With this general operations background, appellant claimed a number of its purchases on which sales tax had been paid or for which use tax had been assessed[5] were exempt from the imposition of either sales or use tax. R.C. 5739.02 generally provides:

> "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 this chapter, an excise tax is hereby levied on each retail sale made in this state."

Continuing, R.C. 5739.02(B) expressly exempts certain types of transactions from taxation:

> "The tax does not apply to the following:
>
> "***
>
> "(42) Sales where the purpose of the purchaser is to do any of the following:
>
> "***
>
> "(j) To use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility when the inventory is primarily distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing. This division does not apply to motor vehicles registered for operation on the public highways. As used in this division, 'affiliated group' has the same meaning as in division (B)(3)(e) of section 5739.01 of the

[5] Complementary to the tax imposed on taxable sales made within Ohio, R.C. 5741.02(A)(1) levies an excise tax on "the storage, use, or other consumption in this state of tangible personal property ***."

> Revised Code and 'direct marketing' has the same meaning as in division (B)(35) of this section."

Referenced in the preceding statute, R.C. 5739.02(B)(35)[6] defines the phrase "direct marketing" as "the method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility by means of the United States mail, delivery service, or common carrier."

In each of his final determinations, the Tax Commissioner determined appellant did not qualify for the exemption allowed by R.C. 5739.02(B)(42)(j) because its activities did not constitute "direct marketing." In reaching this conclusion, the commissioner reasoned that the definition of direct marketing must be read in the context of the exemption provided for within R.C. 5739.02(B)(35):

> "The claimant argues that it falls within the purview of R.C. [5739.02(B)(42)(j)] as a direct marketer. The claimant maintains sales inventory in the facility in question. This inventory is primarily distributed outside Ohio. The question remains whether the claimant's activities constitute 'direct marketing.' The claimant receives orders from its customers by means of the mail, delivery service or telecommunications. The claimant ships the tangible personal property from its warehouse by means of common carrier. The definition of 'direct marketing' found in R.C. 5739.02(B)(35)(c), however, must be read in conjunction with the entirety of the exemption found at R.C. R.C. 5739.02(B)(35) and cannot be properly construed without considering the context of the exemption therein.
>
> "R.C. 5937.02(B)(35) provides exemption for certain items for use in making retail sales and, more specifically, subsection (b) provides exemption for certain items used in making direct

[6] This definition appears in the second paragraph of R.C. 5739.02(B)(35)(c).

> marketing retail sales. Therefore, when the R.C. [5739.02(B)(42)(j)] exception is construed in *pari materia* with the (B)(35) exemption for direct marketers, it is evident that the exception applies only in the case of retail sales.
>
> "Since the claimant did not engage in making retail sales, the claimant could not be engaged in direct marketing. Therefore, the claimant's purchases cannot satisfy the requirements of the warehouse exemption ***." BTA No. 2006-K-1556, S.T. at 1-2.

From the commissioner's denial of its application for refund of sales tax and its objections to assessments for use tax, appellant appealed to this board, arguing that the commissioner's reading of R.C. 5739.02(B)(42)(j) requiring it to make retail sales in order to qualify for the exemption is unduly restrictive and not required by the express terms of the statute. In considering appellant's appeals, we note that findings made by the Tax Commissioner are presumptively valid and that an appellant must demonstrate, with competent and probative evidence, that such findings are in error. *Alcan Aluminum Corp v. Limbach* (1989), 42 Ohio St.3d 121, 124; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213, 215; *Standards Testing Laboratories, Inc. v. Tracy*, 100 Ohio St.3d 240, 2003-Ohio-5804; *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Furthermore, as the court pointed out in *Cousino Construction Co. v. Wilkins*, 108 Ohio St.3d 90, 2006-Ohio-162, at ¶11, "[a]ny claimed exemption from taxation 'must be strictly construed,' and the taxpayer 'must affirmatively establish his or her right' to the exemption. *Campus Bus Serv. v. Zaino*, 98 Ohio St.3d 463, 2003-Ohio-1915, *** ¶8."

It appears uncontroverted that the Milan facility is a warehouse, distribution center, or similar facility and that appellant's purchased sales inventory is primarily

distributed outside Ohio by U.S. mail, delivery service, or common carrier, to customers who have placed orders by U.S. mail, delivery service, or telecommunication. The commissioner contends, however, that appellant "does not satisfy the direct marketing requirement of R.C. 5739.02(B)(42)(j) because its customers are not 'consumers' that are subject to sales and use tax because they primarily resell the items purchased from Freudenberg *** [and that appellant's] claims are still barred because a significant majority of the items requested for exemption are not used in storing, transporting, mailing, or otherwise handling purchased sales inventory." Id. at 3.

In advancing the first of these arguments, the commissioner maintains appellant does not satisfy the "direct marketing" definition of R.C. 5937.02(B)(35), referenced within R.C. 5739.02(B)(42)(j), because its sales are not retail sales on which tax is paid by its customers since the personal property transferred is held for resale, see R.C. 5739.01(E),[7] and because the purchasers of appellant's products are not consumers. We disagree.

The term "consumer" is separately defined for purposes of Ohio's sales and use tax chapters, the former being set forth in R.C. 5739.01:

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

[7] R.C. 5739.01(E) defines "retail sale" and "sales at retail," for purposes of the excise tax levied by R.C. 5939.02 to "include all sales, except those in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by a person engaging in business, in the form in which the same is, or is to be, received by the person."

With respect to use tax, the term is defined in R.C. 5741.01 as follows:

"As used in this chapter:

"***

"(F) 'Consumer' means any person who has purchased tangible personal property or has been provided a service for storage, use, or other consumption or benefit in this state. 'Consumer' does not include a person who receives, without charge, tangible personal property or a service."

Notwithstanding the commissioner's apparent concession that appellant's customers fall within these definitions, he nevertheless cites to dictionary definitions and Ohio's general statutory framework, i.e., R.C. 5739.03(A) and R.C. 5741.02(B),[8] to surmise that because it is the intent to impose tax upon "end users," the definition of "consumer" must necessarily exclude persons who purchase items for resale. As a corollary to this argument, the commissioner insists that the person engaged in direct marketing must make retail sales. In essence, the commissioner reads the direct marketing exemption to encompass only entities which market directly to the ultimate consumer who pays tax on such transactions. However, the preceding statutes impose no such requirements and we are unwilling to engage in statutory construction to interject such words where the language of the statute is plain and unambiguous.[9]

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[8] R.C. 5739.03(A) provides that "the tax imposed by or pursuant to section 5739.02 *** of the Revised Code shall be paid by the consumer to the vendor, and each vendor shall collect from the consumer, as a trustee for the state of Ohio, the full and exact amount of the tax payable on each taxable sale ***," while R.C. 5741.02(B) provides that "[e]ach consumer, storing, using, or otherwise consuming in this state tangible personal property or realizing in this state the benefit of any service provided, shall be liable for the tax, and such liability shall not be extinguished until the tax has been paid to this state." The commissioner asserts these provisions "demonstrate that the meaning of 'consumer' is two fold: (1) the consumer is the person who receives the benefit of the item purchased and (2) is the person that pays the tax." Appellee's brief at 8.

[9] As noted in R.C. 5739.01(E), even though a purchase may be excepted from tax, a person may still constitute a "consumer."

Having concluded that the nature of appellant's operations at its Milan facility does not alone disqualify it from seeking exemption for its purchases pursuant to R.C. 5739.02(B)(42)(j), we next consider whether appellant has demonstrated such purchases were "use[d] or consume[d] *** primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory[.]" In its brief, appellant notes that the taxable status of several items is no longer in issue.[10]

During this board's hearing, Meier testified regarding several purchases for which a refund of sales tax was requested and for which use tax was assessed, generally described below:

BTA No. 2006-K-1556[11]

- Toyota Standup Reach Truck Monthly Rental – a fork lift which is used to retrieve product stored at upper levels at different stations within the Milan facility
- Toyota Order Picker Monthly Rental – a platform that employees can use to access product stored at various levels within the facility
- Guidance Wire for Toyota Order Picker – wiring imbedded into concrete which receives/transmits the signal from the Toyota Order Picker and allows it to safely move on a delineated path to its destination
- Toyota Sit Down Rider CB and Toyota Forklift Monthly Rental – standard forklifts used to handle material and inventory associated with appellant's end product

[10] Conceding it failed to meet its burden of proof under the claimed statutory basis for exemption, appellant withdrew its claim for refund for taxes paid with respect to a 2002 Industrial Cleaner. See BTA No. 2006-K-1556, S.T. at 37. It also withdrew its objections to several purchases on which use tax was assessed described in worksheets as install water tap & supply for emer shower & eyewash, canned soda, box coffee filters, mowing of woods, L & BLDG Supplies 1-maintenance kit, cartridge assembly-negative, , invoice for 25% Lewco sales order, Ward's motor vehicle data book, Seeing the Whole, McMillian Dictionary, Zig, Ziglar & Gr. Leaders Quotes, Warehouse Systems & the Supply Chain, and walnut finish award plaques. See BTA No. 2006-K-1558, S.T. at 9, 11-12, 16, 18-21. Appellant also withdrew its objections to assessments on credit card purchases made by its employees Kay Ziles, an employee in sourcing purchasing, and Todd Gilbert, an employee involved in sales in OES, whose duties were admittedly separate and distinct from the claimed exemption. See Appellant's brief at 17-21.

[11] At the outset of Meier's direct examination regarding the various purchases, counsel noted his reason for eliciting testimony with respect to purchases identified in BTA No. 2006-K-1556, S.T. 34-37: "For the record, since this is part of the Statutory Transcript, the Statutory Transcript will show that this was part of the list of invoices and purchases and the amount of sales tax paid to the vendor on those purchases on the refund application. Pages 18 through 34 are basically repeats of monthly invoices for the same equipment. So I am going to focus on Pages 34 through 37 because if we – from that point forward, uh, we will actually have a description for each piece of equipment." H.R. at 18.

- Forklift Battery/Charger and Guidance Wire – the battery charger element used to maintain a charge in battery operated forklifts and guidance wires imbedded into concrete which receives/transmits signals allowing particular forklifts to move to designated inventory locations
- Upright Lift Truck – similar in function and use to the Toyota Standup Reach Truck
- Toyota Walkie Rider Pallet Truck Monthly Rental – self-propelled material-handling equipment used for moving pallets of inventory a few inches above the ground

BTA No. 2006-K-1558[12]

- C & H Distributors: Structural Column Protection – a round fiberglass protection device attached to key load bearing walls/inventory racks to protect both the walls/inventory racks and inventory itself from damage from forklifts
- Johnson Plumbing, Heating & AC: Ran 460' of 1-inch air line to existing column #18 – the former is a compressed air line used to operate pneumatic equipment, e.g., socket gun, within the Milan facility which serves to keep inventory handling equipment, e.g., forklifts, operational[13]
- S A Comunale Co. Inc.: Progressive Billing for Corteco Mezzanine Sprinkler – upper and lower level spinkler system required by fire code and serves to protect product
- Siemens Dematic Corp.: Conveyor Equipment/Equip & Services 30%/24% for Pick Modul – a conveyor system within a master picking module that provides for retrieval of individual inventory components
- Tempus Systems Inc.: Timeclock, Maintenance, Terminals, Manual – used by warehousing employees
- Total Fleet Solutions: Wire Guidance System and Installation; Crown Batteries Charger Stands, Sackett Battery Han – associated with above-referenced guidance wires and batteries
- MT Business Technologies, Inc.: Monthly Maintenance Contract #23264 & Copies – a copy machine and associated maintenance contract believed to be in the customer service department
- Headsets, Inc.: 2-GN Netcom 2100 Series Flex-Binaural Flex Headsets w/ Noise Canc – required communication devices used by customer service and warehouse personnel
- Nu Wave Technology Inc.: 19" Rack Blank Filler, 1½" Wire Management; Emergency Phone Hookup & Wire New Locations 50% – uncertain but involves recabling/networking of customer service department
- R&D Equipment Inc.: 12-Shelf Brackets; Parker Powertrain: Sample-Engine Sales Ford 4.6L F-4; Sandusky Toyota Chrysler Plymo: Samples 1-Oil Ring, Oil Seal, O Ring, Water Seal, O Ring Kit – presumably involved in purchasing of product

[12] Counsel directed the witness' attention to page S.T. 9 through 23 where individual line items identify the vendor and offer a brief description of the associated purchase.

[13] Appellant's objection to an additional purchase from Johnson Plumbing, Heating & AC, i.e., install water tap & supply for emer shower & eyewash, was withdrawn. See fn. 10.

used to create shadow boards/visual aids[14] to ensure that the respective operators on the assembly line are including the correct products in a product kit

- Homberger Trucking Co.: 3 Trailers Rental X 125.00, 3 Trailers Rental X 125.00, and 7 Trailers Rental X 125.00; 1 3 Trailer Rental X 62.50; and G Edward Wikel Inc.: Storage Trailers spotted at Milan Facility Monthly Rental Charge – rental of trailers where appellant's inventory/finished product was temporarily stored during a transition between layouts of appellant's Milan facility
- Interstate Billing Service: Sample Gaskets – believed to relate to sample used in the construction of shadow board
- Fireside Auto Services, Inc.: 1U-Steering Gear Rack, 1U Power Steering Pump, 1Y-Engine Assembly Chevy 350 Motor for Parts 2 Piece Rear Main SE, 1Y-Engine Assembly; Ganley East, Inc.: Samples-2-Seal Kit-S, The Invoice Not Attached to Check #077501; Ganley Mazda: Samples-, Samples-1-Specl Seal Set, Samples-1-Specl Boot, Rac; Metro Toyota, Inc: Sample Gasket Kit ; Zarzour Nissan Inc: Samples-1 Seal Kit Power, 1 Seal kit Housin, Samples-1-1 Oil Seal Kit, 1 Seal Kit RR HS – all samples purchased for shadow board and quality control systems
- Acadia Polymers: 4 Samples 2#; American Honda Motor Co Inc: Samples-2 EGR Pipe Kits, Samples-1 Hose Set; Samples-1 Brake Hose Clip, RR Brake Hose, Gasket B Oil Bolt, Samples-1 Brake Hose Clip, FR Brake R, Samples-1 Brake Hose Clip, FR Brake L, Samples-1 Brake Hose Clip, FR Brake, Samples-1 Brake Hose Clip, RR Brake R, Samples-1 Brake Hose Clip, FR Brake L, Samples-1 Brake Hose Clip, Gasket B, Oil Bolt, Samples-Speaker Assy, Tweeter – samples purchased for production, quality service, and shadow board
- ATC Distribution Group: Samples-1 Renault Piston Kit, Samples-1 Spx #27602 – respective samples relating to appellant's quality systems and shadow boards
- Transtar Industries: Samples 2-Converter Seal Installers, Samples Update Kits, Hi Perf Bands, Pump Vane, Gear Kit Governor; Zarzour Nissan, Inc: Samples-Pan Assy Oil, Samples-Bolt, Samples-1 Resistor Assy-A, Samples-Retainer Assy-Oil, Seal-Oil Cranks, Gaskets, Gasket Reta; Parts Distributors, Inc: World Samples-2 Trans Seals; Sandusky Motors Inc: 1-World Seal B Samples; Sandusky Toyota Chrysler Plmo: Sample 1-Gasket-Cyl, Sample 1-Gasket Thr, O Ring ELT – samples relating to appellant's quality systems and shadow boards
- Ford Motor Company: Transparencies for Car & Truck Text & Illus, Vol #11 Cross Ref Lis – described as a data reference for sales, direct marketing for specific customer
- ICX Corporation: Total Fleet Solutions, Holland Toyota Picker Invoice has no Tax PD; Total Fleet Solutions Inc. – Milan Monthly Maintenance Bill for Phases I&II (Lifts, Pickers, Etc) – maintenance costs on material handling equipment, i.e., Toyota Picker, previously referenced

[14] Meier testified that his testimony would be the same for references made throughout the assessment to samples.

Also included among those purchases on which use tax was assessed were a number of items acquired by several of appellant's employees[15] using company-issued credit cards. Although Meier was unable to testify regarding the precise nature or use of such items purchased, appellant nevertheless posits that "since each employee was governed by corporate policy in making these credit card purchases, the fact that a particular employee's card was charged with a purchase supports the inference that employee credit card purchases were for those purposes – and only for those purposes – for which corporate policy permitted that employee to use the corporate credit card." Appellant's brief at 20.

The Supreme Court has held that this board is to be accorded wide latitude in determining the weight to be given evidence presented by parties to an appeal and the credibility of witnesses who appear before us. *Cardinal Fed. S. & L. Assn. v. Bd. of Revision* (1975), 44 Ohio St.2d 13. Nevertheless, in considering the evidence offered by appellant in support of its appeals, we must remain cognizant of those decisions directing that "[s]tatutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto." *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus.

We find Meier sufficiently knowledgeable regarding several of the contested purchases, and that appellant's purchases associated with its Toyota Standup Reach Truck, Toyota Sit Down Rider CB, Toyota Forklift, Upright Lift Truck, Toyota Walkie Rider Pallet Truck, and Forklift Battery/Charger and Guidance Wire fall within the requested exemption in that they are used in storing, transporting, and handling appellant's product and inventory

[15] These employees included John Wozniak, who works in the product design department, Tammy Jones, who is part of the customer service group, Tony Darr, a product technician, Ryan Rostetter, a product design

within its warehousing operations. As for the purchases which were the subject of use tax assessment discussed by Meier, we find the purchases of items incorporated into visual demonstration boards, i.e., "sample," qualify for exemption as they are used to provide illustration to appellant's assembly line employees as well as its quality control personnel to ensure the correct individual components are included within specific product kits. We also agree that qualifying for exemption as storing, transporting, or handling, are the aforementioned column protection devices, compressed air lines, sprinkler and conveyor systems, guidance wires and batteries, maintenance costs associated with its Toyota truck, pickers, etc., and the temporary storage trailers.

We do not find appellant's purchases associated with its warehouse time clock or the transparencies, the use of the latter being unclear, fall within R.C. 5739.02(B)(42)(j). While we acknowledge the telecommunications component upon which eligibility for the exemption is conditioned, exemption is only accorded items *used* in "storing, transporting, mailing, or otherwise handling" inventory, so we are unable to extend the exemption to items apparently acquired for use, which Meier was capable of testifying to at best only generally, in its customer service department, i.e., copy machine, recabling/networking, and headsets. We find overly speculative and unsupported appellant's suggestion that we accept Meier's sweeping conclusion that merely because an employee works in a particular division and uses a corporate-issued credit card, then all of his/her purchases must necessarily have been used in an exempt manner. In the absence of the testimony of individuals personally familiar with such transactions, we cannot assume they are exempt.

Footnote contd.——————————
engineer, Brian (Bill) Cook, who works in the information technology department, Mary Jane Uther, who also works in the information technology department, and Paula Rice, who works in the quality department.

Based upon the foregoing, we find appellant's arguments to be well-taken in part, resulting in our decision today to affirm in part and reverse in part the commissioner's final determinations. It is the order of this board that these matters be remanded to the commissioner with instructions to grant appellant's application for refund as noted herein and to adjust the amount of use tax assessment and preassessment interest previously assessed consistent with the preceding discussion.

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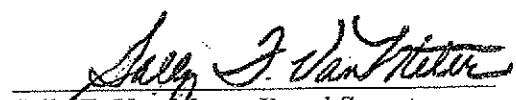
I hereby certify the foregoing to be a true and complete copy of the action taken by the Board of Tax Appeals of the State of Ohio and entered upon its journal this day, with respect to the captioned matter.



Sally F. Van Meter, Board Secretary