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In the Supreme Court of Ohio

Epic Aviation LLC,	:	Case No.: 2014-1691
	:	
Appellant,	:	On Appeal from the Ohio
	:	Board of Tax Appeals
v.	:	
	:	BTA Case No. 2012-A-1557
Joseph W. Testa, Tax Commissioner of Ohio,	:	
	:	
Appellee.	:	

MERIT BRIEF OF APPELLANT EPIC AVIATION LLC

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MERIT BRIEF OF APPELLANT EPIC AVIATION LLC

I. INTRODUCTION

The jet fuel purchased by AirNet Systems, Inc. ("AirNet") is not subject to sales or use tax because the fuel was purchased for use in the rendition of a public utility service within the meaning of R.C. 5739.02(B)(42)(a) and 5739.01(P). AirNet, a common carrier, provides vital services to the public and is subject to special regulations and governmental controls reflecting its role as a major air carrier.

II. STATEMENT OF THE CASE

EPIC Aviation LLC ("EPIC") collected Ohio sales tax on fuel purchased by AirNet at the Rickenbacker Air Field and cooperated with AirNet in filing the refund claim for the over-collected tax. As the entity remitting the tax, EPIC has standing to seek the refund and appeal its denial, even though it is AirNet that qualifies for the exemption. R.C. 5739.07(A).

EPIC sought a refund of sales or use tax on fuel purchased by AirNet during the audit period. The refund was denied by the Audit Division of the Ohio Department of Taxation ("Tax Department"). Appx. 24, Denial of Refund, Tax Refund Claim No. 201100027 (dated Sept. 13,

2010). The tax auditor requested a copy of a certificate of public convenience and necessity and, upon being informed that AirNet did not have that certification, summarily denied the requested refund. *Id*.

At the Tax Appeals Division, AirNet made an extensive presentation of the facts and circumstances that qualify it for the exemption provided by R.C. 5739.01(P). The Tax Commissioner's Final Determination responded with a detailed analysis. Appx. 11-23, Final Determination, Tax Refund Claim No. 201100027 (filed July 6, 2010) ("Final Determination"). The Final Determination does not take issue with the facts presented by AirNet but concluded that the refund should be denied. Appx. 23, Final Determination at 13. Notably, the Final Determination is not grounded upon the absence of a certificate of public convenience and necessity. Instead, the Final Determination principally argued, erroneously, that AirNet did not serve the public generally, and the public had no right to the services. Appx. 16-22, Final Determination at 6-12.

At the hearing at the Ohio Board of Tax Appeals ("BTA"), the Attorney General, on behalf of the Tax Commissioner, resurrected the Audit Division's argument that the absence of a certificate of public convenience and necessity, standing alone, disqualifies AirNet from public utility status. (Appellant's Supplement ("Suppl.") 9, Hearing Transcript at 9). The Attorney General argued for this approach, despite the fact it has been implicitly rejected by this Court. The Tax Commissioner is candid about the reason for that claim: the Tax Department declines the obligation to make a facts and circumstances determination because the "Ohio taxing authorities are not in the best position to determine what a public utility in the air carrier field is." (Suppl. 10, Hearing Transcript at 10).

The evidence in this case includes the Statutory Transcript submitted at the Tax Appeals Division of the Tax Department ("S.T.") and the exhibits and testimony of two well-qualified witnesses presented at the BTA. Thomas Schaner is the Vice-President of Operations and Director of Operations of AirNet (the latter position is one required by the Federal Aviation Administration ("FAA")). In addition to being qualified to speak about AirNet's operations, Mr. Schaner has participated extensively in industry matters and is familiar with the industry. (Suppl. 20, Hearing Transcript at 20). The other witness, Kent Jackson is an attorney who has been practicing in the aviation field for twenty-five years. Mr. Jackson has written and spoken extensively about legal and economic issues relevant to the aviation industry. (Suppl. 112-15, Hearing Transcript at 112-15). Mr. Jackson was qualified as an expert in the FAA, the Department of Transportation, and the business of aviation. (Suppl. 116, Hearing Transcript at 116). The Tax Commissioner identified an expert witness in advance of the hearing but then failed to call him.

III. STATEMENT OF FACTS

A. Nature Of AirNet's Operations

AirNet, based at Rickenbacker Air Field near Columbus, provides an extensive air and ground network to move packages. AirNet is the third-largest, all-cargo air carrier in the United States. (Suppl. 176, AirNet Informational Background at 1). During the audit period, AirNet had 185 aircraft serving 186 cities and over 80 major markets. (Suppl. 198, AirNet Route Structure). AirNet had more than 400 departures a day. (*Id.*). AirNet provides door-to-door service. Specifically, AirNet will pick up the packages at the home or office of the customer and deliver the package to the ultimate destination. (Suppl. 28-29, Hearing Transcript at 28-29). This capability contrasts with the more typical model of most other, smaller air carriers that will

take the packages only from one airport and deliver the package to another airport. (Suppl. 29, Hearing Transcript at 29).

Like other major air freight carriers, AirNet uses the Hub and Spoke system for delivering packages. A package is picked up from the customer, delivered to the nearest airport, sorted, directed to a central airport (a hub) where it is offloaded, sorted by destination, reloaded on an aircraft for transit to an airport close to the customer and directed by ground delivery to the desired destination. The Hub and Spoke design is the familiar package delivery model employed by the limited number of freight carriers that provide the key elements of the air transportation network. (Suppl. 24-27, Hearing Transcript at 24-27).

AirNet publishes scheduled routes on its website for the benefit of the public. (Suppl. 31-33, Hearing Transcript at 31-33). The following diagram illustrates AirNet's routes:

(Suppl. 198, AirNet Route Structure).

These departures occur on a regular schedule. The schedule admitted into evidence is representative of the audit period, but actually contains fewer flights compared with the number that were in place during the audit period. (Suppl. 33, Hearing Transcript at 33). For illustration purposes, only the first page of the schedule, which is nearly 100 pages long, appears in the record Supplement. (Suppl. 199, Excerpt of AirNet Route Schedule; *see also* S.T. 96-193 (Full, Published AirNet Route Schedule)). In addition, any customer can demand that its package be shipped, and AirNet will ship the package, so long as AirNet is qualified to ship that particular commodity and has capacity to ship the product at the requested time. (Suppl. 42, Hearing Transcript at 42). In other words, if AirNet can physically and legally provide the service, AirNet does not turn away any customer.

AirNet is part of the segment of the air freight delivery companies representing the more significant contributors to the transportation system. The understanding among carriers that one carrier could rely on its competitor to deliver packages for the originating carrier was a well-known obligation and not questioned in the industry. (Suppl. 161, Hearing Transcript at 161). Specifically, other carriers, when necessary, rely on AirNet to accept packages for the other carrier's customers. (Suppl. 41, Hearing Transcript at 41). In turn, AirNet can depend upon other carriers to complete the delivery of some of its customer's packages. In both cases, an air carrier can agree to fulfill its obligations to customers secure in the knowledge that another carrier can be called upon to complete the delivery when needed. This interdependency is possible because AirNet publishes scheduled routes and because AirNet would never refuse packages. (Suppl. 30-34, 41-42, Hearing Transcript at 30-34, 41-42).

B. Principal Markets: Financial And Express

AirNet's services are made available to the public generally and are not confined to limited segments of the public. (Suppl. 25, Hearing Transcript at 25). AirNet advertised to the public, as demonstrated by AirNet's television commercial, "After Midnight." (S.T. 194, EPIC's Memorandum in Support of Application for Refund, Tax. Refund Claim No. 201100027 (filed May 4, 2011) at Ex. C).[1] Its schedule was published on its public website. (Suppl. 32-33, 89-90, Hearing Transcript at 32-33, 89-90). AirNet's activities also touched virtually every check writer in the United States because AirNet carried a majority of the checks for the check-clearing process among financial institutions during the audit period. (Suppl. 39, Hearing Transcript at 39).

1. Financial Institutions

The financial segment of AirNet's operations during the audit period represented the movement of checks and other financial instruments (collectively "checks") for banks and other financial institutions. (Suppl. 37-40, Hearing Transcript at 37-40). AirNet carried 65% to 70% of the checks being cleared. (Suppl. 187, AirNet Informational Background at 12). AirNet represented "pretty much any financial institute in the United States." (Suppl. 77, Hearing Transcript at 77). AirNet formed the backbone of the check-clearing process nationwide. (Suppl. 38-39, Hearing Transcript at 38-39). Several elements graphically show the importance of AirNet to the financial industry.

AirNet was particularly valuable to the financial industry because of its ability to pick up the checks late in the day (or overnight) and deliver the checks very early the next day. (Suppl. 37-39, Hearing Transcript at 37-39). AirNet had the advantage of using faster (and smaller)

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[1] This video may also be accessed through https://archive.org/web/
by viewing http://www.soultheater.com/video/airnet-systems as of July 3, 2011.

aircraft than other air carriers that use larger aircraft. AirNet's smaller aircraft made it able to serve many smaller airports, rather than being limited only to the largest airports. (Suppl. 46-48, Hearing Transcript at 46-48). For these reasons, during the audit period, financial institutions were greatly reliant on AirNet.

The movement of checks today has declined significantly compared with the audit period because most checks now can be cleared electronically. The advent of electronic clearing for checks did not happen all at once. A significant transition occurred during which the banks were adapting to electronic check clearing. AirNet continued to service the banking industry as the institutions adapted to the new method of check clearing. (Suppl. 104-05, Hearing Transcript at 104-05). Even today, some financial institutions continue to rely on AirNet. (Suppl. 106, Hearing Transcript at 106).

During the audit period, AirNet competed with an agency of the United States Government for the transportation of checks. (Suppl. 40, Hearing Transcript at 40). This agency, the Check Relay Network, was part of the Federal Reserve. (*Id.*). As the use of electronic check clearing increased, AirNet experienced the classic anti-competitive problem of meeting government pricing in a shrinking market. Senior executives of AirNet testified before Congress about the potential adverse effect of a failure by the Check Relay Network to price its services correctly as the volume of checks declined. Congress acknowledged this problem during the enactment of what is known as "Check 21" that authorized the electronic clearing of checks. Congress recognized the importance of traditional check-clearing activities and AirNet's role in that market. Specifically, the law mandated that the Federal Reserve must publish data about the pricing of its Check Relay Network so that the crucial market for moving checks would

not be disrupted by anti-competitive pricing by the Check Relay Network. (Suppl. 187-88, AirNet Informational Background at 12-13).

The importance of AirNet to the check-clearing process also was illustrated following the terrorist attack of September 11, 2001 (sometimes "9/11"). (Suppl. 188, AirNet Informational Background at 13; Suppl. 104-05, Hearing Transcript at 104-05). The grounding of aircraft following 9/11 resulted in an unacceptable backup of the check-clearing process. (*Id.*). Alan Greenspan, then Chairman of the Federal Reserve, personally intervened and the Federal Reserve approached AirNet to assist in the rapid deployment of aircraft to move the enormous volume of checks that needed to be transported. (Suppl. 42-43, Hearing Transcript at 42-43). The fact that AirNet resumed operations so soon after 9/11 and before other air carriers shows the vital nature of its services.

2. Express Service

All of AirNet's services other than the transport of checks come within the "Express Services" designation. (Suppl. 44, Hearing Transcript at 44). While AirNet does not limit its markets, it is well-recognized for broad segments of the market for which AirNet is well-situated to meet customers' special needs.

a. Biological Products

AirNet is able to transport blood products efficiently because of the flexibility of its operations and ability to make timely deliveries. For example, the Red Cross looks to AirNet when the transport of blood has been interrupted. Immediately after 9/11, AirNet moved blood into Teterboro, a small airport outside New York City. AirNet planes were the only aircraft in the air at that time. For the early flights after the terrorist attack, AirNet aircraft were accompanied by military jets when delivering the blood. Mr. Schaner described the

extraordinary circumstance for the pilots to experience the absence of other air traffic at that time. (Suppl. 50, Hearing Transcript at 50). AirNet also was called on to move blood when the Midwest United States was subject to disruption of the electric grid resulting in a blackout. (Suppl. 200, *First 'Lifeguard Flight' After Attacks Ships Central Ohio Blood Products*, Shapshots (Nov. 2001); Suppl. 201, American Red Cross Letter (dated Aug. 25, 2003); Suppl. 50-51, Hearing Transcript at 50-51). The Red Cross has commended AirNet for its service. (*Id.*).

AirNet also delivered much of the radiopharmaceuticals manufactured during the audit period. A broadcast of a segment from "Modern Marvels," produced by the History Channel, shows AirNet's role in the transport of these items. (S.T. 204, EPIC's Memorandum in Support of Application for Refund, Tax. Refund Claim No. 201100027 (filed May 4, 2011) at Ex. G).[2] Radiopharmaceuticals are used, among other things, to diagnose and treat cancers. They can have half-lives of only 110 minutes, meaning that the products must be delivered to the hospitals within four hours from leaving the hot box in which they are manufactured. (Suppl. 184, AirNet Informational Background at 9). AirNet is one of the few air carriers capable of transporting these products because of the speed of its jets and its ability to utilize smaller airports closer to the destinations of the patients needing the radiopharmaceuticals. AirNet delivers other biological products, including products that require testing within relatively short time periods (Suppl. 45-46, Hearing Transcript at 45-46).

[2] This video may also be accessed at http://www.youtube.com/watch?v=RFKKPmV9AH0 (accessed Feb. 7, 2015).

b. Lifeguard Status

Because of the nature of its activities, AirNet flights can qualify for Lifeguard Status. Specifically, when AirNet is carrying time-sensitive biological material, AirNet can invoke Lifeguard Status for the flight. This Status ensures the AirNet flight will be given priority by air traffic controllers to receive the most direct routing of the aircraft, so as to reduce travel time and ensure on-time delivery. (Suppl. 186, AirNet Informational Background at 11).

c. State Department Documents

AirNet also has a subcontract to deliver sensitive United States State Department documents. In fact, when the State Department changed its contract with its general contractor, the State Department insisted that the transportation of the documents continue to be handled by AirNet. (Suppl. 51-52, Hearing Transcript at 51-52). Because of its role in the delivery of these government documents, AirNet is not free to leave the business. (Suppl. 96, Hearing Transcript at 96).

d. Other Freight

AirNet delivers all manner of other types of freight, including United States mail. AirNet does not limit its operations to certain segments of the market. (Suppl. 25, Hearing Transcript at 25).

C. <u>Regulation Of Air Carriers</u>

The federal and state governments impose many types of regulatory requirements upon air carriers. To operate, air carriers must adhere to strict safety standards, obtain economic authority, and comply with Transportation Security Administration ("TSA") requirements.

1. Safety Standards Under Part 135

AirNet is qualified as a Section 135, Title 14, C.F.R. ("Part 135") air carrier.[3] A Part 135 air carrier is a common carrier, and is more heavily regulated and subject to greater scrutiny by the FAA than a Section 91, Title 14, C.F.R. ("Part 91") aircraft.[4] AirNet could not operate as a Part 91 operation because AirNet is a common carrier. (*See* Suppl. 202, AirNet Federal Aviation Administration Air Carrier Certificate (FAA Form 8430-18) ("AirNet Air Carrier Certificate")).

While carriers with larger aircraft must qualify under Section 121, Title 14, C.F.R. ("Part 121"), Part 135 is the correct designation for air carriers, such as AirNet, that operate smaller aircraft. AirNet's use of small and fast Learjets was absolutely essential to the performance of AirNet's expedited delivery services. Therefore, AirNet did not elect to qualify under Part 135 to avoid Part 121 regulation. Rather, AirNet's qualification under Part 135 is a direct consequence of the size of its jets.

Qualification under Part 135 does not mean that AirNet "avoids" Part 121 regulations or has a lesser regulatory burden. To the contrary, AirNet is subject to many Part 121 regulations, which are made applicable to AirNet due to the nature of its operations. Relevant to the audit period, a Part 135 operator is subject to the same safety requirements as a Part 121 operator because there is only "one level of safety in commercial air carriage." (Suppl. 56, Hearing Transcript at 56). In fact, Mr. Jackson testified that oversight is more intensive for Part 135 air carriers as compared with Part 121 air carriers because of greater involvement by the FAA with Part 135 air carriers. (Suppl. 130, Hearing Transcript at 130).

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[3] Cited sections of the Code of Federal Regulation are not appended to this brief because they are voluminous and the specific terms of the specific federal regulations are not determinative of this appeal. For purposes of this appeal, they are merely regulatory classifications that provide the backdrop for the appeal.

[4] Part 91 covers general, private air carriers.

Specifically, the FAA imposes company-specific standards to which air carriers, including AirNet, must adhere in its operations, called Operations Specifications ("Op. Specs."). These principal operating rules for AirNet are updated continually by the FAA—at least quarterly—with new requirements. (Suppl.Vol. II, 204-367). Much of the Part 121 regulations are applicable to AirNet and are incorporated into AirNet's Op. Specs. (Suppl. 55, 128-29, Hearing Transcript at 55, 128-29).

Furthermore, the regulations for Part 121 operations reflect the similarity of the large aircrafts used by Part 121 operations. (Suppl. 162, Hearing Transcript at 162). In contrast, a Part 135 air carrier can use a wider range of types of aircraft. Because many types of smaller and faster aircraft and many more airports are available to Part 135 operations, the particular Op. Specs. for each air carrier are more specialized for some Part 135 air carriers. In addition, regulations for Part 135 air carriers have become more complex over time. In fact, AirNet's Op. Specs. are at the extreme end of the length and complexity scale, as compared with other Part 135 air carriers. (Suppl. 117-18, 129, Hearing Transcript at 117-18, 129).

AirNet is subject to a myriad of other types of regulations. (Suppl. 14-18, AirNet Informational Background at 14-18). Absent conformity with these regulations, AirNet would be prohibited from transporting products in the required quantities. For example, AirNet engages the services of a physicist to comply with the requirements of transporting radioactive materials. (Suppl. 59, Hearing Transcript at 59).

AirNet chose to qualify for Part 135 not to avoid regulation but because Part 135 was the appropriate scheme for the type of aircraft that AirNet used. In contrast, AirNet could not perform its operations as a Part 121 air carrier because it would lose considerable flexibility. For example, its use of larger aircraft would limit AirNet's access to only 500 airports, rather than

the 5000 airports it can use as a Part 135 air carrier. (Suppl. 56-57, Hearing Transcript at 56-57). Further, AirNet revolutionized the Express segment by its use of the Learjets, *i.e.*, fast aircraft. (Suppl. 163, Hearing Transcript at 163). FedEx is now expanding its express delivery services to keep up with AirNet. (Suppl. 94, Hearing Transcript at 94). Both Messrs. Schaner and Jackson testified that AirNet would be unable to conduct its specialized operations if it substituted the Part 121-regulated larger planes for its Part 135-regulated jets. (Suppl. 55-56, 162, Hearing Transcript at 55-56, 162).

2. Economic Regulation

As an air carrier, AirNet must adhere not only to the safety regulations of the FAA but also the economic standards of the Department of Transportation. AirNet derives its economic authority to operate under Section 298, Title 14, C.F.R. ("Part 298"). (Suppl. 156-60, Hearing Transcript at 156-60). Part 121 carriers must obtain a certificate of public convenience and necessity as their economic authority. Part 135 air carriers are exempted from that requirement, but they must obtain different economic authority. Mr. Jackson described the challenges and delays that can arise in obtaining Part 135 economic authority. (Suppl. 126, Hearing Transcript at 126). Mr. Jackson testified that the economic authority regulation for Part 121 operations is not greater than Part 135, but it is merely different. (*Id.*).

AirNet is subject to other forms of economic regulation. As noted above, the rates for the carriage of checks required Congressional oversight. In addition, AirNet's ability to leave the business is constrained by its commitment to the State Department to deliver sensitive government documents. (Suppl. 96, Hearing Transcript at 96).

AirNet is not subject to rate regulation. In that regard, AirNet is the same as other air carriers, including both Part 121 and Part 135 air carriers, as well as other types of public utilities subject to market pricing instead of government-approved rate-making.

3. TSA And Homeland Security

AirNet is subject to additional regulation arising from national security considerations. The events of 9/11(which occurred after the end of the audit period in the *Castle Aviation* case described below)[5] resulted in a considerable increase in the regulation of the air industry. These security requirements, however, do not apply uniformly across the entire air freight industry. A separate regulatory scheme applies to "large aircraft," meaning aircraft with a maximum certificated takeoff weight of more than 12,500 pounds. ("the Twelve-Five Standard Security Program"). Air carriers subject to this Program are required to request special instructions by contacting the TSA Principal Security Specialist for their home base of operations.

AirNet must meet this program's requirements. (Suppl. 35-36, Hearing Transcript at 35-36). AirNet does not use the largest aircraft of the Part 121 air carriers but its aircraft are considered "large aircraft" under the Twelve-Five Standard Security Program. These regulations could not be described in any more detail at hearing because of security requirements. (Suppl. 36, Hearing Transcript at 36). The regulations, however, are considerable. (*Id*.).

D. <u>Common Carriage</u>

AirNet is regulated as a common carrier under its Part 298 economic authority. (Suppl. 202, AirNet Air Carrier Certificate). AirNet recognizes that as a common carrier, it has the obligation under common law to provide carriage to the general public. (Suppl. 25, 64-65, Hearing Transcript at 25, 64-65). Mr. Schaner testified that AirNet never turned down a request

[5] *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420.

for transport. (Suppl. 66-67, Hearing Transcript at 66-67). AirNet accepted its obligation as a common carrier to be required to carry freight wherever AirNet is authorized to carry that commodity and when AirNet has capacity. (Suppl. 65-66, Hearing Transcript at 65-66). Both Mr. Schaner and Mr. Jackson testified that it was understood that AirNet could not legally refuse a request by the public to use AirNet's services. (Suppl. 65, 161, Hearing Transcript at 65, 161).

IV. LAW AND ARGUMENT

> **Proposition of Law**: An air carrier transporting freight qualifies as a public utility for purposes of R.C. 5739.01(P) and 5739.02(B)(42)(a) when the air carrier operates in the public interest and is subject to special regulation and control by a governmental regulatory agency. *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 296, 2006-Ohio-2420, approved and followed. The public utility exemption for transporting freight is not limited to air carriers that hold, and are required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102.

A. AirNet Qualifies As A "Public Utility" For Ohio Sales And Use Tax Purposes.

The exemption from taxation of items used directly in providing a public utility service is set forth in R.C. 5739.02(B)(42)(a) in the following terms:

> (B) The tax does not apply to the following:
>
> (42) Sales where the purpose of the purchaser is to do any of the following:
>
> (a) To * * * use or consume the thing transferred * * * directly in the rendition of a public utility service, * * * This paragraph does not exempt from 'retail sale' or 'sales at retail' the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

The phrase "used directly in the rendition of a public utility service" is described in R.C. 5739.01(P) as follows:

> (P) 'Used directly in the rendition of a public utility service' means that property that is to be incorporated into and will become a part of the consumer's * * * transportation * * * system and that retains its classification as tangible personal property after such incorporation; fuel or power used in the * * * transportation * * * system; and tangible personal property used in the repair and maintenance of the * * * transportation * * * system, * * * including only such motor vehicles as are specially designed and equipped for such use. Tangible personal property and

> services used primarily in providing highway transportation for hire are not used directly in the rendition of a public utility service. In this definition, 'public utility' includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102.

The Opinion of the Ohio Tax Commissioner 90-0012, October 8, 1991, described the scope of the exemption for purchase of fuel by an air carrier transporting packages as a public utility as follows:

> Ohio Revised Code section 5739.01(E)(2)[6] excepts from the definition of a retail sale the purchase of items by a consumer whose purpose is to use or consume the items directly in the rendition of a public utility service. Generally, a two-part test formulated by the Supreme Court of Ohio is used to determine whether an entity is a public utility, i.e., ' * * * whether the taxpayer is a regulated public utility service * * * and * * * whether it was rendering a public utility service when the purchases were made' * * * * This general test notwithstanding, the Ohio Supreme Court has recognized that a consumer does not have to be statutorily defined as a public utility nor does it have to be regulated. * * * * It does, however, need to provide a service of public consequence or need which it offers to an indefinite public which has a legal right to the service.

Appx. 26, 1991 Ohio Tax Commr. Op. No. 90-0012 at 2 (citing *Pittsburgh & Conneaut Dock Co. v. Limbach*, 18 Ohio St.3d 320, 481 N.E.2d 579 (1985); *Midwest Haulers, Inc. v. Glander*, 150 Ohio St. 402, 83 N.E.2d 53 (1948); *Manfredi Motor Transit Co. v. Limbach*, 35 Ohio St.3d 73, 76, 518 N.E.2d 936 (1988); *Trans World Airlines v. Porterfield*, 22 Ohio St.2d 177, 258 N.E.2d 458 (1970); *Ohio Power Co. v. Attica*, 19 Ohio App.2d 89, 250 N.E.2d 111 (3rd Dist. 1969); *Southern Power Co. v. Public Utilities Commission of Ohio*, 110 Ohio St. 246, 143 N.E. 700 (1924)).

In *Castle Aviation, Inc. v. Wilkins*, this Court addressed the exemption for Castle Aviation Inc. ("Castle") under the prior version of Section 5739.01(P). 109 Ohio St.3d 290, 2006-Ohio-2420. Castle was "a small air carrier operating out of the Akron/Canton airport, whose business consists mostly of transporting freight rather than passengers. During the audit

[6] The exemption in R.C. 5739.01(E)(2) was moved to R.C. 5739.02(B)(42)(a) without substantive change. The Opinion was issued before the amendment to R.C. 5739.01(P).

period, Castle operated eight single-and twin-engine planes having at most nine seats." *Id.* at ¶ 2. In *Castle Aviation*, the Court summarized the relevant cases and focused on the following considerations for establishing the claim for the public utility sales tax exemption.

> We acknowledge that there are many different criteria that can be used to determine whether an entity qualifies as a public utility in a given situation. *See, e.g., A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees* (1992), 64 Ohio St.3d 385, 596 N.E.2d 423 (involving local zoning restrictions). Nevertheless, the preceding review of tax cases shows that the court has consistently found that one of the most important criteria, if not the most important, for the application of R.C. 5739.01(E)(2) to the rendition of a public utility service is special regulation and control by a governmental regulatory agency.

Id. at ¶ 27. *A&B Refuse Disposers*, referenced in *Castle Aviation*, holds as follows:

> The determination of whether a particular entity is a public utility for the purpose of exemption from local zoning restrictions requires a consideration of several factors related to the 'public service' and 'public concern' characteristics of a public utility. While the definition of a 'public utility' is a flexible one, the entity must provide evidence that it possesses certain attributes associated with public utilities or its claim to that status must fail.

A & B Refuse Disposers, Inc. v. Ravenna Twp. Bd. of Trustees, 64 Ohio St.3d 385, 596 N.E.2d 423 (1992), syllabus.

In *Castle Aviation*, after summarizing the case law, the Court provided the following guidelines: (1) the employment of a flexible analysis for the determination of whether an entity qualifies as a "public utility" for tax purposes, (2) an emphasis on the special public character of the taxpayer in distinguishing it from other businesses, and (3) a focus on the special regulation of the entity that reveals and reflects the special nature of the entity. *Castle Aviation*, 2006-Ohio-2420, at ¶¶ 20-27. Qualification is not confined to entities that are defined as public utilities for the public utility tax or that fit within a particular designation for state or federal regulatory purposes. *Id.* at ¶ 20. The taxpayer need not be granted a certificate of public convenience and

necessity under state or federal law to qualify as a public utility for Ohio sales and use tax purpose, but it must be subject to special regulation. *Id.* at ¶ 23.

The Ohio General Assembly has limited the air transportation exemption to the group of companies that form the backbone of air transport. This limited group is characterized by providing vital services that are subject to "special regulation and control by a governmental agency" and are, thus, public utilities under the sales tax statute. *Id*. at ¶ 27.

The Tax Commissioner on audit and at the BTA insisted that the public utility exemption must be reserved for air carriers holding a certificate of public convenience and necessity that is only required to be held by Part 121 carriers.[7] In *Castle Aviation*, the Tax Commissioner likewise had insisted that exemption was limited to entities qualifying for the certificate of public convenience and necessity issued under Part 121. *See id*. This Court, however, did not endorse the Tax Commissioner's argument. *Id*.

After *Castle Aviation*, in 2006, the Ohio General Assembly amended the statute to provide specifically that public utility status includes but is not confined to those required to seek Part 121 status. The current statute states that a "'public utility' *includes* a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102." (Emphasis added.) R.C. 5739.01(P). A certificate of public convenience and necessity reflects only one example of sufficient governmental regulation and control for an entity to be deemed a public utility, but it is not the sole qualifying criterion.

[7] Only a Part 121 carrier is required to receive a certificate of public convenience and necessity so the Part 121 designation and the holding of a certification of public convenience and necessity designate the very same group of carriers, *i.e.*, those with the very large aircraft.

B. **A Certificate Of Public Convenience And Necessity Is A Sufficient But Not A Necessary Condition For Qualifying As A Public Utility For Tax Purposes.**

During audit, the Tax Department limited the review of AirNet's claim to a single factor. Upon determining that AirNet did not have a certificate of public convenience and necessity, the claim for refund was denied summarily. As described further below, in the first review of the assessment in the Tax Appeals Division within the Ohio Tax Department, the denial was not premised on the absence of the certificate of public convenience and necessity.

At the BTA, however, the Tax Commissioner reverted to the argument that only Part 121 carriers could qualify. The Tax Commissioner expressed his view in the following terms:

> Here, in defining the term 'public utility,' the statute identifies a single, specific group—*i.e.*, those air carriers that hold and are required to hold a [certificate of public convenience and necessity] pursuant to 49 U.S.C. § 41102. However, it is undisputed that AirNet has never obtained a [certificate of public convenience and necessity], nor has it ever sought to do so.

Brief of Appellee, BTA No. 2012-A-1557 (filed Feb. 3, 2014) at 8.

At the BTA, the Tax Commissioner argued that notwithstanding the use of the word "includes" in the definition, ["In this definition, 'public utility' includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102."] that only Part 121 carriers could qualify. The BTA rejected the Tax Commissioner's argument. The BTA found specifically that the Part 121 designation (*i.e.*, the receipt of the certificate of public convenience and necessity) was not a requirement of the sales tax statute. This aspect of the BTA's finding was correct.

The Tax Commissioner did not appeal the determination that Part 121 status was not a requirement, so that conclusion is now final. In any case, the Tax Commissioner's position at the BTA that only Part 121 carriers could qualify as public utilities was untenable.

Moreover, even when the Tax Commissioner's argument at the BTA ostensibly drifted away from the argument that only Part 121 carriers qualified, the so-called disqualifying characteristics for AirNet were the very same characteristics that distinguish Part 121 and Part 135 carriers. For example, the Tax Commissioner emphasized that AirNet was not subject to an economic fitness test that applies only to Part 121 carriers. While, in any case, the witnesses explained that in fact AirNet was subject to significant economic regulation, the Tax Commissioner cannot simply identify the differences between Part 121 and Part 135 carriers and choose those characteristics as the basis to disqualify all Part 135 carriers. Ultimately, because the Tax Commissioner focused on Part 121 qualifications before the BTA, the Tax Commissioner will now need to summon new reasons to deny the refund in arguments made to this Court.

C. <u>AirNet's Operations Met The Conditions To Be A Public Utility</u>.

The Tax Commissioner's own findings support AirNet's public utility status.

- The Tax Commissioner specifically found that the services that AirNet provides are special, as he stated, "The importance of this service performed by AirNet is clear and unequivocal." Appx. 18, Final Determination at 8.
- The Tax Commissioner acknowledged the extensive special regulation and control by governmental regulation to which AirNet was subject. *See*, in particular, Appx. 20, Final Determination at 10.

Using Part 121 carrier operations as a guide for exemption also supports the finding that AirNet qualifies as a public utility for tax purposes. The testimony was clear that over time the safety standards applicable to Part 121 air carriers have become applicable to some Part 135 air

carriers through the FAA-imposed, air carrier-specific Op. Specs. Both witnesses described how the voluminous Op. Specs. for AirNet incorporated stringent requirements, including for safety.

The BTA was wrong in the assertion that the regulation of AirNet was "substantially similar" to that for Castle Aviation. Appx. 7, Decision and Order, BTA No. 2012-A-1557 (entered Sept. 3, 2014) at 3. Nothing in the Record supports that conclusion, and the BTA provides no support in the Decision. Considering the significance of the Op. Specs. to AirNet, it is noteworthy that the *Castle Aviation* case did not address the Op. Specs. for Castle Aviation, or if Castle Aviation even had them during the period in question.

Furthermore, the undisputed testimony regarding a comparison of AirNet to Castle Aviation showed no substantial similarity. The testimony revealed that (1) AirNet was regulated more than other Part 135 air carriers, including those carriers that would be similar to Castle Aviation; (2) that AirNet's particular Op. Specs. were rigorous; and (3) that safety and other standards for Part 121 and Part 135 air carriers had been coalescing with greater restrictions being applied to some of the Part 135 carriers, including AirNet. The BTA's application of the law to these undisputed facts is an error of law.

D. AirNet Squarely Met The Conditions That The Tax Commissioner Had Found Wanting In The Final Determination.

The Tax Commissioner denied AirNet's claim in a Final Determination after an extensive presentation by AirNet at the Tax Appeals Division at the Ohio Tax Department. It is noteworthy that the lawyers at the Tax Appeals Division did not rely on the absence of the Part 121 status in deciding against AirNet. Instead, the Final Determination raised two objections to the public utility classification. First, the Commissioner determined that AirNet's service "is specialized to a certain niche of persons rather than the public in general." Appx. 19, Final Determination at 9. Second, the Tax Commissioner determined that AirNet "has not

demonstrated that it is governed by any statute or regulation that grants the general public a legal right to demand or receive its service." Appx. 21, Final Determination at 11.

Now that the Tax Commissioner's reliance upon the absence of a certificate of public convenience and necessity was rejected by the BTA and not appealed, these objections raised in the Final Determination presumably remain as the Tax Commissioner's objections to the requested relief. AirNet plainly met both objections and overcame them with evidence at the hearing at the BTA.

1. AirNet Serves The General Public

While the Tax Commissioner argued that AirNet cannot be a public utility because AirNet does not serve the public at large but only segments of the public, factually AirNet did serve the public. The advertisements and published schedules show that AirNet held its services out to the public. Mr. Schaner testified that AirNet transported goods for individuals and businesses of all types. Mr. Schaner further testified that AirNet did not limit its services to only certain segments of the public. Moreover, AirNet's delivery of checks meant that virtually anyone using the banking system for payment of checks benefitted from AirNet's services. The Tax Commissioner's assertions that AirNet limited its services to only certain segments of air transportation were expressly contradicted by the evidence adduced.

2. The Public Has The Legal Right To Demand AirNet's Services

AirNet proved that the public has the right to demand its service. Before describing the evidence, it is important to address the legal basis for the rights of the public against common carriers. The public's right is inherent in the concept of a common carrier. AirNet was specifically designated as a common carrier by the FAA. (Suppl. 202, AirNet Air Carrier Certificate).

Despite the federal designation of AirNet as a common carrier, the Tax Commissioner argues that the absence of statutes or regulations specifically granting a right to service for customers of AirNet means that AirNet cannot establish the right of the public to obtain service. The Tax Commissioner's error is that the designation of a common carrier and that carrier's rights and obligations arise from the common law that predates Ohio and even the United States.

"The common carrier doctrine arose from common law rules * * * ." *Iowa Telecommunications Servs., Inc. v. Iowa Utils. Bd.*, 563 F.3d 743, 746 n.3 (8th Cir. 2009); *see also Time Warner Telecom, Inc. v. Fed. Communications Comm.*, 507 F.3d 205, 210 n.5 (3rd Cir. 2007). Accordingly, if the term "common carrier" is undefined by statute, "we must look to the common law for clarifying definition." *In re United Parcel Serv., Inc.*, 256 A.2d 443, 447 (Me. 1969); *see also CSI Aviation Servs., Inc. v. United States Dept. of Transp.*, 637 F.3d 408, 415 (D.C. Cir. 2011) (applying "presumption in favor of following common law usage" to term "common carrier," which has "a well-settled common law meaning"); *Natl. Assn. of Regulatory Util. Commrs. v. Fed. Communications Comm.*, 533 F.2d 601, 608 (D.C. Cir. 1976) ("[T]he circularity and uncertainty of the common carrier definitions set forth in the statute and regulations invite recourse to the common law of carriers."); *Pan Am. Airways, Inc. v. United States*, 150 F.Supp. 569, 572 (Cust. Ct. 1957) ("In the absence of statute, [common carrier status] is to be determined by applying the principles of common law."); *Executive Aviation, Inc. v. Natl. Ins. Underwriters*, 16 Cal. App.3d 799, 805 (1971) (observing that "the cases have relied on common law precedents" to define "common carriage" where undefined by statute and regulations).

Because neither federal nor state statutes define the rights or obligations of the common carrier, those rights and obligations are defined in common law. AirNet operates on the basis

that the common law confers rights on the public to demand service and that no statute or regulation overrides that common law principle. This common law principle also applies to interpret the statutory reference to "public utility." The General Assembly has provided that the common law is an appropriate consideration in construing statutes. R.C. 1.49(D).

The Tax Commissioner also insisted that AirNet could not prove what the common law is without court decisions. Common law, however, is more than the sum total of reported decisions. "[T]he common law * * * is the system from which our judicial ideas and definitions are derived." *Moore v. United Sta*tes, 91 U.S. 270, 274, 23 L.Ed. 346 (1875). The law is not made by judicial decisions; it is "derived from" them. *See Black's Law Dictionary* 313 (9th Ed.2009). That is, the common law exists even when no case law addresses it—it is merely "inarticulate until it is expressed in a judgment." *Id*. (quoting Patrick Devlin, *The Judge* 177 (1979)). Indeed, common law traces its origins to a time when judges decided cases "in accordance with morality and custom and later judges followed his decision." *Id*. Later judges did not simply "constru[e] the words" of the earlier judge's opinion. Instead, "[t]hey looked for the reason which had made him decide the case the way he did * * * * Thus it was the principle of the case, not the words, which went into the common law." *Id*.

The authority of the common law "rests entirely upon general reception and usage * * * that it hath always been the custom to observe it." *Hous. Fin. & Dev. Corp. v. Ferguson*, 91 Haw. 81, 89-90, 979 P.2d 1107 (1999) (quoting 1 W. Blackstone, *Commentaries*). "To the early writers on English law" such as Blackstone, "the 'common law' meant those rules which by custom, usage, and court decision, and not by act of Parliament, had come to be recognized as the law of the land." *State v. Bass*, 255 N.C. 42, 45, 120 S.E.2d 580 (1961).

"Custom has always made law. The common law, 'the law and custom of the realm,' was drawn largely from custom." *Tong v. Borstad*, 231 N.W.2d 795, 798 (N.D. 1975) (quoting Plucknett, A Concise History of the Common Law). As one commentator observed, "law is nothing but custom, recognized by legislature or court." *Id*. (citing Carter, *Law, Its Origin, Growth and Function*). Common law, then, "is the embodiment of broad and comprehensive unwritten principles, inspired by natural reason, an innate sense of justice, adopted by common consent for the regulation and government of the affairs of men." *State ex rel. City of Minneapolis v. St. Paul, Minneapolis & Manitoba Ry. Co.*, 98 Minn. 380, 400-01, 108 N.W. 261 (1906).

Under Ohio law, consistent with this history, deriving the common law requires "tak[ing] into consideration the demands of common experience which have resulted in established custom adopted as a rule of conduct in the life of the people as related to the subject matter under consideration." *Miller v. Fairley*, 141 Ohio St. 327, 48 N.E.2d 217 (1943), paragraph one of the syllabus. "Usage of trade and commerce" are "part of the common law." *Mercer Cty. v. Hacket*, 68 U.S. 83, 95, 17 L.Ed. 548 (1863).

A litigant can prove "custom of trade" by reference to witness testimony. *See Steamboat Albatross v. Wayne*, 16 Ohio 513, 515-16 (1847) (finding there was not "anything unfair" about a party questioning a witness as to "the custom of trade in delivering goods at Memphis by steamboats"). The burden of proving custom is not great. "It is not necessary * * * that all the witnesses on both sides of the case should agree concerning it." *Williams-Donahoe Co. v. Felty*, 29 Ohio Dec. 241, 248, 1918 WL 953 (C.P. 1918). Rather, the testimony of even "one witness who has adequate means of knowledge may be sufficient to prove the existence of a usage in a given trade or business." *Id*.

At hearing, Mr. Jackson stated unequivocally that air carriers acting as common carriers (in contrast to private carriers under Part 91) accept the legal obligation to provide transportation and no one had ever questioned that obligation to Mr. Jackson's knowledge in his twenty-five years of practice. Mr. Jackson explained that the lack of disputes on that question could be explained by the fact AirNet depends on other carriers to carry packages for AirNet's customers when AirNet is unable to do so. Likewise, because AirNet has established and published route schedules, other carriers depend on AirNet to carry their packages for the public. But for the mutual obligations to provide service, the air freight system could not operate effectively.

In light of the foregoing authority, the testimony of Messrs. Schaner and Jackson is more than sufficient to prove the industry respect for the custom that air carriers engaged in common carriage must provide service to any member of the public who demands it. The questioning of Mr. Schaner elicited the following evidence of AirNet's adherence to its obligations as a common carrier:

> Q. Would you describe from your perspective what you understand that common carrier reference to be?
>
> A. Well, as a person who is the principal for -- it means that I'm going to accept packages tendered to me that I'm legal to carry, and that I have the capacity to carry, and I'm going to deal without discrimination or any kind of preferential treatment. I'm going to common carry them for everybody.
>
> Q. Does AirNet ever operate outside the common carriage context for any of its operations?
>
> A. No, sir.
>
> Q. From your understanding, do your customers have a right to service?
>
> A. Yes.
>
> Q. Would you explain the basis for reaching that conclusion?
>
> A. Well, I'm a common carrier.

(Suppl. 65, Hearing Transcript at 65). As Mr. Jackson explained,

> A. My experience is -- both as an attorney and an air carrier, is we just don't do that to each other. I mean, I just never had the situation arise.
>
> To my mind, it speaks to how our industry is. We don't shut each other down like that. I mean, I just never had someone call me wanting to deny someone service, a competitor service, or wanting to do it. I've never had that experience in 25 years as a lawyer in this area.

(Suppl. 161, Hearing Transcript at 161).

The testimony of the two witnesses constitutes persuasive evidence of industry custom of open access to the services. This testimony leaves no doubt that air carriers always provide service to members of the public who demand it. The public, therefore, has a well-recognized common-law right to demand AirNet's services.

E. <u>AirNet Operates In The Public Interest</u>.

AirNet stands out from other Part 135 air carriers and conducts its services in a manner characteristic of the premier air carriers whereby AirNet:

- provides door-to-door service utilizing a Hub and Spoke operation to deliver packages throughout the United States;
- publishes a detailed and extensive public schedule and advertises its services to the public on its website and in the media;
- has been a vital part of the check-clearing process for the United States banking process such that the then Chairman of the Federal Reserve intervened to ensure that the check-clearing process could resume quickly after September 11, 2001;
- has been recognized for its role in transporting biological products such as blood, radiopharmaceuticals, test samples and other products and can claim Lifeguard status for its flights when delivering time-sensitive materials;

- was selected by the United States State Department through a subcontract to transport sensitive government documents; and
- has revolutionized the package delivery process by its use of Learjets for super-expedited delivery, which approach to air delivery then was picked up by FedEx.

F. **<u>The Tax Commissioner Elevates Administrative Convenience Over Legislative Intent</u>.**

It cannot seriously be disputed that both this Court and the Ohio General Assembly have provided explicitly that the test for a public utility is a flexible approach requiring a case-by-case analysis. *Castle Aviation*, 109 Ohio St.3d 290, 2006-Ohio-2420, at ¶ 27; R.C. 5739.01(P). Even the Tax Commissioner has recognized that he was not authorized to require specific regulation by the Public Utilities Commission of Ohio or other agency as he said in Opinion 90-0012: "the Ohio Supreme Court has recognized that a consumer does not have to be statutorily defined as a public utility * * * ." Appx. 26, 1991 Ohio Tax Commr. Op. No. 90-0012 at 2. The Tax Commissioner cannot abdicate his responsibility by declaring that only Part 121 carriers qualify and avoiding the required case-by-case analysis.

In response to the Tax Commissioner's assertion that institutionally he lacks the ability to distinguish among air carriers to determine which air carriers qualify as a public utility, the Tax Commissioner comes to the Court never having seriously tried to address the issue. Nothing prevents the Tax Department from using the administrative rule-making process to develop workable standards. In any case, the Tax Commissioner cannot be rewarded for declining to determine the scope of the exemption on a case-by-case basis to avoid making a decision.

At hearing before the BTA, the Attorney General expressed the view on behalf of the Tax Commissioner that other Part 135 air carriers have not succeeded in claiming exemption so that

therefore no Part 135 carrier can qualify. AirNet, however, is different from Castle Aviation and other smaller air carriers in the following respects:

- AirNet serves important segments of the transportation industry including the transport of financial documents, biological products (with short shelf lives) and sensitive United States Government documents;
- In the Final Determination, the Tax Commissioner specially acknowledged that AirNet provides important services;
- AirNet uses the Hub and Spoke system, has published routes and otherwise acts in a manner that characterizes the core group of air carriers upon which the transportation market depends;
- AirNet is a common carrier under federal law, (Suppl. 202, AirNet Air Carrier Certificate), has shown that its customers have a claim on its services, and has shown that it acts on that basis and accommodates the public directly and indirectly through its competitors;
- AirNet operates under extensive and detailed Ops. Specs. that control its operations in a manner distinct from other carriers;
- AirNet is subject to detailed and rigorous regulation by Homeland Security as an air carrier using large aircraft as defined for Homeland Security purposes;
- AirNet is subject to Part 121 regulations that are made applicable to it by incorporation in its Ops. Specs. and is subject to the same safety standards as a Part 121 air carrier;

- While not subject to the same economic fitness test of Part 121 air carriers, AirNet nevertheless remains subject to meaningful economic regulation by the United States Department of Transportation; and
- AirNet has been recognized for its contributions to the transportation industry by the Federal Reserve, the Red Cross, the regional blood services banks and other segments of the transportation industries.

Thus, the facts in the *Castle Aviation* decision are so different from the facts in this case that AirNet is a public utility for sales tax purposes even if Castle Aviation is not.

G. <u>The Basis for Exemption</u>.

The air transport of freight is an activity that never has been within the sales and use tax base. Likewise, transportation is not taxed indirectly by taxing the fuel consumed in transporting freight by air. These exemptions have existed since the inception of the sales tax.

The General Assembly limits the exemption to the fuel and other purchases by the major air carriers and airlines with greater impact on the transportation industry and denies the exemption to those whose impact on the industry is insufficient. R.C. 5739.01(P), which describes the exemption, does not establish a bright line for determining which air carriers qualify as the major air carriers; its language references the largest delivery companies regulated under Part 121; and it provides that the exemption is not limited to Part 121 carriers by using the word "includes" rather than "means" in the last sentence of that section.

The 2006 amendment to R.C. 5739.01(P), therefore, reaffirms this Court's decision in *Castle Aviation*, including the Court's implicit rejection of the holding of a certificate of public convenience and necessity as the litmus test for qualification. *Compare* Appx. 76, 2006 Am. Sub. H.B. No. 699 at lines 12928-31 *with Castle Aviation*, 109 Ohio St.3d 290, 2006-Ohio-2420,

at ¶ 27. The air carrier and airline exemption was inserted in the definition of "public utility" in R.C. 5739.01(P) because the public utility definition traditionally has been the source for the air carrier and airline sales tax exemptions. Any suggestion that a qualifying air carrier would have to resemble the air carrier operations in the 1970's and earlier—during which times rate schedules and expenses were controlled by the government—would fail to reflect the fact that as of 2006, the rates charged by the air carriers were no longer being regulated. Any claimed linkage between rate regulation and the definition of public utility has no application in a deregulated environment. By 2006, the reference to "public utility" in this context is simply the shorthand description for those airlines and air carriers that qualify for exemption for their fuel purchase under the Ohio tax statute.

The two largest freight air carriers, UPS and FedEx, both Part 121 air carriers, qualify for public utility status. Castle Aviation, a small air carrier, does not qualify for exemption. AirNet, the third-largest freight air carrier, strongly resembles the Part 121 air carriers in its operations and significance for the transportation industry while providing real benefits by its use of small, fast jets to provide expedited delivery.

On the other hand, AirNet is wholly different than Castle Aviation. Mr. Jackson testified that smaller air carriers look at AirNet as one of the major air carriers and considered AirNet to be quite different than them, including the air carrier that Mr. Jackson operated. (Suppl. 120, Hearing Transcript at 120). The facts show that AirNet is a major air carrier and entitled to the classification as a public utility:

Attributes	AirNet Systems	FedEx	United Parcel	Castle Aviation
Fleet Size	185	664	216	8
Operating Certificate Type	Part 135	Part 121	Part 121	Part 135
Part 145 Certificate	Yes	Yes	Yes	No
Regularly Scheduled Flights	Yes	Yes	Yes	No
National Flight Network	Yes	Yes	Yes	No
"Hub & Spoke" Configuration	Yes	Yes	Yes	No
Door-to-Door Delivery	Yes	Yes	Yes	No
On-Line Shipping	Yes	Yes	Yes	No
Call Center (24 x 7x 365)	Yes	Yes	Yes	No
Real Time Shipment Tracking	Yes	Yes	Yes	No
Regional Sales Reps	Yes	Yes	Yes	No
Significant Marketing Program	Yes	Yes	Yes	No
DOT SP-7060 Permit	Yes	Yes	No	No
12-5 Standard Security Program	Yes	Yes	Yes	No
Public Company / SEC Reporting	Yes	Yes	Yes	No

(Suppl. 203, Comparison Chart of Services Offered by AirNet, FedEx, United Parcel Service, and Castle Aviation).

If AirNet does not qualify for exemption, then no air carrier other than Part 121 air carriers would ever qualify. If the Tax Commissioner prevails in this appeal, he will continue his policy that Part 121 air carriers qualify and all Part 135 air carriers are deemed non-qualifying.

The Tax Commissioner's conclusion disregards the 2006 amendment to R.C. 5739.01(P) and should be rejected.

V. CONCLUSION

AirNet deserves the classification of public utility. AirNet is entitled to the claimed relief. The Decision and Order of the Board of Tax Appeals should be REVERSED.

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing was served upon Daniel Kim and Daniel Fausey, Office of the Ohio Attorney General, Taxation Section, attorneys for the Tax Commissioner, 30 E. Broad Street, 25th Floor, Columbus, Ohio 43215 by electronic and ordinary mail delivery this 9th day of February, 2015.

s/ Edward J. Bernert
Edward J. Bernert

ORIGINAL

In the Supreme Court of Ohio

EPIC AVIATION, LLC, Appellant, v. JOSEPH W. TESTA TAX COMMISSIONER OF OHIO Appellee.	:	Case No. 14-1691 Appeal from Ohio Board of Tax Appeals Case No. 2012-1557

NOTICE OF APPEAL

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APPENDIX

In the
Supreme Court of Ohio

EPIC AVIATION, LLC, Appellant, v. JOSEPH W. TESTA TAX COMMISSIONER OF OHIO Appellee.	: : : : : : : : : : :	Case No. _____ Appeal from Ohio Board of Tax Appeals Case No. 2012-1557

NOTICE OF APPEAL

Appellant, EPIC Aviation, LLC ("Appellant"), on behalf of its customer, AirNet Systems, Inc., hereby gives notice of its appeal to the Supreme Court of Ohio from a Decision and Order of the Ohio Board of Tax Appeals ("BTA") journalized in Case No. 2012-1557 rendered on September 3, 2014. A true copy of the Decision and Order of the BTA being appealed is attached hereto as Exhibit A and incorporated herein by reference. This appeal is taken as a matter of right pursuant to Ohio Revised Code ("R.C.") 5717.04.

During the relevant period, AirNet operated an airline that qualified as a "public utility" within the meaning of R.C. 5739.02(B)(42)(a) and R.C. 5739.01(P). AirNet purchased the subject fuel for use directly in the rendition of the public utility service and thus the purchase of the fuel was exempt from Ohio sales and use tax.

The BTA erred in the following respects:

1. By failing to permit the requested refund and refusing to find that the purchases of the fuel qualified for exemption under the Ohio statues relevant to public utilities and pursuant to

the standards set forth in *Castle Aviation, Inc. v. Wilkins,* 109 Ohio St. 3d 290, 2006-Ohio-2420, including by not limited to, the requirements of special regulations and control by governmental regulatory agencies, which requirements and control applied to AirNet;

2. The error of denying the refund because AirNet is regulated under Section 135, Title 14, Code of Federal Regulation ("Part 135") rather than Part 121 of Title 14, Code of Federal Regulations ("Part 121") and the fact that AirNet did not obtain a certificate of public convenience and necessity;

3. The error of finding that the regulations to which AirNet was subject as well as the relevant Operations Specifications were not sufficiently restrictive or special to qualify AirNet as a public utility;

4. The error in finding that the providing of services pursuant to contracts prevents AirNet from qualifying as a public utility for tax purpose or supports a finding that AirNet was not subject to sufficient regulation and control generally (and not subject to government regulation that controls the relations between it and the public as its customers) to qualify as a public utility;

5. The error of denying the public utility status upon failing to uphold the only bases asserted by the Tax Commissioner in his final determination for denial of the exemption;

6. The error of denying public utility status based on the BTA's conclusion that an entity that voluntarily choses to carry certain types of freight could not qualify as a public utility based on the level of regulation attendant to that type of freight;

7 The errors in reaching certain conclusions that are wholly unsupported by the record, including:

a. concluding that AirNet was subject to similar regulations to Castle Aviation contrary to undisputed testimony to the contrary; and

b. concluding that the Part 121 regulations were more rigorous than those of Part 135 operations contrary to undisputed testimony to the contrary; and

8. The denial of the public utility status for sales and use tax purposes by the Tax Commissioner as affirmed by the BTA violates AirNet's rights to equal protection under the Fourteenth Amendment to the U.S. Constitution and Article I, §2 of the Constitution of the State of Ohio because the Tax Commissioner denied the status based on the absence of the Part 121 certification even though the Ohio statute does not utilize such classification as the criterion for qualification and the case law requires the use of a flexible approach. Accordingly, the Tax Commissioner's practice was not rationally related to the determination of whether AirNet qualifies as a public utility for purposes of the sales and use tax.

Because of the errors stated above, Appellant requests that the Decision and Order of the BTA be reversed and the refund authorized.

Respectfully submitted,

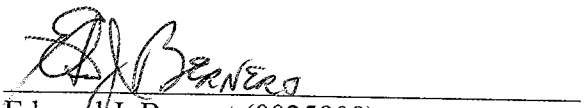

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EXHIBIT A
~~APPENDIX~~

OHIO BOARD OF TAX APPEALS

EPIC AVIATION, LLC, (et. al.), Appellant(s), vs. JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.), Appellee(s).	))))))))))	CASE NO(S). 2012-1557 (SALES TAX) DECISION AND ORDER

APPEARANCES:

For the Appellant(s) - EPIC AVIATION, LLC
Represented by:
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For the Appellee(s) - JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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COLUMBUS, OH 43215-3428

Entered Wednesday, September 3, 2014

Mr. Williamson, Mr. Johrendt, and Mr. Harbarger concur.

Appellant appeals a final determination of the Tax Commissioner wherein he denied appellant's application for refund of sales tax paid on purchase of jet fuel by its customer, AirNet Systems, Inc. ("AirNet"). We proceed to consider the matter upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, the record of the hearing before this board ("H.R."), and the parties' briefs.

Appellant filed its application for refund based on the exemption in R.C. 5739.02(B)(42)(a) for purchases for use "in the rendition of a public utility service." AirNet provides cargo air transportation services, and specializes in the transport of time-sensitive cargo, i.e., checks for transfer among financial institutions, radio pharmaceuticals, and sensitive government documents. The commissioner denied the application, finding that AirNet is not a "public utility" within the meaning of the statute, and the present appeal ensued.

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

Co. v. Porterfield (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

R.C. 5739.02(B)(42)(a) provides that "[s]ales where the purpose of the purchase is to *** use or consume the thing transferred ***directly in the rendition of a public utility service." R.C. 5739.01(P) defines "used directly in the rendition of a public utility service" as follows:

> "[P]roperty that is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and that retains it classification as tangible personal property after such incorporation; fuel or power used in the production, transmission transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system ***. Tangible personal property and services used primarily in providing highway transportation for hire are not used directly in the rendition of a public utility service. *In this definition, 'public utility' includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102.*" (Emphasis added.)

The last sentence was added to the statute in 2006, following the Supreme Court's decision in *Castle Aviation, Inc. v. Wilkins*, 109 Ohio St.3d 290, 2006-Ohio-2420. In that case, the court affirmed this board's decision finding that an air taxi operator who did not hold a certificate of public convenience and necessity was not a "public utility" under R.C. 5739.01(P). As the regulations that the appellant was subject to in *Castle Aviation* are substantially similar to those that AirNet is subject to, we find the following explanation by the court instructive:

> "Before an aircraft owner can provide air-transportation service as an air carrier, it must obtain separate authorization or exemption from two different sections of the United States Department of Transportation: (1) economic authority from the Office of the Secretary of Transportation in the form of a certificate of public convenience and necessity, Section 41102, Title 49, U.S. Code, and (2) safety authority from the FAA in the form of an air carrier certificate and operations specifications issued under either Part 121 or Part 135, Title 14, C.F.R. While Section 298.11, Title 14, C.F.R. provides that air taxi operations may be exempted from the economic requirement to obtain a certificate of public convenience and necessity, there is no prohibition against an air taxi operator voluntarily choosing to obtain a certificate of public convenience and necessity.
>
> "If a carrier chooses to obtain a certificate of public convenience and necessity, it must undergo certain review by the Department of Transportation, including meeting a requirement that it be found fit, and must submit periodic financial and traffic reports and maintain a higher level of insurance coverage. Section 41102, Title 49, U.S. Code. An air carrier that has obtained a certificate of public necessity and convenience [sic] is commonly referred to as a 'certified air carrier.' Castle has elected, under Section 298.11, Title 14, C.F.R. to be exempted from the requirement to obtain a certificate of public convenience and necessity. As a result, Castle merely has to register with the Department of Transportation and submit proof of insurance coverage. Section 298.3, Title 14, C.F.R.
>
> "Apart from the issue of the certificate of public necessity and convenience [sic], which is controlled by the Department of Transportation, is the question of safety rules, which are determined by the FAA. There are two classes of operating safety rules, Part 121 and Part 135 of Title 14, C.F.R. The requirements set forth in Part 135 are less rigorous than those imposed under Part 121.
>
> "Section 119.21, Title 14, C.F.R. sets forth the criteria to determine whether Part 121 or Part

> 135 rules are applicable to a given operation. Because the types of planes Castle operates and the way in which it operates, its operations are conducted under the less rigorous safety requirements of Part 135. If Castle wished to do so, it could subject itself to the more rigorous Part 121 rules, but it has chosen not to do so." Id. at ¶¶11-14.

After reviewing the cases involving the definition of "public utility" under Chapter R.C. 5739, the court concluded that it had "consistently found that one of the most important criteria, if not the most important, for the application of R.C. 5739.01(E)(2)[, the predecessor to R.C. 5739.02(B)(42)(a),] to the rendition of a public utility service is special regulation and control by a governmental regulatory agency." Id. at 27. The court ultimately concluded that Castle Aviation failed to show that it was subject to such regulation, and therefore, did not qualify for the sales tax exemption:

> "Castle's operations are similar to many other private business operations in that they must comply with various regulations, e.g., safety or environmental regulations, in order for the business to operate; however, those regulations do not control the relation between the business and the public as its customers. In a nontax case, *A & B Refuse Disposers, Inc.*[*v. Ravenna Twp. Bd. of Trustees* (1992), 64 Ohio St.3d 385], the court rejected the assertion that any business that simply claims that its services are open to the public can be categorized as a public utility, stating: 'This view is an unduly expansive construction of our holding [in *Marano v. Gibbs* (1989), 45 Ohio St.3d 310, ***] in that such a definition encompasses traditional business enterprises which are, in various degrees, regulated by diverse public authorities, *e.g.*, dry cleaners, restaurants, and grocery stores. They are not and should not be deemed public utilities.' 64 Ohio St.3d at 389, ***." Id. at ¶29.

See, also, *Sundorph Aeronautical Corp. v. Lindley* (Jan. 10, 1986), BTA No. 1982-D-842, unreported; *Childers v. Wilkins* (May 18, 2007), BTA No. 2004-R-1326, unreported.

The record demonstrates that AirNet is subject to substantially similar regulations as Castle Aviation. AirNet is a Part 135 air taxi operator. It has chosen not to obtain a certificate of public convenience and necessity, and has chosen not to subject itself to the more rigorous safety standards of Part 121. However, AirNet argues that the nature of its operations distinguish it from *Castle Aviation* and from other Part 135 operators, because of its "hub and spoke operation," its "detailed and extensive public schedule," its "vital" role in the "check-clearing process for the U.S. Banking process," its recognition "for its role in transporting biological products," its "selection by the U.S. State Department through a subcontract to transport sensitive government documents," and its revolutionary super-expedited delivery service. Appellant's Brief at 15-16. In addition, appellant argues that "[t]he increased regulation and control arising from the events of September 11, 2001 makes a significant difference in this case compared to the regulatory environment pre-2001 that was relevant to the *Castle Aviation* case." Id. at 25.

While we agree with appellant's contention that holding a certificate of public convenience and necessity is not a requirement of R.C. 5739.01(P), given the legislature's use of the term "includes" in its 2006 addition to the definition of "public utility," see *Gilman v. Hamilton Cty. Bd. of Revision*, 127 Ohio St.3d 154, 2010-Ohio-4992, we find that the analysis of *Castle Aviation*, supra, is still applicable to this case. The court in *Castle Aviation* did not affirm denial of the exemption based only upon Castle's lack of a certificate of public convenience and necessity. Rather, the court looked at the amount and degree of "special regulation and control by a government regulatory agency." *Castle Aviation*, supra, at ¶27.

Upon review of the evidence presented in this case, we find that AirNet is not subject to the great degree of "special regulation and control" that *Castle Aviation* required to qualify as a "public utility" under R.C. 5739.01(P). Much of the regulation to which AirNet is subject is based on the types of services it provides, i.e., transportation of checks for the banking industry, and time-sensitive biological and pharmaceutical products. AirNet has voluntarily undertaken these obligations through its contracts with its customers. No government regulation has imposed an obligation to provide such services upon AirNet. Like any private

business, AirNet has chosen to perform these services and undertake the additional risks associated with them, i.e., extensive background checks for employees involved in transporting government documents, H.R. at 52, audits by the U.S. Nuclear Regulatory Commission related to transport of radio pharmaceuticals, H.R. at 59. We find insufficient evidence that AirNet is subject to government regulation that controls the relation between it and the public as its customers. Id. at ¶29. Therefore, we find that it is not a "public utility" under R.C. 5739.01(P) and that the application for refund under R.C. 5739.02(B)(42)(a) was properly denied.

Finally, we acknowledge appellant's specification of error on appeal that the denial of the refund denies it the right to equal protection under the U.S. and Ohio constitutions. While the Supreme Court has authorized this board to accept evidence on constitutional points, it has clearly stated that this board has no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195. Therefore, we acknowledged appellant's constitutional claims on appeal, but make no findings in relation thereto.

Accordingly, we find that the final determination of the Tax Commissioner was reasonable and lawful, and, therefore, must be, and hereby is, affirmed.

BOARD OF TAX APPEALS		
RESULT OF VOTE	YES	NO
Mr. Williamson		
Mr. Johrendt		
Mr. Harbarger		

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.

A.J. Groeber, Board Secretary

APPENDIX

BEFORE THE BOARD OF TAX APPEALS
STATE OF OHIO

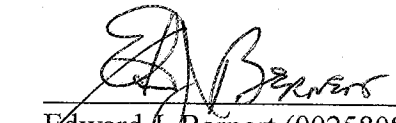
EPIC AVIATION, LLC,	:	
Appellant,	:	
v.	:	Case No. _____
JOSEPH W. TESTA TAX COMMISSIONER OF OHIO	:	Appeal from Ohio Board of Tax Appeals
Appellee.	:	Case No. 2012-1557

PRAECIPE

TO THE OHIO BOARD OF TAX APPEALS

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

Respectfully submitted,



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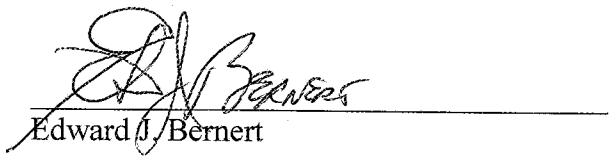
CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal and Praecipe were filed by hand-delivery with the Ohio Board of Tax Appeals, 30 East Broad Street, 24th Floor, Columbus, Ohio 43215, and were served upon the Ohio Tax Commissioner, 22nd Floor, 30 East Broad Street, Columbus, Ohio 43215, by certified mail return receipt requested, and by hand delivery with the Taxation Section of the Office of the Ohio Attorney General 25th floor, 30 East Broad Street, Columbus, Ohio this 1st day of October, 2014.



Edward J. Bernert

FINAL DETERMINATION

Date: APR 0 6 2012

Epic Aviation, LLC
P.O. Box 12249
Salem, OR 97309

Re: Refund Claim No. 201100027
Filed July 6, 2010
Sales Tax January 1, 2006 – April 30, 2009

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,727,790.27 of sales tax filed pursuant to R.C. 5739.07. Upon initial review the claim was denied. The claimant disagreed and requested reconsideration of the matter.

AirNet Systems, Inc. purchased jet fuel from Epic Aviation LLC. Epic collected and remitted sales tax on purchases. Epic filed the refund claim on behalf of AirNet.[1] The claimant maintains that its purchase of jet fuel is not subject to sales or use tax because the fuel was purchased for use in the rendition of a public utility service within the meaning of R.C. 5739.02(B)(42)(a) and R.C. 5739.01(P).

The claimant is the third largest all-cargo airline in the United States. The claimant provides time-critical, expedited delivery services. AirNet's deliveries are, oftentimes, highly specialized.[2] The claimant specializes in the transportation of time-sensitive packages for shippers requiring higher levels of care, custody and control than generally available from other air cargo carriers. The services provided by the claimant are discussed below in greater detail.

AirNet's Operations

AirNet states that it is a "leading provider of expedited and specialized transportation solutions." AirNet's services "are divided into two broad categories, 'Bank Services' and 'Express Services'". *Informational Background*, pg. 3. During the refund years in question, AirNet was the country's leading transporter of cancelled checks for the U.S. banking industry, providing transportation services to over 100 major financial institutions. *Id.*

Additionally, AirNet also provides "specialized, high-priority expedited delivery services to a broad range of other customers." *Id.* AirNet's Express Services focus on non-bank customers whose transportation needs are highly time-sensitive, highly regulated or require a highly controlled and secure shipping environment. These customers include shippers involved in life sciences, the entertainment industry, defense and aerospace contractors, producers of

[1] When reference is made to the "claimant", it is referring to AirNet.
[2] See Informational Background Report submitted by John P. Gordon, Outside Legal Counsel for AirNet.

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hazardous materials, and governmental agencies. *Id.* "A significant portion of AirNet's Express Services is provided to shippers in the life sciences industry, including producers and recipients of radio pharmaceuticals, diagnostic specimens, blood products, umbilical cord blood, clinical trials, vaccines and human tissue and organs." *Id.* AirNet Express Services also support other markets including hospitals, universities, defense contractors, government entities, and the entertainment industry. (*Id* at 3-4).

According to the information provided by AirNet, specific products that it transports under its Express Services operations include:

> Critical medical equipment for hospitals, such as x-ray and imaging tubes, highly perishable vaccines, umbilical cord blood for cryogenic storage, blood and blood products for testing, diagnostic specimens, clinical trials, recovered tissue and organs for implant, live donor organs, genetically engineered mice for universities and government agencies, horse and other animal semen for the thoroughbred industry and zoos, pre-release films for the entertainment industry, security sensitive documents for the federal government, security sensitive shipments for the aerospace and defense industry, other highly sensitive ships, such as data tapes. (*Id.* pg. 4).

AirNet also specializes in the shipment of dangerous goods that many other air carriers cannot, or will not, handle. AirNet states that its pilots, couriers, and ground handlers are all extensively trained in dangerous goods regulations and must undergo annual periodic training. AirNet ships hazardous materials in the following classifications:

> Explosives 1.4S Category (Class 1), Flammable Gases (Class 2.1), Nonflammable Gases (Class 2.2), Flammable Liquids (Class 3), Flammable Solids (Class 4), Organic Peroxides (Class 5.2), Toxic Substances (Class 6.1), Infectious Substances Affecting Humans or Animals (Class 6.2), Radioactive Materials (Class 7), Corrosives (Class 8), Miscellaneous (Class 9).

<u>The Federal Aviation Administration (FAA) and AirNet's FAA Status</u>

The aviation industry is regulated by the Federal Aviation Administration and the Department of Transportation. An aircraft owner seeking to provide air transportation service as an air carrier must obtain two separate authorizations from the United States Department of Transportation: economic authority from the Office of the Secretary of Transportation and safety authority from the Federal Aviation Administration.

Economic Authority

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The Office of the Secretary of Transportation (OST) is responsible for issuing some form of economic authority to anyone who wants to provide air transportation service as an air carrier. OST's economic regulation is concerned with the public interest and consistent with public convenience and necessity. In other words, OST's function is to maintain the established safety procedures in air transportation and air commerce that has come to be expected by the traveling and shipping public.[3]

In order to provide air transportation service as an air carrier, "economic authority" must be obtained in the form of a certificate of public convenience and necessity.[4] The Statute allows the Department to grant exemptions from the certificate requirement where it finds that such exemptions are "consistent with the public interest". In order to receive a certificate of public convenience and necessity, a company must be found to be fit, willing and able to provide the transportation. Exemptions may be granted to individual carriers or classes of air carriers. Carriers proposing to operate only small aircraft (60 or fewer seats or with an original payload capacity of 18,000 pounds or less) are exempt from the certificate requirements and may obtain authority as an air taxi operator or commuter air carrier in accordance with 14 CFR Part 298. *How to Become a Certificated Air Carrier.*

The evidence establishes that AirNet is registered as an Air Taxi Operator in accordance with Part 298. AirNet provided its registration as an Air Taxi Operator. (Exh. F) The registration form indicates that AirNet is registered to provide scheduled cargo, on-demand passenger, and on-demand cargo operations.

In accordance with Section 298.3, Title 14, C.F.R, Air Taxi Operators, do not utilize large aircraft in air transportation, do not hold a certificate of public convenience and necessity and do not engage in scheduled passenger operations.

FAA "Safety" Authority

FAA certification is based upon the particular business operation being conducted.

There are two classes of operating safety rules, Section 121, Title 14, C.F.R., hereinafter, Part 121, and Section 135, Title 14 ,C.F.R., hereinafter, Part 135. The operating rules specify the particular safety standards and requirements that must be met depending upon the type of operation conducted.

Part 121, which provides the safety requirements for all major air carriers, as well as any certificate holder conducting scheduled or nonscheduled operations with airplanes configured with more than 30 passenger seats, is generally considered to have more restrictive requirements

[3] Section 40101 (a), Title 49, U.S.Code

[4] Air Carrier Fitness Division, Office of the Secretary, U.S. Dept. of Transportation, *How To Become a Certificated Air Carrier.*

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than Part 135.[5] In general, scheduled passenger-carrying or on-demand operation of airplanes having a passenger seat configuration of 30 seats or fewer, excluding each crewmember seat, *and* a payload capacity of 7,500 pounds or less are conducted under part 135. Stated another way, an all-cargo operation conducted with airplanes having a payload capacity of 7,500 pounds or less, or with rotorcraft, are defined as on demand operations.[6]

The evidence indicates that AirNet operates under Part 135. The evidence further indicates that AirNet is an "all-cargo" operation. *Informational Background.* By definition, "all-cargo" operations are considered nonscheduled operations as opposed to scheduled operations, which include passenger operations in which the departure location and arrival location are offered in advance by the operator.[7]

In summary, the claimant operates as an Air Taxi Operator, under the least restrictive Part 135, and does not have a certificate of public convenience and necessity. As stated previously, the claimant maintains that its purchase of fuel was exempt from taxation, because it was used in the rendition of a public utility.

Public Utility

As a threshold matter, it is noted that air transportation that is accorded public utility status generally operates under Part 121 and has a certificate of public convenience and necessity. Nonetheless, AirNet contends that it is possible to be accorded this status without a certificate of public convenience and necessity.[8] However, for this to occur there has to be compelling and significant indicia that are characteristic of a public utility.

We start the analysis by asking the question what is a public utility?

A public utility company is an entity which delivers certain services considered essential to the public interest. http://en.wikipedia.org/wiki/Public_utility. A private business organization, subject to governmental regulation, that provides an essential commodity or service, such as water, electricity, transportation, or communication, to the public. http://www.answers.com/topic/public-utility.

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[5] 60 F.R. 65832

[6] See FAA Order 8900.1, Volume 2, Chapter 2, Section 1, Flight Standards Information Management System, *Air Operator and Air Agency Certification and Application Process.*

[7] See FAA Order 8900.1, at Volume 2, Chapter 2, Section 2.

[8] State governments often used the concept of "public convenience and necessity" to regulate commercial activity. The term 'convenience and necessity' refers to a variety of state interests that are protected through requirements relating to such issues as safety, financial responsibility, suitability of character, and market conditions." Daniel M. Forman, *The Dormant Commerce Clause and the Massachusetts Landfill Moratorium: Are National Market Principles Adequately Served?,* 24 B.C. Envtl. Aff. L. Rev. 425 (1997), http://lawdigitalcommons.bc.edu/ealr/vol24/iss2/5 citing, William K. Jones, *Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920*, 79 COLUM. L. REV. 426, 426 (1979).

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Commonly recognized characteristics of public utilities include:

- Required by law to render adequate service at reasonable prices to all who apply for it.
- Provides necessary services that are "affected with a public interest", and therefore subject to a degree of government regulation from which other businesses are exempt. *Id.*
- Public utilities supply an essential service, the unavailability of which would injuriously affect public health and welfare. *Id.*
- Public utilities satisfy the vital needs of large populations. *Id.*
- A public utility is a business that furnishes an everyday necessity to the public at large.
- Public utility services may be subject to rate control and other regulations which are not common to general businesses.

In *Washington Twp. Trustees v. Davis* (2002), 95 Ohio St.3d 274, 767 N.E.2d 261, the Supreme Court of Ohio set forth several factors that an entity must establish exhibiting that it has the "public service" and "public concern" characteristics of a public utility.[9] An entity must provide evidence that it possesses certain attributes associated with public utilities or its claim to that status must fail. An entity must first demonstrate, what is often considered the most important attribute of a public utility, "a devotion of an essential good or service to the general public which has a legal right to demand or receive this good or service." *Id.*, citing, *A &B Refuse Disposers, Inc. v. Ravenna Twp. Bd. Of Trustees* (1992), 64 Ohio St.3d at 387, 596 N.E. 2d 423. Associated with this requirement, the entity must demonstrate that it provides its service to the public "indiscriminately and reasonably."

Some courts have looked at the characteristics that render a utility "public." One characteristic is whether the service rendered is enjoyed by a privileged few, or open to the public in general. "It is one of the indicia of the public use that there is a user indefiniteness that gives to it a public character." *Freight, Inc. v. Bd. of Twp. Trustees of Northfield Ctr. Twp.* (1958), 107 Ohio App. 288, 158 N.E.2d 537. "That test is whether the general public indiscriminately has a legal right to use its services, and whether such use of its services cannot be denied or withdrawn at the whim of the owners." *Freight.*

The Supreme Court of Ohio has already decided that an air taxi operator that engaged in the air transportation of persons or property, operated under Part 135 and did not hold a certificate of public convenience and necessity was not a public utility. *Castle Aviation v. Wilkins* (2006), 109 Ohio St.3d 290, 847 N.E.2d 420. Castle was a small air carrier whose business consisted mostly of transporting freight. Castle operated eight single and twin engine planes, having at most nine seats. Castle Aviation was a charter operator and its operations classified it as an air taxi operator. As an air taxi, Castle did not have a certificate of public

[9] Even though *Washington Twp* involved a general exemption from zoning regulations, the public utility analysis is relevant.

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convenience and necessity. Additionally, Castle operated under the less stringent rules of Part 135. In determining whether Castle's operations fit within the public utility exemption, the Supreme Court of Ohio stated that Castle's operations did not meet the criterion of being under special regulation and control by a governmental regulatory agency.

Likewise, in *Sundorph Aeronautical Corp. v. Lindley*, (Jan. 10, 1986), BTA Case No. 82-D-842, unreported, the Board of Tax Appeals held that an aviation company was not entitled to the public utility exemption. Sundorph was an aviation company that devoted a portion of its business to charter operations and flight training. Sundorph argued that it did not have to pay sales tax on fuel when engaging in these operations because it was entitled to the public utility exemption. The Board focused on Sundorph's air carrier services and determined that Sundorph failed to establish that the principle characteristic of its air transportation business is that type of service which the general public had an enforceable legal right to demand and receive. In making this decision, the Board considered that even though, as an air taxi operator, Sundorph was certificated under Part 298, Sundorph was exempted from a significant portion of the Federal Aviation Act.[10] The Board reasoned that because air taxi operators are relieved from a significant portion of the Act, there is nothing that places an enforceable duty on an air taxi or nothing that grants the general public an enforceable right to demand its air transportation services.

However, the claimant attempts to distinguish itself from Castle Aviation and other air taxi operators that operate under Part 135 and don't qualify for the public utility exemption.[11] AirNet maintains that the following characteristics render it a public utility: it offers scheduled services, it provides essential air transportation services, its lifeguard status in emergency situations, it serviced the nation's financial institutions; finally, AirNet maintains that it is a heavily regulated entity. These factors are discussed below.

AirNet must demonstrate that it is providing an essential service to the general public which has a legal right to demand or receive this service. The first question we must answer is whether AirNet provides a service to the *general* public.

Scheduled Services

AirNet has regularly scheduled times that it ships its cargo. (Exh B). However, AirNet is an all-cargo operation. Therefore, its services do not fall under the FAA's definition of scheduled operations. Under the FAA's definition, "scheduled operations" include passenger operations in which the departure location and time and the arrival location are offered in advance by the operator. Scheduled operations can also carry cargo. However, an all-cargo operation is defined as nonscheduled.[12]

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[10] On July 5, 1994, the Federal Aviation Act was rescinded and recodified into Title 49 of the United States Code.

[11] In further support of its contention, AirNet provides a chart emphasizing the similarities between it and FedEx and United Parcel Service, which apparently operate under Part 121 and qualifies for the public utility exemption and distinguishing itself from Castle Aviation. (Exh T).

[12] See FAA Order 8900.1, at Volume 2, Chapter 2, Section 2, *supra*.

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AirNet states that the FAA's definition should not be read to mean that an airline conducting all cargo operations under Part 135 or an Air Taxi Operator under Part 298 cannot conduct regularly scheduled cargo operations. AirNet argues that its Air Taxi Operator Registration Form 4507, specifically reflects that AirNet intended to conduct "scheduled cargo." Nonetheless, under the FAA's definition, scheduled operations clearly refers to passenger operations. Therefore, AirNet is not conducting scheduled operations according to the FAA's definition.

Essential Air Transportation Services

AirNet maintains that it provides an essential and vital public service by providing air transportation services that are generally not available from other air transportation companies. For example, AirNet emphasizes its transportation of radio pharmaceuticals. Radio pharmaceuticals, AirNet explains, are used in the detection of cancer and are matters of life and death. According to AirNet, it transports more time-critical radio pharmaceuticals than any other U.S. air transportation company.

As evidence of the essential and vitality of radio pharmaceuticals, AirNet focuses on the extreme short life span of radio pharmaceuticals. According to AirNet, one radio pharmaceutical has a half life of 110 minutes. Due to the extreme short life, they must be delivered to the hospital where they are going to be used within four hours of manufacture. In order to accomplish this task, radio pharmaceutical manufacturers turn to AirNet, "which specializes in the transportation of radio pharmaceuticals." *Informational Background,* pg. 9. "AirNet's specially trained staff, fleet of high speed Lear 35 aircraft and DOT-7060 Permit make it one of the few air transportation companies that can meet the time-critical delivery deadlines that radio pharmaceuticals require." *Id.*[13]

In further support of its position, AirNet also emphasizes that it is the primary transporter of molybdenum-99 generators used to produce Technetium-99m. According to AirNet, Technetium-99m is the most widely used radioisotope for diagnosing diseased organs. AirNet is one of a handful of air transportation companies that possesses a DOT-SP 7060 permit which allows it to transport higher quantities of radio-active material by air than is generally permitted under Federal Regulations.

AirNet emphasizes that it also provides transportation services to customers within the life services industry that, due to the nature of the materials being shipped, require special handling and/or equipment during transport. AirNet contends that such customers include

[13] As further evidence of the essential nature of AirNet's services to the radio pharmaceutical industry, AirNet provides a CD which features a segment on the History Channel, titled "Modern Marvels", which details the logistical problems with manufacturing a radio pharmaceutical in Columbus, Ohio which must be used in Chicago, New York, or Atlanta within four hours of coming out of the manufacturer's "hot cell".

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shippers of organs, organs and tissue to be used in implants, umbilical blood, diagnostic specimens, materials used in clinical trials, semen, vaccines and experimental mice.

The importance of this service performed by AirNet is clear and unequivocal. However, it is also clear that the general public is not transporting radio pharmaceuticals or molybdenum-99 generators, organs or experimental mice. Rather, this service is essential and important to the life services industry.

Lifeguard Status

AirNet is authorized to request "Lifeguard" status in emergency situations. Lifeguard status allows aircraft to operate without delays in takeoff, routing and landing. In support of its contention of the necessity of this service, AirNet points to the events following 9/11. Shortly following the attack on 9/11, the FAA closed the National Air Space, grounding all U.S. and foreign aircraft operating over the United States.

According to AirNet, it was the first airline granted Lifeguard status on September 11, 2001 and in conjunction with the Red Cross determined what critical medical supplies were needed and where. AirNet states that it completed four critical medical flights on September 11 and eight on September 12, while the National Air Space remained closed. AirNet submits an American Red Cross article discussing these events. (Exh H).[14]

Again, the importance of this service is not questioned. However, by AirNet's own admission, this service is provided in specialized emergency situations. Again, this specialized service is not targeted to the general public. The general public does not require AirNet to obtain "Lifeguard" status.

Check Clearing for the 21st Century Act

AirNet maintains that during the tax years in question, its services were also essential to the nation's financial institutions. AirNet contends that it was the nation's largest transporter of cancelled checks and other sensitive banking information. AirNet states that its expedited Bank Services allowed banks to clear checks overnight. AirNet further states that during its height of transporting cancelled checks, it met 2,200 daily delivery deadlines for the banking industry.[15]

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[14] AirNet cites other examples where it served the medical and life science industries. For example, following the North American power grid failure in 2003, the American Red Cross' laboratory in Detroit Michigan was incapacitated. AirNet assisted in transporting over 3,500 blood samples to alternative testing labs. The American Red Cross states this about AirNet's contributions, "[w]ithout your assistance, the availability of life sustaining blood components in all three communities would have been severely compromised." (Exh I).

[15] AirNet maintains that the legislative history leading to the Check Clearing for the 21St Century Act, (commonly referred to as Check 21) demonstrates the critical nature of Airnet's services to the financial industry during the tax years in question. AirNet maintains that its primary competitor in the transportation of cancelled checks was the Check Relay Network (CRN), which was operated by the Federal Reserve System. According to AirNet, there was a concern that with the implementation of Check 21 that CRN might engage in anti-competitive pricing due to the lack of a profit motive, as check transportation volumes dropped. In other words, CRN might elect to operate at a

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AirNet maintains that the vital nature of its services to the banking industry were evident following the terrorist attack on September 11, 2001. Following the attack and the closing of the National Air Space, overnight check clearing was virtually halted. On September 13, with the reopening of the National Air Space, the Federal Reserve Board called AirNet and requested its assistance to coordinate the massive movement of checks that had been waiting to be processed since September 11. AirNet contends that On September 13, it helped move over 500,000 pounds of checks. AirNet further emphasizes that its vital services during this time was recognized by a number of banking customers. AirNet states that following 9/11, it received commendation letters from Bank of America and the American Red Cross which were recorded in the Congressional Record.

AirNet clearly provided this service to the financial institutions, rather than shipping public at large.

AirNet has not demonstrated that it offers the type of service that is devoted to general public. As stated earlier, one factor that courts look at is whether the service rendered is enjoyed by a few or by the public in general. In this case, it is clear that AirNet's service, while important, is specialized to a certain niche of persons, rather than the public in general. While the services AirNet provides are critical and valuable, even AirNet acknowledges that its services are divided into two broad categories, bank services and express services. *Informational Background*, pg. 3. Indeed, AirNet contends that it provides specialized, high priority expedited delivery services for customers whose transportation needs are highly time-sensitive, highly regulated, or required a highly controlled and secure shipping environment. AirNet acknowledges that a significant portion of its Express Services is provided to shippers involved in life sciences industry, including producers of radio pharmaceuticals, diagnostic specimens, blood products, umbilical cord blood, clinical trials, vaccines and human tissue and organs. While this is a very essential service to these customers, the general public typically doesn't ship such items. Therefore, the evidence demonstrates that AirNet services a limited and specialized class of shipper, rather than the general public at large.

Does the General Public have a Legal Right to Demand AirNet's Service/Regulation

The question of whether the claimant is a public utility is a question of fact that must be proven. *Ohio Valley Air Ways, Inc. v. Bowers* (1961), 114 Ohio App. 427, 177 N.E.2d 303. The question is not whether the public generally uses the services, but whether the public has the right to use the services and whether those services can be denied to the public. *Id.* citing

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loss to keep its check volumes up, which would effectively cripple AirNet's ability to fairly compete, which would result in the loss of AirNet's vital services. According to AirNet, this concern was so great that Congress and the Federal Reserve Board agreed that AirNet needed protection from potential anti-competitive pricing by the CRN. As a result, Congress ultimately included language in the legislation which required the FRB to disclose its check transportation revenue and operating costs to ensure that it would not engage in anti-competitive pricing of its services at a loss. (Informational Background, pg. 12-13).

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Freight Co. v. Board of Township Trustees, 107 Ohio App.288, 158 N.E.2d 537. It has to be compulsory for the claimant to have to serve the public. *Ohio Valley Air Ways, Inc. supra.*

The Court in *Castle Aviation, supra*, set forth the standard analysis when making the determination whether a taxpayer is sufficiently regulated to obtain public utility status. *Castle* recognized that the first question to be answered when a taxpayer seeks public utility status, is whether the taxpayer is a *regulated* public utility service. *Castle*, citing *Manfredi Motor Transit Co. v. Limbach* (1988), 35 Ohio St.3d 73, 76, 518 N.E. 2d 936. The Court went on to recognize that "only a public utility service that is so important to the public interest that special regulation and control [have] been imposed upon it may have its purchases excepted." *Id.* citing *Pittsburgh & Conneaut Dock Co.,* (1985), 18 Ohio St.3d 320, 481 N.E.2d 579. "The required regulation equates to control of the taxpayer's business." The Court further recognized that when a taxpayer could cease business at any time, the public could not demand and receive the taxpayer's services, as it could if the taxpayer were specially regulated.

AirNet's Regulation

AirNet holds an air carrier certificate pursuant to Part 135 of the Federal Aviation Regulations. (Exh J). AirNet holds a repair station certificate pursuant to Part 145 of the Federal Aviation Regulations. (Exh K). AirNet holds an Air Taxi Operator Registration under Part 298. (Exh F).

AirNet also holds the following certificates and permits:

- DOT-SP 7060. (Exh L)
- Permit for Equivalent Level of Safety. (Exh M)
- Hazardous Materials Certificate of Registration. (Exh N)
- USDA Class T Carrier Registration. (Exh O).
- Indirect Air Carrier Approval. (Exh P)
- Twelve-Five Standard Security Program.[16]
- FCC License. (Exh Q)
- DOD Defense Commercial Air Carrier Quality Certification. (Exh R)

The Department of Transportation (DOT) and Transportation Security Administration (TSA) have regulatory authority concerning operational and security concerns in transportation. AirNet also contends that it is subject to regulation by the USDA, which regulates the transportation of pharmaceuticals and live animals. AirNet further maintains that it is subject for various state and local authorities, including the Columbus Regional Airport Authority. Additionally, AirNet states that the TSA requires it to maintain certain security programs related to its operations. AirNet emphasizes that the regulations increased significantly following the terrorist attack of September 11, 2001.

[16] AirNet states that this certificate cannot be reproduced under federal law because it contains sensitive security information.

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The Court in *Castle Aviation* said that R.C. 4921.04 was an example of the requisite control necessary of a public utility. R.C. 4921.04 gave the Public Utilities Commission of Ohio the power to fix rates, to regulate service and the safety of operations, and to regulate the relationship between motor transport companies and the public. Another example recognized by the Court, was R.C. 4921.07, which required companies to secure a certificate of convenience and necessity from the Public Utilities Commission.

It appears that AirNet holds many certificates and/or permits. However, as the Supreme Court of Ohio recognized in *Castle Aviation*, many private business operations must comply with various safety or environmental regulations in order to conduct business, those regulations, however, do not control the relation between the business and the public as its customers.

AirNet has not demonstrated that it is governed by any statute or regulation that grants the general public a legal right to demand or receive its service. Indeed, the claimant's burden is especially cumbersome, in that, it has already been decided that Part 298, which regulates air taxis, does not grant the general public a legally enforceable right to demand the claimant's services. *Sundorph, supra.* Unlike the large air carriers that form the backbone of the air transportation industry, AirNet does not hold a certificate of public convenience and necessity, nor is it subject to a fitness evaluation, and AirNet operates under the less rigorous standard of Part 135 as opposed to Part 121. OST does not require the claimant to demonstrate that there is a good likelihood that it will continue to be in business because the claimant's service is not essential to the continuity of the air transportation network.

Since the claimant's air taxi operations are subject to the least restrictive level of requirements under both the FAA and the OST, it stands to reason that the claimant's services are viewed by both the FAA and the OST as the least essential of the air transportation services that they regulate. This is further proof that the services provided by the claimant are not vital or essential to the general public. Therefore, AirNet has not demonstrated that the general public has a legal right to demand its services. Thus, AirNet has not demonstrated that it is entitled to the public utility exemption.

Common Carrier Status

AirNet maintains that it operates as a common carrier, and holds itself out to the general public as willing to furnish transportation services to any person who desires such services. AirNet states that it advertises to the general public via its website, advertisements in trade magazines, electronic brochures, the yellow pages, facebook, twitter, television, trade shows, and conferences. (Exh D).[17] In support of this contention, AirNet provides a copy of its television commercial, "After Midnight." (Exh C).

[17] Exhibit D is a list of trade shows and conferences AirNet was scheduled to appear in 2011.

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However, the claimant must demonstrate that it operates as a common carrier for public utility purposes. To do this is must show that it does more than just advertise to the public. If advertising to the public was the standard in making a determination as to whether a company is a public utility every business would qualify. "The distinctive characteristic of a common carrier is that is undertakes to carry for all people indifferently, as opposed to private carriers who are not bound to carry for any reason unless the obligation to do so is voluntarily assumed by virtue of a specific contract. This requirement separates a common carrier for public utility purposes from private carriers." *Sundorph, supra.*

The claimant was not acting as a contract carrier or private carrier during the period in question.[18] The claimant maintains that as a common carrier it is subject to the exclusive jurisdiction of the federal courts with regard to damage claims. AirNet further contends that as a common carrier it cannot exculpate itself from liability for shipments damaged during transport. Finally, AirNet maintains that it can be compelled to provide services by an action for specific performance. It appears that the claimant is making these contentions in support of its claim that the public has a legal right to demand its service. In support of its contention that a common carrier that refuses to provide transportation services can be sued for damages or specific performance, the claimant cites *Pennsylvania R.R. Co. v. Puritan Coal Mining Co.* (1915), 237 U.S. 129, 35 S.Ct. 484, 59 L.Ed. 867. However, it is clear from the facts set forth in the case that The Pennsylvania Railroad Company was an interstate carrier that had a legal obligation that was based on Section 2 of the Commerce Act. Moreover, Section 8 of the act, gave a right of action for damages for violation of the act. Likewise, the claimant cites *V. L. Johnson d/b/a Johnson Lumber Co. v. Chicago, Milwaukee, St. Paul & Pacific RR. Co.*, 400 F.2d 968 (9th Cir. 1968), in support of its position. Again, the facts of the *Johnson* case are distinguishable, because it is clear that Pacific Railroad had a legal duty and obligation as a common carrier that was based on statutory and common law.

However, unlike the cases mentioned by the claimant, the claimant has not provided any statute or regulation under which it is governed that grants the general public the right to demand its services. Moreover, it has already been determined that the claimant has not demonstrated that the general public has a legal right to demand its service under Part 298, under which the claimant is governed. The claimant's operation is subject to the less stringent safety and economic regulations than traditional airlines precisely because the service that the claimant provides is not essential to the public air transportation system. AirNet has not demonstrated that it is a public utility.

Equal Protection

The claimant maintains that denial of public utility status deprives it of its right to equal protection under the Fourteenth Amendment to the Constitution of the United States and the

[18] According to AirNet's website, it provides cargo charter services. However, it appears that AirNet just recently began charter services.

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Ohio Constitution. The claimant states that if large freight carriers qualify for exemption, then AirNet qualifies for exemption because it operates like those entities.

The Department of Taxation is an administrative agency without jurisdiction to consider constitutional issues. However, if one were to decide the issue, the claimant's contention would not be well taken. Unlike the claimant, the large freight carriers that qualify as a public utility, because of the inherent nature of their operation, operate under FAA Part 121 and hold a certificate of public convenience and necessity. Moreover, treating these two classes of carrier differently does not violate equal protection. The Equal Protection Clause "does not require things which are different in fact *** to be treated in law as though they were the same." *GTE North, Inc. v. Zaino* (2002), 9 Ohio St. 3d 9, 2002-Ohio-2984, quoting *Tigner v. Texas* (1940), 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.ED. 1124. In other words, Equal Protection requires similar treatment for the similarly situated. There is no requirement of equal treatment of differently situated persons. See *Home Depot USA, Inc. v. Levin* (2009), 121 Ohio St.3d 482, 905 N.E.2d 630, 2009-Ohio-1431.

Based on the foregoing, the refund claim is denied.

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

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

JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner

Bernert, Edward

From: Jason_Hickok@tax.state.oh.us
Sent: Monday, September 13, 2010 3:25 PM
To: mlabonte@airbpaviation.com
Cc: Bernert, Edward; malena.marshall@crowehorwath.com
Subject: Ohio Sales & Use Tax Refund
Attachments: EPIC_T300.pdf

Re: Refund Claim #201100027
Amount $1,727,790.27

Mr. Labonte,

The above referenced request for refund of sales/use tax has been reviewed. The evidence in file establishes that no refund is warranted. The request has been denied for the following reason:

Pursuant to Ohio Revised Code section 5739.02 (C), "it is presumed that all sales made in this state are subject to the tax until the contrary is established." On August 2, 2010 a request for additional information was submitted. The invoices that were requested as well as the statement specifiying the part of Title 14, C.F.R. under which AirNet's specifications were issued have been received. However, to date, neither a copy of AirNet's certificate of public convenience and necessity nor a statement of usage describing AirNet's activites and how they qualify as a public utility have been submitted. Therefore, without sufficient reason for exemption, no basis for refund exists, and the refund is denied.

To expedite the closure of the refund, please complete the attached T-300 that will indicate your agreement with the denial and return it to me via fax or email.

In the event you do not agree with the denial, please indicate so on the T-300 and choose whether you want to attend a hearing regarding this matter or whether you want the hearing officer to make a determination without your presence. If you do not want to appear but wish to submit additional information, you should return the additional information with your signed T-300. I will forward it to the Appeals Division.

Regardless of whether you agree or disagree, you must sign and return the attached T-300 within sixty (60) days from the date of this letter. If neither a hearing is requested nor additional information provided, the commissioner shall take no further action and the refund amount denied becomes final.

In accordance with Ohio Revised Code section 5703.70 (Refunds: Reduction Notification), this is the only notification that will be made regarding this matter.

If you have any questions, please contact me.

Jason Hickok, Auditor
Audit Division - South Central
Phone: 614.387.2054
Fax: 614.387.2071
Email: jason_hickok@tax.state.oh.us

OPINION of the Tax Commissioner

Date Issued: OCT 08 1991

Opinion No.: 90-0012

XXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXX
XXXXXXXXXXXXXXXXXXXXXXXX

This request for an opinion of the Tax Commissioner was received on December 18, 1990. Specifically, it concerns the application of sales and use tax to XXXXXXXXXXXXXXX express delivery service.

FACTUAL BACKGROUND

XXXXXXXXXXXXXXX (hereinafter XXX or Taxpayer) has submitted evidence outlining the following factual circumstances:

1. XXXX formerly XXXXXXXXXXXXXXXXXXXXXXXX, is a wholly-owned subsidiary of XXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXXX.

2. XXXXXXXX provides next morning, door-to-door express delivery of packages weighing less than one hundred pounds throughout the United States as well as to and from some foreign countries. XXXXXXXX also acts as a domestic and international freight forwarder for shipments of any size.

3. In providing its services, XXXXXXXX uses the fleet of airplanes owned by XXX to deliver all freight to XXXXXXXXXXXXXXXXXX which is, in its turn, a wholly-owned subsidiary of XXX.

4. XXX's personnel sort the packages and freight at the XXXXXXXXXX central sorting facility and reload the items for shipment to the appropriate destinations.

5. None of the corporate entities are regulated by the Public Utilities Commission of Ohio; nevertheless, XXX and XXXXXXXXXXXXXXXXXXX are subject to regulation and certification by other federal and state departments.

REQUEST FOR OPINION

Taxpayer requests an opinion of the Tax Commissioner finding that it is engaged in the rendition of a public utility service for purposes of Chapter 5739 of the Ohio Revised Code.

Ohio Revised Code section 5739.01(E)(2) excepts from the definition of a retail sale the purchase of items by a consumer whose purpose is to use or consume the items directly in the rendition of a public utility service. Generally, a two-part test formulated by the Supreme Court of Ohio is used to determine whether an entity is a public utility, i.e., "...whether the taxpayer is a regulated public utility service...and...whether it was rendering a public utility service when the purchases were made...." See Pittsburgh & Conneaut Dock Co. v. Limbach (1985), 18 Ohio St. 3d 320; Midwest Haulers, Inc. v. Glander (1948), 150 Ohio St. 402; Manfredi Motor Transit Co. v. Limbach (1988), 35 Ohio St. 3d 73, 76. This general test notwithstanding, the Ohio Supreme Court has recognized that a consumer does not have to be statutorily defined as a public utility nor does it have to be regulated. Trans World Airlines v. Porterfield (1970), 22 Ohio St. 2d 177. It does, however, need to provide a service of public consequence or need which it offers to an indefinite public which has a legal right to the service. Ohio Power Co. v. Attica (1969), 19 Ohio App. 2d 89; Midwest Haulers, supra; Southern Ohio Power Co. v. Public Utilities Commission of Ohio (1924), 110 Ohio St. 246.

Based on the documentation and facts as presented, it is the opinion of the Tax Commissioner that Taxpayer is engaged in providing a public utility service.

This opinion applies to this taxpayer only. The opinion, and any reliance placed upon it, may not be transferred or assigned.

In addition, the tax consequences stated in this opinion may be subject to change for any of the reasons stated in R.C. 5703.53(C). It is the duty of the taxpayer to be aware of such changes. R.C. 5703.53(E).

/S/ ROGER W. TRACY
Roger W. Tracy
Tax Commissioner

APPENDIX

Baldwin's Ohio Revised Code Annotated
Title LVII. Taxation (Refs & Annos)
Chapter 5739. Sales Tax (Refs & Annos)
Levy and Collection

R.C. § 5739.02

5739.02 Levy of tax; purpose; rate; exemptions

Effective: September 11, 2014
Currentness

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.

(A)(1) The tax shall be collected as provided in section 5739.025 of the Revised Code. The rate of the tax shall be five and three-fourths per cent. The tax applies and is collectible when the sale is made, regardless of the time when the price is paid or delivered.

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

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

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

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

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(B) The tax does not apply to the following:

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

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

(3) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;

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

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

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

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

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

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

(b) The limitation on the number of days on which tax-exempt sales may be made by a church or organization under division (B)(9)(a) of this section does not apply to sales made by student clubs and other groups of students of a primary or secondary

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school, or a parent-teacher association, booster group, or similar organization that raises money to support or fund curricular or extracurricular activities of a primary or secondary school.

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

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

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

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

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

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

(13) Building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract with this state or a political subdivision of this state, or with the United States government or any of its agencies; building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property that are accepted for ownership by this state or any of its political subdivisions, or by the United States government or any of its agencies at the time of completion of the structures or improvements; building and construction materials sold to construction contractors for incorporation into a horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock; building materials and services sold to a construction contractor for incorporation into a house of public worship or religious education, or a building used exclusively for charitable purposes under a construction contract with an organization whose purpose is as described in division (B)(12) of this section; building materials and services sold to a construction contractor for incorporation into a building under

a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes; building and construction materials sold for incorporation into the original construction of a sports facility under section 307.696 of the Revised Code; building and construction materials and services sold to a construction contractor for incorporation into real property outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state; building and construction materials for incorporation into a transportation facility pursuant to a public-private agreement entered into under sections 5501.70 to 5501.83 of the Revised Code; and, until one calendar year after the construction of a convention center that qualifies for property tax exemption under section 5709.084 of the Revised Code is completed, building and construction materials and services sold to a construction contractor for incorporation into the real property comprising that convention center;

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

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

(16) Sales of food to persons using supplemental nutrition assistance program benefits to purchase the food. As used in this division, “food” has the same meaning as in 7 U.S.C. 2012 and federal regulations adopted pursuant to the Food and Nutrition Act of 2008. [1]

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

(18) Sales of drugs for a human being that may be dispensed only pursuant to a prescription; insulin as recognized in the official United States pharmacopoeia; urine and blood testing materials when used by diabetics or persons with hypoglycemia to test for glucose or acetone; hypodermic syringes and needles when used by diabetics for insulin injections; epoetin alfa when purchased for use in the treatment of persons with medical disease; hospital beds when purchased by hospitals, nursing homes, or other medical facilities; and medical oxygen and medical oxygen-dispensing equipment when purchased by hospitals, nursing homes, or other medical facilities;

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

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

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

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

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

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

(25)(a) Sales of water to a consumer for residential use;

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(b) Sales to direct marketing vendors of preliminary materials such as photographs, artwork, and typesetting that will be used in printing advertising material; and of printed matter that offers free merchandise or chances to win sweepstake prizes and that is mailed to potential customers with advertising material described in division (B)(35)(a) of this section;

(c) Sales of equipment such as telephones, computers, facsimile machines, and similar tangible personal property primarily used to accept orders for direct marketing retail sales.

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

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

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

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

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

(a) Motor racing vehicles;

(b) Repair services for motor racing vehicles;

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

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

(40) Sales of tangible personal property and services to a provider of electricity used or consumed directly and primarily in generating, transmitting, or distributing electricity for use by others, including property that is or is to be incorporated into and will become a part of the consumer's production, transmission, or distribution system and that retains its classification as tangible personal property after incorporation; fuel or power used in the production, transmission, or distribution of electricity; energy conversion equipment as defined in section 5727.01 of the Revised Code; and tangible personal property and services used in the repair and maintenance of the production, transmission, or distribution system, including only those motor vehicles as are specially designed and equipped for such use. The exemption provided in this division shall be in lieu of all other exemptions in division (B)(42)(a) or (n) of this section to which a provider of electricity may otherwise be entitled based on the use of the tangible personal property or service purchased in generating, transmitting, or distributing electricity.

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

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

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

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

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

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

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

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

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

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

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

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

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(k) To use or consume the thing transferred to fulfill a contractual obligation incurred by a warrantor pursuant to a warranty provided as a part of the price of the tangible personal property sold or by a vendor of a warranty, maintenance or service contract, or similar agreement the provision of which is defined as a sale under division (B)(7) of section 5739.01 of the Revised Code;

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

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

(n) To use or consume the thing transferred primarily in producing tangible personal property for sale by farming, agriculture, horticulture, or floriculture. Persons engaged in rendering farming, agriculture, horticulture, or floriculture services for others are deemed engaged primarily in farming, agriculture, horticulture, or floriculture. This paragraph does not exempt from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.

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

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

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

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

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

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

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

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

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

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

(ii) “Qualified direct selling entity” means an entity selling to direct sellers at the time the entity enters into a tax credit agreement with the tax credit authority pursuant to section 122.17 of the Revised Code, provided that the agreement was entered into on or after January 1, 2007. Neither contingencies relevant to the granting of, nor later developments with respect to, the tax credit shall impair the status of the qualified direct selling entity under division (B)(48) of this section after execution of the tax credit agreement by the tax credit authority.

(c) Division (B)(48) of this section is limited to machinery, equipment, and software first stored, used, or consumed in this state within the period commencing June 24, 2008, and ending on the date that is five years after that date.

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

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

(51) Any transfer or lease of tangible personal property between the state and JobsOhio in accordance with section 4313.02 of the Revised Code.

(52)(a) Sales to a qualifying corporation.

(b) As used in division (B)(52) of this section:

(i) “Qualifying corporation” means a nonprofit corporation organized in this state that leases from an eligible county land, buildings, structures, fixtures, and improvements to the land that are part of or used in a public recreational facility used by a

major league professional athletic team or a class A to class AAA minor league affiliate of a major league professional athletic team for a significant portion of the team's home schedule, provided the following apply:

(I) The facility is leased from the eligible county pursuant to a lease that requires substantially all of the revenue from the operation of the business or activity conducted by the nonprofit corporation at the facility in excess of operating costs, capital expenditures, and reserves to be paid to the eligible county at least once per calendar year.

(II) Upon dissolution and liquidation of the nonprofit corporation, all of its net assets are distributable to the board of commissioners of the eligible county from which the corporation leases the facility.

(ii) “Eligible county” has the same meaning as in section 307.695 of the Revised Code.

(53) Sales to or by a cable service provider, video service provider, or radio or television broadcast station regulated by the federal government of cable service or programming, video service or programming, audio service or programming, or electronically transferred digital audiovisual or audio work. As used in division (B)(53) of this section, “cable service” and “cable service provider” have the same meanings as in section 1332.01 of the Revised Code, and “video service,” “video service provider,” and “video programming” have the same meanings as in section 1332.21 of the Revised Code.

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

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

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

CREDIT(S)

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1978 H 8, H 291, H 563, H 635; 1974 S 244, H 1313; 1973 H 3, S 241; 1971 H 475, S 222; 132 v S 474, S 207, S 350, H 519; 131 v H 605, S 203; 130 v H 11, H 1; 129 v 1336, 1301; 128 v 421; 1953 H 1; GC 5546-2)

Notes of Decisions (611)

Footnotes

1 7 U.S.C.A. § 2011 et seq.

R.C. § 5739.02, OH ST § 5739.02

Current through Files 1 to 146, 148 to 190, 192 to 195 and Statewide Issue 1 of the 130th GA (2013-2014).

End of Document

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APPENDIX

Baldwin's Ohio Revised Code Annotated
Title LVII. Taxation (Refs & Annos)
Chapter 5739. Sales Tax (Refs & Annos)
Definitions

R.C. § 5739.01

5739.01 Definitions

Effective: September 29, 2013
Currentness

As used in this chapter:

(A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, societies, corporations, the state and its political subdivisions, and combinations of individuals of any form.

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

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

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

(3) All transactions by which:

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(r) On and after August 1, 2003, the transportation of persons by motor vehicle or aircraft is or is to be provided, when the transportation is entirely within this state, except for transportation provided by an ambulance service, by a transit bus, as defined

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in section 5735.01 of the Revised Code, and transportation provided by a citizen of the United States holding a certificate of public convenience and necessity issued under 49 U.S.C. 41102;

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

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

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

(4) All transactions by which printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter are or are to be furnished or transferred;

(5) The production or fabrication of tangible personal property for a consideration for consumers who furnish either directly or indirectly the materials used in the production of fabrication work; and include the furnishing, preparing, or serving for a consideration of any tangible personal property consumed on the premises of the person furnishing, preparing, or serving such tangible personal property. Except as provided in section 5739.03 of the Revised Code, a construction contract pursuant to which tangible personal property is or is to be incorporated into a structure or improvement on and becoming a part of real property is not a sale of such tangible personal property. The construction contractor is the consumer of such tangible personal property, provided that the sale and installation of carpeting, the sale and installation of agricultural land tile, the sale and erection or installation of portable grain bins, or the provision of landscaping and lawn care service and the transfer of property as part of such service is never a construction contract.

As used in division (B)(5) of this section:

(a) “Agricultural land tile” means fired clay or concrete tile, or flexible or rigid perforated plastic pipe or tubing, incorporated or to be incorporated into a subsurface drainage system appurtenant to land used or to be used primarily in production by farming, agriculture, horticulture, or floriculture. The term does not include such materials when they are or are to be incorporated into a drainage system appurtenant to a building or structure even if the building or structure is used or to be used in such production.

(b) “Portable grain bin” means a structure that is used or to be used by a person engaged in farming or agriculture to shelter the person's grain and that is designed to be disassembled without significant damage to its component parts.

(6) All transactions in which all of the shares of stock of a closely held corporation are transferred, or an ownership interest in a pass-through entity, as defined in section 5733.04 of the Revised Code, is transferred, if the corporation or pass-through entity is not engaging in business and its entire assets consist of boats, planes, motor vehicles, or other tangible personal property operated primarily for the use and enjoyment of the shareholders or owners;

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(7) All transactions in which a warranty, maintenance or service contract, or similar agreement by which the vendor of the warranty, contract, or agreement agrees to repair or maintain the tangible personal property of the consumer is or is to be provided;

(8) The transfer of copyrighted motion picture films used solely for advertising purposes, except that the transfer of such films for exhibition purposes is not a sale;

(9) On and after August 1, 2003, all transactions by which tangible personal property is or is to be stored, except such property that the consumer of the storage holds for sale in the regular course of business;

(10) All transactions in which “guaranteed auto protection” is provided whereby a person promises to pay to the consumer the difference between the amount the consumer receives from motor vehicle insurance and the amount the consumer owes to a person holding title to or a lien on the consumer's motor vehicle in the event the consumer's motor vehicle suffers a total loss under the terms of the motor vehicle insurance policy or is stolen and not recovered, if the protection and its price are included in the purchase or lease agreement;

(11)(a) Except as provided in division (B)(11)(b) of this section, on and after October 1, 2009, all transactions by which health care services are paid for, reimbursed, provided, delivered, arranged for, or otherwise made available by a medicaid health insuring corporation pursuant to the corporation's contract with the state.

(b) If the centers for medicare and medicaid services of the United States department of health and human services determines that the taxation of transactions described in division (B)(11)(a) of this section constitutes an impermissible health care-related tax under the “Social Security Act,” section 1903(w), 42 U.S.C. 1396b(w), and regulations adopted thereunder, the medicaid director shall notify the tax commissioner of that determination. Beginning with the first day of the month following that notification, the transactions described in division (B)(11)(a) of this section are not sales for the purposes of this chapter or Chapter 5741. of the Revised Code. The tax commissioner shall order that the collection of taxes under sections 5739.02, 5739.021, 5739.023, 5739.026, 5741.02, 5741.021, 5741.022, and 5741.023 of the Revised Code shall cease for transactions occurring on or after that date.

(12) All transactions by which a specified digital product is provided for permanent use or less than permanent use, regardless of whether continued payment is required.

Except as provided in this section, “sale” and “selling” do not include transfers of interest in leased property where the original lessee and the terms of the original lease agreement remain unchanged, or professional, insurance, or personal service transactions that involve the transfer of tangible personal property as an inconsequential element, for which no separate charges are made.

(C) “Vendor” means the person providing the service or by whom the transfer effected or license given by a sale is or is to be made or given and, for sales described in division (B)(3)(i) of this section, the telecommunications service vendor that provides the nine hundred telephone service; if two or more persons are engaged in business at the same place of business under a single trade name in which all collections on account of sales by each are made, such persons shall constitute a single vendor.

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Physicians, dentists, hospitals, and veterinarians who are engaged in selling tangible personal property as received from others, such as eyeglasses, mouthwashes, dentifrices, or similar articles, are vendors. Veterinarians who are engaged in transferring to others for a consideration drugs, the dispensing of which does not require an order of a licensed veterinarian or physician under federal law, are vendors.

(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.

(2) Physicians, dentists, hospitals, and blood banks operated by nonprofit institutions and persons licensed to practice veterinary medicine, surgery, and dentistry are consumers of all tangible personal property and services purchased by them in connection with the practice of medicine, dentistry, the rendition of hospital or blood bank service, or the practice of veterinary medicine, surgery, and dentistry. In addition to being consumers of drugs administered by them or by their assistants according to their direction, veterinarians also are consumers of drugs that under federal law may be dispensed only by or upon the order of a licensed veterinarian or physician, when transferred by them to others for a consideration to provide treatment to animals as directed by the veterinarian.

(3) A person who performs a facility management, or similar service contract for a contractee is a consumer of all tangible personal property and services purchased for use in connection with the performance of such contract, regardless of whether title to any such property vests in the contractee. The purchase of such property and services is not subject to the exception for resale under division (E)(1) of this section.

(4)(a) In the case of a person who purchases printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of that printed matter, and the purchase of that printed matter for that purpose is a sale.

(b) In the case of a person who produces, rather than purchases, printed matter for the purpose of distributing it or having it distributed to the public or to a designated segment of the public, free of charge, that person is the consumer of all tangible personal property and services purchased for use or consumption in the production of that printed matter. That person is not entitled to claim exemption under division (B)(42)(f) of section 5739.02 of the Revised Code for any material incorporated into the printed matter or any equipment, supplies, or services primarily used to produce the printed matter.

(c) The distribution of printed matter to the public or to a designated segment of the public, free of charge, is not a sale to the members of the public to whom the printed matter is distributed or to any persons who purchase space in the printed matter for advertising or other purposes.

(5) A person who makes sales of any of the services listed in division (B)(3) of this section is the consumer of any tangible personal property used in performing the service. The purchase of that property is not subject to the resale exception under division (E)(1) of this section.

(6) A person who engages in highway transportation for hire is the consumer of all packaging materials purchased by that person and used in performing the service, except for packaging materials sold by such person in a transaction separate from the service.

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(7) In the case of a transaction for health care services under division (B)(11) of this section, a medicaid health insuring corporation is the consumer of such services. The purchase of such services by a medicaid health insuring corporation is not subject to the exception for resale under division (E)(1) of this section or to the exemptions provided under divisions (B)(12), (18), (19), and (22) of section 5739.02 of the Revised Code.

(E) “Retail sale” and “sales at retail” 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.

(F) “Business” includes any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect. “Business” does not include the activity of a person in managing and investing the person's own funds.

(G) “Engaging in business” means commencing, conducting, or continuing in business, and liquidating a business when the liquidator thereof holds itself out to the public as conducting such business. Making a casual sale is not engaging in business.

(H)(1)(a) “Price,” except as provided in divisions (H)(2), (3), and (4) of this section, means the total amount of consideration, including cash, credit, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, whether received in money or otherwise, without any deduction for any of the following:

(i) The vendor's cost of the property sold;

(ii) The cost of materials used, labor or service costs, interest, losses, all costs of transportation to the vendor, all taxes imposed on the vendor, including the tax imposed under Chapter 5751. of the Revised Code, and any other expense of the vendor;

(iii) Charges by the vendor for any services necessary to complete the sale;

(iv) On and after August 1, 2003, delivery charges. As used in this division, “delivery charges” means charges by the vendor for preparation and delivery to a location designated by the consumer of tangible personal property or a service, including transportation, shipping, postage, handling, crating, and packing.

(v) Installation charges;

(vi) Credit for any trade-in.

(b) “Price” includes consideration received by the vendor from a third party, if the vendor actually receives the consideration from a party other than the consumer, and the consideration is directly related to a price reduction or discount on the sale; the vendor has an obligation to pass the price reduction or discount through to the consumer; the amount of the consideration attributable to the sale is fixed and determinable by the vendor at the time of the sale of the item to the consumer; and one of the following criteria is met:

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(i) The consumer presents a coupon, certificate, or other document to the vendor to claim a price reduction or discount where the coupon, certificate, or document is authorized, distributed, or granted by a third party with the understanding that the third party will reimburse any vendor to whom the coupon, certificate, or document is presented;

(ii) The consumer identifies the consumer's self to the seller as a member of a group or organization entitled to a price reduction or discount. A preferred customer card that is available to any patron does not constitute membership in such a group or organization.

(iii) The price reduction or discount is identified as a third party price reduction or discount on the invoice received by the consumer, or on a coupon, certificate, or other document presented by the consumer.

(c) “Price” does not include any of the following:

(i) Discounts, including cash, term, or coupons that are not reimbursed by a third party that are allowed by a vendor and taken by a consumer on a sale;

(ii) Interest, financing, and carrying charges from credit extended on the sale of tangible personal property or services, if the amount is separately stated on the invoice, bill of sale, or similar document given to the purchaser;

(iii) Any taxes legally imposed directly on the consumer that are separately stated on the invoice, bill of sale, or similar document given to the consumer. For the purpose of this division, the tax imposed under Chapter 5751. of the Revised Code is not a tax directly on the consumer, even if the tax or a portion thereof is separately stated.

(iv) Notwithstanding divisions (H)(1)(b)(i) to (iii) of this section, any discount allowed by an automobile manufacturer to its employee, or to the employee of a supplier, on the purchase of a new motor vehicle from a new motor vehicle dealer in this state.

(v) The dollar value of a gift card that is not sold by a vendor or purchased by a consumer and that is redeemed by the consumer in purchasing tangible personal property or services if the vendor is not reimbursed and does not receive compensation from a third party to cover all or part of the gift card value. For the purposes of this division, a gift card is not sold by a vendor or purchased by a consumer if it is distributed pursuant to an awards, loyalty, or promotional program. Past and present purchases of tangible personal property or services by the consumer shall not be treated as consideration exchanged for a gift card.

(2) In the case of a sale of any new motor vehicle by a new motor vehicle dealer, as defined in section 4517.01 of the Revised Code, in which another motor vehicle is accepted by the dealer as part of the consideration received, “price” has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the consumer by the dealer for the motor vehicle received in trade.

(3) In the case of a sale of any watercraft or outboard motor by a watercraft dealer licensed in accordance with section 1547.543 of the Revised Code, in which another watercraft, watercraft and trailer, or outboard motor is accepted by the dealer as part of the consideration received, “price” has the same meaning as in division (H)(1) of this section, reduced by the credit afforded the

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consumer by the dealer for the watercraft, watercraft and trailer, or outboard motor received in trade. As used in this division, “watercraft” includes an outdrive unit attached to the watercraft.

(4) In the case of transactions for health care services under division (B)(11) of this section, “price” means the amount of managed care premiums received each month by a medicaid health insuring corporation.

(I) “Receipts” means the total amount of the prices of the sales of vendors, provided that the dollar value of gift cards distributed pursuant to an awards, loyalty, or promotional program, and cash discounts allowed and taken on sales at the time they are consummated are not included, minus any amount deducted as a bad debt pursuant to section 5739.121 of the Revised Code. “Receipts” does not include the sale price of property returned or services rejected by consumers when the full sale price and tax are refunded either in cash or by credit.

(J) “Place of business” means any location at which a person engages in business.

(K) “Premises” includes any real property or portion thereof upon which any person engages in selling tangible personal property at retail or making retail sales and also includes any real property or portion thereof designated for, or devoted to, use in conjunction with the business engaged in by such person.

(L) “Casual sale” means a sale of an item of tangible personal property that was obtained by the person making the sale, through purchase or otherwise, for the person's own use and was previously subject to any state's taxing jurisdiction on its sale or use, and includes such items acquired for the seller's use that are sold by an auctioneer employed directly by the person for such purpose, provided the location of such sales is not the auctioneer's permanent place of business. As used in this division, “permanent place of business” includes any location where such auctioneer has conducted more than two auctions during the year.

(M) “Hotel” means every establishment kept, used, maintained, advertised, or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether the rooms are in one or several structures, except as otherwise provided in division (G) of section 5739.09 of the Revised Code.

(N) “Transient guests” means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days.

(O) “Making retail sales” means the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated to provide a service or to transfer title to or possession of the item sold. “Making retail sales” does not include the preliminary acts of promoting or soliciting the retail sales, other than the distribution of printed matter which displays or describes and prices the item offered for sale, nor does it include delivery of a predetermined quantity of tangible personal property or transportation of property or personnel to or from a place where a service is performed.

(P) “Used directly in the rendition of a public utility service” means that property that is to be incorporated into and will become a part of the consumer's production, transmission, transportation, or distribution system and that retains its classification as tangible personal property after such incorporation; fuel or power used in the production, transmission, transportation, or distribution system; and tangible personal property used in the repair and maintenance of the production, transmission, transportation, or distribution system, including only such motor vehicles as are specially designed and equipped for such use. Tangible personal property and services used primarily in providing highway transportation for hire are not used directly in

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the rendition of a public utility service. In this definition, “public utility” includes a citizen of the United States holding, and required to hold, a certificate of public convenience and necessity issued under 49 U.S.C. 41102.

(Q) “Refining” means removing or separating a desirable product from raw or contaminated materials by distillation or physical, mechanical, or chemical processes.

(R) “Assembly” and “assembling” mean attaching or fitting together parts to form a product, but do not include packaging a product.

(S) “Manufacturing operation” means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. “Manufacturing operation” does not include packaging.

(T) “Fiscal officer” means, with respect to a regional transit authority, the secretary-treasurer thereof, and with respect to a county that is a transit authority, the fiscal officer of the county transit board if one is appointed pursuant to section 306.03 of the Revised Code or the county auditor if the board of county commissioners operates the county transit system.

(U) “Transit authority” means a regional transit authority created pursuant to section 306.31 of the Revised Code or a county in which a county transit system is created pursuant to section 306.01 of the Revised Code. For the purposes of this chapter, a transit authority must extend to at least the entire area of a single county. A transit authority that includes territory in more than one county must include all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(V) “Legislative authority” means, with respect to a regional transit authority, the board of trustees thereof, and with respect to a county that is a transit authority, the board of county commissioners.

(W) “Territory of the transit authority” means all of the area included within the territorial boundaries of a transit authority as they from time to time exist. Such territorial boundaries must at all times include all the area of a single county or all the area of the most populous county that is a part of such transit authority. County population shall be measured by the most recent census taken by the United States census bureau.

(X) “Providing a service” means providing or furnishing anything described in division (B)(3) of this section for consideration.

(Y)(1)(a) “Automatic data processing” means processing of others' data, including keypunching or similar data entry services together with verification thereof, or providing access to computer equipment for the purpose of processing data.

(b) “Computer services” means providing services consisting of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the sale, lease, or operation of taxable computer equipment or systems.

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

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

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

For transactions occurring on or after the effective date of the amendment of this section by H.B. 157 of the 127th general assembly, December 21, 2007, "electronic information services" does not include electronic publishing as defined in division (LLL) of this section.

(d) "Automatic data processing, computer services, or electronic information services" shall not include personal or professional services.

(2) As used in divisions (B)(3)(e) and (Y)(1) of this section, "personal and professional services" means all services other than automatic data processing, computer services, or electronic information services, including but not limited to:

(a) Accounting and legal services such as advice on tax matters, asset management, budgetary matters, quality control, information security, and auditing and any other situation where the service provider receives data or information and studies, alters, analyzes, interprets, or adjusts such material;

(b) Analyzing business policies and procedures;

(c) Identifying management information needs;

(d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;

(e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management;

(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

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(i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;

(j) Providing debt collection services by any oral, written, graphic, or electronic means.

The services listed in divisions (Y)(2)(a) to (j) of this section are not automatic data processing or computer services.

(Z) "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;

(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

(AA)(1) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. "Telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether the service is referred to as voice-over internet protocol service or is classified by the federal communications commission as enhanced or value-added. "Telecommunications service" does not include any of the following:

(a) Data processing and information services that allow data to be generated, acquired, stored, processed, or retrieved and delivered by an electronic transmission to a consumer where the consumer's primary purpose for the underlying transaction is the processed data or information;

(b) Installation or maintenance of wiring or equipment on a customer's premises;

(c) Tangible personal property;

(d) Advertising, including directory advertising;

(e) Billing and collection services provided to third parties;

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(f) Internet access service;

(g) Radio and television audio and video programming services, regardless of the medium, including the furnishing of transmission, conveyance, and routing of such services by the programming service provider. Radio and television audio and video programming services include, but are not limited to, cable service, as defined in 47 U.S.C. 522(6), and audio and video programming services delivered by commercial mobile radio service providers, as defined in 47 C.F.R. 20.3;

(h) Ancillary service;

(i) Digital products delivered electronically, including software, music, video, reading materials, or ring tones.

(2) “Ancillary service” means a service that is associated with or incidental to the provision of telecommunications service, including conference bridging service, detailed telecommunications billing service, directory assistance, vertical service, and voice mail service. As used in this division:

(a) “Conference bridging service” means an ancillary service that links two or more participants of an audio or video conference call, including providing a telephone number. “Conference bridging service” does not include telecommunications services used to reach the conference bridge.

(b) “Detailed telecommunications billing service” means an ancillary service of separately stating information pertaining to individual calls on a customer's billing statement.

(c) “Directory assistance” means an ancillary service of providing telephone number or address information.

(d) “Vertical service” means an ancillary service that is offered in connection with one or more telecommunications services, which offers advanced calling features that allow customers to identify callers and manage multiple calls and call connections, including conference bridging service.

(e) “Voice mail service” means an ancillary service that enables the customer to store, send, or receive recorded messages. “Voice mail service” does not include any vertical services that the customer may be required to have in order to utilize the voice mail service.

(3) “900 service” means an inbound toll telecommunications service purchased by a subscriber that allows the subscriber's customers to call in to the subscriber's prerecorded announcement or live service, and which is typically marketed under the name “900 service” and any subsequent numbers designated by the federal communications commission. “900 service” does not include the charge for collection services provided by the seller of the telecommunications service to the subscriber, or services or products sold by the subscriber to the subscriber's customer.

(4) “Prepaid calling service” means the right to access exclusively telecommunications services, which must be paid for in advance and which enables the origination of calls using an access number or authorization code, whether manually or electronically dialed, and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

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(5) “Prepaid wireless calling service” means a telecommunications service that provides the right to utilize mobile telecommunications service as well as other non-telecommunications services, including the download of digital products delivered electronically, and content and ancillary services, that must be paid for in advance and that is sold in predetermined units or dollars of which the number declines with use in a known amount.

(6) “Value-added non-voice data service” means a telecommunications service in which computer processing applications are used to act on the form, content, code, or protocol of the information or data primarily for a purpose other than transmission, conveyance, or routing.

(7) “Coin-operated telephone service” means a telecommunications service paid for by inserting money into a telephone accepting direct deposits of money to operate.

(8) “Customer” has the same meaning as in section 5739.034 of the Revised Code.

(BB) “Laundry and dry cleaning services” means removing soil or dirt from towels, linens, articles of clothing, or other fabric items that belong to others and supplying towels, linens, articles of clothing, or other fabric items. “Laundry and dry cleaning services” does not include the provision of self-service facilities for use by consumers to remove soil or dirt from towels, linens, articles of clothing, or other fabric items.

(CC) “Magazines distributed as controlled circulation publications” means magazines containing at least twenty-four pages, at least twenty-five per cent editorial content, issued at regular intervals four or more times a year, and circulated without charge to the recipient, provided that such magazines are not owned or controlled by individuals or business concerns which conduct such publications as an auxiliary to, and essentially for the advancement of the main business or calling of, those who own or control them.

(DD) “Landscaping and lawn care service” means the services of planting, seeding, sodding, removing, cutting, trimming, pruning, mulching, aerating, applying chemicals, watering, fertilizing, and providing similar services to establish, promote, or control the growth of trees, shrubs, flowers, grass, ground cover, and other flora, or otherwise maintaining a lawn or landscape grown or maintained by the owner for ornamentation or other nonagricultural purpose. However, “landscaping and lawn care service” does not include the providing of such services by a person who has less than five thousand dollars in sales of such services during the calendar year.

(EE) “Private investigation and security service” means the performance of any activity for which the provider of such service is required to be licensed pursuant to Chapter 4749. of the Revised Code, or would be required to be so licensed in performing such services in this state, and also includes the services of conducting polygraph examinations and of monitoring or overseeing the activities on or in, or the condition of, the consumer's home, business, or other facility by means of electronic or similar monitoring devices. “Private investigation and security service” does not include special duty services provided by off-duty police officers, deputy sheriffs, and other peace officers regularly employed by the state or a political subdivision.

(FF) “Information services” means providing conversation, giving consultation or advice, playing or making a voice or other recording, making or keeping a record of the number of callers, and any other service provided to a consumer by means of a nine

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hundred telephone call, except when the nine hundred telephone call is the means by which the consumer makes a contribution to a recognized charity.

(GG) “Research and development” means designing, creating, or formulating new or enhanced products, equipment, or manufacturing processes, and also means conducting scientific or technological inquiry and experimentation in the physical sciences with the goal of increasing scientific knowledge which may reveal the bases for new or enhanced products, equipment, or manufacturing processes.

(HH) “Qualified research and development equipment” means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 of the Revised Code, or used for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

(II) “Building maintenance and janitorial service” means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, “building maintenance and janitorial service” does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.

(JJ) “Employment service” means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so provided or supplied receive their wages, salary, or other compensation from the provider or supplier of the employment service or from a third party that provided or supplied the personnel to the provider or supplier. “Employment service” does not include:

(1) Acting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser.

(2) Medical and health care services.

(3) Supplying personnel to a purchaser pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.

(4) Transactions between members of an affiliated group, as defined in division (B)(3)(e) of this section.

(5) Transactions where the personnel so provided or supplied by a provider or supplier to a purchaser of an employment service are then provided or supplied by that purchaser to a third party as an employment service, except “employment service” does include the transaction between that purchaser and the third party.

(KK) “Employment placement service” means locating or finding employment for a person or finding or locating an employee to fill an available position.

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(LL) “Exterminating service” means eradicating or attempting to eradicate vermin infestations from a building or structure, or the area surrounding a building or structure, and includes activities to inspect, detect, or prevent vermin infestation of a building or structure.

(MM) “Physical fitness facility service” means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a physical fitness facility such as an athletic club, health spa, or gymnasium, which entitles the member to use the facility for physical exercise.

(NN) “Recreation and sports club service” means all transactions by which a membership is granted, maintained, or renewed, including initiation fees, membership dues, renewal fees, monthly minimum fees, and other similar fees and dues, by a recreation and sports club, which entitles the member to use the facilities of the organization. “Recreation and sports club” means an organization that has ownership of, or controls or leases on a continuing, long-term basis, the facilities used by its members and includes an aviation club, gun or shooting club, yacht club, card club, swimming club, tennis club, golf club, country club, riding club, amateur sports club, or similar organization.

(OO) “Livestock” means farm animals commonly raised for food, food production, or other agricultural purposes, including, but not limited to, cattle, sheep, goats, swine, poultry, and captive deer. “Livestock” does not include invertebrates, amphibians, reptiles, domestic pets, animals for use in laboratories or for exhibition, or other animals not commonly raised for food or food production.

(PP) “Livestock structure” means a building or structure used exclusively for the housing, raising, feeding, or sheltering of livestock, and includes feed storage or handling structures and structures for livestock waste handling.

(QQ) “Horticulture” means the growing, cultivation, and production of flowers, fruits, herbs, vegetables, sod, mushrooms, and nursery stock. As used in this division, “nursery stock” has the same meaning as in section 927.51 of the Revised Code.

(RR) “Horticulture structure” means a building or structure used exclusively for the commercial growing, raising, or overwintering of horticultural products, and includes the area used for stocking, storing, and packing horticultural products when done in conjunction with the production of those products.

(SS) “Newspaper” means an unbound publication bearing a title or name that is regularly published, at least as frequently as biweekly, and distributed from a fixed place of business to the public in a specific geographic area, and that contains a substantial amount of news matter of international, national, or local events of interest to the general public.

(TT) “Professional racing team” means a person that employs at least twenty full-time employees for the purpose of conducting a motor vehicle racing business for profit. The person must conduct the business with the purpose of racing one or more motor racing vehicles in at least ten competitive professional racing events each year that comprise all or part of a motor racing series sanctioned by one or more motor racing sanctioning organizations. A “motor racing vehicle” means a vehicle for which the chassis, engine, and parts are designed exclusively for motor racing, and does not include a stock or production model vehicle that may be modified for use in racing. For the purposes of this division:

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(1) A "competitive professional racing event" is a motor vehicle racing event sanctioned by one or more motor racing sanctioning organizations, at which aggregate cash prizes in excess of eight hundred thousand dollars are awarded to the competitors.

(2) "Full-time employee" means an individual who is employed for consideration for thirty-five or more hours a week, or who renders any other standard of service generally accepted by custom or specified by contract as full-time employment.

(UU)(1) "Lease" or "rental" means any transfer of the possession or control of tangible personal property for a fixed or indefinite term, for consideration. "Lease" or "rental" includes future options to purchase or extend, and agreements described in 26 U.S.C. 7701(h)(1) covering motor vehicles and trailers where the amount of consideration may be increased or decreased by reference to the amount realized upon the sale or disposition of the property. "Lease" or "rental" does not include:

(a) A transfer of possession or control of tangible personal property under a security agreement or a deferred payment plan that requires the transfer of title upon completion of the required payments;

(b) A transfer of possession or control of tangible personal property under an agreement that requires the transfer of title upon completion of required payments and payment of an option price that does not exceed the greater of one hundred dollars or one per cent of the total required payments;

(c) Providing tangible personal property along with an operator for a fixed or indefinite period of time, if the operator is necessary for the property to perform as designed. For purposes of this division, the operator must do more than maintain, inspect, or set up the tangible personal property.

(2) "Lease" and "rental," as defined in division (UU) of this section, shall not apply to leases or rentals that exist before June 26, 2003.

(3) "Lease" and "rental" have the same meaning as in division (UU)(1) of this section regardless of whether a transaction is characterized as a lease or rental under generally accepted accounting principles, the Internal Revenue Code, Title XIII of the Revised Code, or other federal, state, or local laws.

(VV) "Mobile telecommunications service" has the same meaning as in the "Mobile Telecommunications Sourcing Act," Pub. L. No. 106-252, 114 Stat. 631 (2000), 4 U.S.C.A. 124(7), as amended, and, on and after August 1, 2003, includes related fees and ancillary services, including universal service fees, detailed billing service, directory assistance, service initiation, voice mail service, and vertical services, such as caller ID and three-way calling.

(WW) "Certified service provider" has the same meaning as in section 5740.01 of the Revised Code.

(XX) "Satellite broadcasting service" means the distribution or broadcasting of programming or services by satellite directly to the subscriber's receiving equipment without the use of ground receiving or distribution equipment, except the subscriber's receiving equipment or equipment used in the uplink process to the satellite, and includes all service and rental charges, premium channels or other special services, installation and repair service charges, and any other charges having any connection with the provision of the satellite broadcasting service.

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(YY) “Tangible personal property” means personal property that can be seen, weighed, measured, felt, or touched, or that is in any other manner perceptible to the senses. For purposes of this chapter and Chapter 5741. of the Revised Code, “tangible personal property” includes motor vehicles, electricity, water, gas, steam, and prewritten computer software.

(ZZ) “Direct mail” means printed material delivered or distributed by United States mail or other delivery service to a mass audience or to addressees on a mailing list provided by the consumer or at the direction of the consumer when the cost of the items are not billed directly to the recipients. “Direct mail” includes tangible personal property supplied directly or indirectly by the consumer to the direct mail vendor for inclusion in the package containing the printed material. “Direct mail” does not include multiple items of printed material delivered to a single address.

(AAA) “Computer” means an electronic device that accepts information in digital or similar form and manipulates it for a result based on a sequence of instructions.

(BBB) “Computer software” means a set of coded instructions designed to cause a computer or automatic data processing equipment to perform a task.

(CCC) “Delivered electronically” means delivery of computer software from the seller to the purchaser by means other than tangible storage media.

(DDD) “Prewritten computer software” means computer software, including prewritten upgrades, that is not designed and developed by the author or other creator to the specifications of a specific purchaser. The combining of two or more prewritten computer software programs or prewritten portions thereof does not cause the combination to be other than prewritten computer software. “Prewritten computer software” includes software designed and developed by the author or other creator to the specifications of a specific purchaser when it is sold to a person other than the purchaser. If a person modifies or enhances computer software of which the person is not the author or creator, the person shall be deemed to be the author or creator only of such person's modifications or enhancements. Prewritten computer software or a prewritten portion thereof that is modified or enhanced to any degree, where such modification or enhancement is designed and developed to the specifications of a specific purchaser, remains prewritten computer software; provided, however, that where there is a reasonable, separately stated charge or an invoice or other statement of the price given to the purchaser for the modification or enhancement, the modification or enhancement shall not constitute prewritten computer software.

(EEE)(1) “Food” means substances, whether in liquid, concentrated, solid, frozen, dried, or dehydrated form, that are sold for ingestion or chewing by humans and are consumed for their taste or nutritional value. “Food” does not include alcoholic beverages, dietary supplements, soft drinks, or tobacco.

(2) As used in division (EEE)(1) of this section:

(a) “Alcoholic beverages” means beverages that are suitable for human consumption and contain one-half of one per cent or more of alcohol by volume.

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(b) “Dietary supplements” means any product, other than tobacco, that is intended to supplement the diet and that is intended for ingestion in tablet, capsule, powder, softgel, gelcap, or liquid form, or, if not intended for ingestion in such a form, is not represented as conventional food for use as a sole item of a meal or of the diet; that is required to be labeled as a dietary supplement, identifiable by the “supplement facts” box found on the label, as required by 21 C.F.R. 101.36; and that contains one or more of the following dietary ingredients:

(i) A vitamin;

(ii) A mineral;

(iii) An herb or other botanical;

(iv) An amino acid;

(v) A dietary substance for use by humans to supplement the diet by increasing the total dietary intake;

(vi) A concentrate, metabolite, constituent, extract, or combination of any ingredient described in divisions (EEE)(2)(b)(i) to (v) of this section.

(c) “Soft drinks” means nonalcoholic beverages that contain natural or artificial sweeteners. “Soft drinks” does not include beverages that contain milk or milk products, soy, rice, or similar milk substitutes, or that contains greater than fifty per cent vegetable or fruit juice by volume.

(d) “Tobacco” means cigarettes, cigars, chewing or pipe tobacco, or any other item that contains tobacco.

(FFF) “Drug” means a compound, substance, or preparation, and any component of a compound, substance, or preparation, other than food, dietary supplements, or alcoholic beverages that is recognized in the official United States pharmacopoeia, official homeopathic pharmacopoeia of the United States, or official national formulary, and supplements to them; is intended for use in the diagnosis, cure, mitigation, treatment, or prevention of disease; or is intended to affect the structure or any function of the body.

(GGG) “Prescription” means an order, formula, or recipe issued in any form of oral, written, electronic, or other means of transmission by a duly licensed practitioner authorized by the laws of this state to issue a prescription.

(HHH) “Durable medical equipment” means equipment, including repair and replacement parts for such equipment, that can withstand repeated use, is primarily and customarily used to serve a medical purpose, generally is not useful to a person in the absence of illness or injury, and is not worn in or on the body. “Durable medical equipment” does not include mobility enhancing equipment.

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(III) “Mobility enhancing equipment” means equipment, including repair and replacement parts for such equipment, that is primarily and customarily used to provide or increase the ability to move from one place to another and is appropriate for use either in a home or a motor vehicle, that is not generally used by persons with normal mobility, and that does not include any motor vehicle or equipment on a motor vehicle normally provided by a motor vehicle manufacturer. “Mobility enhancing equipment” does not include durable medical equipment.

(JJJ) “Prosthetic device” means a replacement, corrective, or supportive device, including repair and replacement parts for the device, worn on or in the human body to artificially replace a missing portion of the body, prevent or correct physical deformity or malfunction, or support a weak or deformed portion of the body. As used in this division, “prosthetic device” does not include corrective eyeglasses, contact lenses, or dental prosthesis.

(KKK)(1) “Fractional aircraft ownership program” means a program in which persons within an affiliated group sell and manage fractional ownership program aircraft, provided that at least one hundred airworthy aircraft are operated in the program and the program meets all of the following criteria:

(a) Management services are provided by at least one program manager within an affiliated group on behalf of the fractional owners.

(b) Each program aircraft is owned or possessed by at least one fractional owner.

(c) Each fractional owner owns or possesses at least a one-sixteenth interest in at least one fixed-wing program aircraft.

(d) A dry-lease aircraft interchange arrangement is in effect among all of the fractional owners.

(e) Multi-year program agreements are in effect regarding the fractional ownership, management services, and dry-lease aircraft interchange arrangement aspects of the program.

(2) As used in division (KKK)(1) of this section:

(a) “Affiliated group” has the same meaning as in division (B)(3)(e) of this section.

(b) “Fractional owner” means a person that owns or possesses at least a one-sixteenth interest in a program aircraft and has entered into the agreements described in division (KKK)(1)(e) of this section.

(c) “Fractional ownership program aircraft” or “program aircraft” means a turbojet aircraft that is owned or possessed by a fractional owner and that has been included in a dry-lease aircraft interchange arrangement and agreement under divisions (KKK)(1)(d) and (e) of this section, or an aircraft a program manager owns or possesses primarily for use in a fractional aircraft ownership program.

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(d) "Management services" means administrative and aviation support services furnished under a fractional aircraft ownership program in accordance with a management services agreement under division (KKK)(1)(e) of this section, and offered by the program manager to the fractional owners, including, at a minimum, the establishment and implementation of safety guidelines; the coordination of the scheduling of the program aircraft and crews; program aircraft maintenance; program aircraft insurance; crew training for crews employed, furnished, or contracted by the program manager or the fractional owner; the satisfaction of record-keeping requirements; and the development and use of an operations manual and a maintenance manual for the fractional aircraft ownership program.

(e) "Program manager" means the person that offers management services to fractional owners pursuant to a management services agreement under division (KKK)(1)(e) of this section.

(LLL) "Electronic publishing" means providing access to one or more of the following primarily for business customers, including the federal government or a state government or a political subdivision thereof, to conduct research: news; business, financial, legal, consumer, or credit materials; editorials, columns, reader commentary, or features; photos or images; archival or research material; legal notices, identity verification, or public records; scientific, educational, instructional, technical, professional, trade, or other literary materials; or other similar information which has been gathered and made available by the provider to the consumer in an electronic format. Providing electronic publishing includes the functions necessary for the acquisition, formatting, editing, storage, and dissemination of data or information that is the subject of a sale.

(MMM) "Medicaid health insuring corporation" means a health insuring corporation that holds a certificate of authority under Chapter 1751. of the Revised Code and is under contract with the department of job and family services pursuant to section 5111.17 of the Revised Code.

(NNN) "Managed care premium" means any premium, capitation, or other payment a medicaid health insuring corporation receives for providing or arranging for the provision of health care services to its members or enrollees residing in this state.

(OOO) "Captive deer" means deer and other cervidae that have been legally acquired, or their offspring, that are privately owned for agricultural or farming purposes.

(PPP) "Gift card" means a document, card, certificate, or other record, whether tangible or intangible, that may be redeemed by a consumer for a dollar value when making a purchase of tangible personal property or services.

(QQQ) "Specified digital product" means an electronically transferred digital audiovisual work, digital audio work, or digital book.

As used in division (QQQ) of this section:

(1) "Digital audiovisual work" means a series of related images that, when shown in succession, impart an impression of motion, together with accompanying sounds, if any.

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(2) "Digital audio work" means a work that results from the fixation of a series of musical, spoken, or other sounds, including digitized sound files that are downloaded onto a device and that may be used to alert the customer with respect to a communication.

(3) "Digital book" means a work that is generally recognized in the ordinary and usual sense as a book.

(4) "Electronically transferred" means obtained by the purchaser by means other than tangible storage media.

CREDIT(S)

(2013 H 59, eff. 9-29-13; 2012 H 487, eff. 9-10-12; 2012 H 508, eff. 9-6-12; 2011 H 153, eff. 9-29-11; 2009 H 1, eff. 7-17-09; 2008 H 562, eff. 9-23-08; 2007 H 157, eff. 12-21-07; 2006 H 699, eff. 3-29-07; 2006 H 293, eff. 1-1-07; 2005 H 66, eff. 1-1-06; 2005 S 26, eff. 6-2-05; 2003 S 37, eff. 10-21-03; 2003 H 95, eff. 9-26-03; 2002 S 200, eff. 9-6-02; 2002 H 524, eff. 6-28-02; 2002 S 143, eff. 6-21-02; 2001 H 405, eff. 12-13-01; 2001 H 94, eff. 9-5-01; 2000 H 612, eff. 9-29-00; 1998 S 173, eff. 1-1-00; 1997 H 215, eff. 9-29-97; 1996 S 266, eff. 11-20-96; 1995 H 61, eff. 10-25-95; 1994 H 715, eff. 4-22-94; 1994 H 632, eff. 7-22-94; 1993 H 152, eff. 7-1-93; 1993 S 122; 1992 H 904, H 791, S 361; 1991 H 298; 1990 H 365, H 531; 1989 H 111; 1988 S 386, H 689; 1987 S 92, H 171, H 274, H 159; 1986 H 54; 1985 H 335; 1984 S 112, H 794; 1983 H 291; 1982 S 530, § 1, 28; 1981 H 671, § 1, 3, H 552, § 1, 25, H 694, § 1, 205, H 275; 1980 H 1032; 1979 H 904, S 16; 1977 H 1; 1976 H 1005, H 1347; 1975 H 1; 1974 S 244, S 544; 1973 S 161, S 241; 132 v S 350, H 919; 129 v 582, 1164; 128 v 421, 1303; 126 v 157; 125 v 305; 1953 H 1; GC 5546-1)

Notes of Decisions (1465)

R.C. § 5739.01, OH ST § 5739.01
Current through Files 1 to 146, 148 to 190, 192 to 195 and Statewide Issue 1 of the 130th GA (2013-2014).

End of Document

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HB699 CAPITAL APPROPRIATIONS (CALVERT, C) To make capital and other appropriations and to provide authorization and conditions for the operation of state programs.

This Act had been signed by the Governor. Page numbers will not correspond with the final printed version, but the languages remain the same.

Passed : December 19, 2006

Signed by the Governor: December 28, 2006

Effective: December 28, 2006

126th General Assembly

House Bill Number 699

An Act

Representatives: Calvert, Peterson, Flowers, McGregor, J., Hartnett, Chandler, Stewart, D., Skindell, Patton, S., Ujvagi, Carmichael, Collier, Combs, Core, Evans, C., Evans, D., Faber, Fende, Hagan, Koziura, Law, Mitchell, Reinhard, Schaffer, Seaver, Seitz, Setzer, White, J., Woodard

Senators: Carey, Stivers, Niehaus, Clancy, Kearney, Armbruster, Coughlin, Fingerhut, Gardner, Goodman, Hagan, Hottinger, Mumper, Spada, Padgett, Fedor, Wilson, Zurz, Jacobson, Miller, R., Roberts

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A BILL

To amend sections 3.21, 3.23, 5.10, 9.37, 101.34, 1
101.72, 101.83, 101.92, 107.40, 121.62, 122.17, 2
122.171, 126.11, 131.02, 133.021, 133.07, 133.08, 3
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154.20, 169.13, 176.05, 307.695, 333.02, 333.04, 6
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1702.01, 1702.08, 1702.11, 1702.17, 1702.19, 8
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5739.01, 5739.09, 5741.101, 5747.39, 5748.01, 25
5751.01, 5751.011, 5751.033, 5910.03, and 5919.31; 26
to enact sections 121.482, 184.191, 3333.34, 27
5533.75, 5709.083, 5713.051, 5748.021, and 28
5748.081 of the Revised Code; to amend Section 29
206.09.84 of Am. Sub. H.B. 66 of the 126th General 30
Assembly, as subsequently amended, and to amend 31
Section 206.09.84 of Am. Sub. H.B. 66 of the 126th 32
General Assembly, for the purpose of codifying it 33
as section 3310.41 of the Revised Code; to amend 34
Section 22.07 of Am. Sub. H.B. 16 of the 126th 35
General Assembly; to amend Sections 203.12.06, 36
203.24, 203.57, 203.81, 206.33, 206.66.06, 209.54, 37
209.63.03, 209.63.30, and 209.93 of Am. Sub. H.B. 38
66 of the 126th General Assembly; to amend 39
Sections 203.27, 203.99, 209.63, and 212.30 of Am. 40
Sub. H.B. 66 of the 126th General Assembly, as 41
subsequently amended; to amend Sections 243.10 and 42
287.20 of Am. Sub. H.B. 530 of the 126th General 43

Assembly; to amend Section 10 of Am. Sub. S.B. 250 44
of the 123rd General Assembly; to repeal Section 4 45
of Sub. H.B. 139 of the 126th General Assembly; 46
and to amend the version of section 5502.62 of the 47
Revised Code that is scheduled to take effect 48
April 1, 2007, to make capital and other 49
appropriations and to provide authorization and 50
conditions for the operation of state programs. 51

BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF OHIO:

* * * *

* * * *

Sec. 5739.01. As used in this chapter: 12556

(A) "Person" includes individuals, receivers, assignees, 12557

trustees in bankruptcy, estates, firms, partnerships, 12558
associations, joint-stock companies, joint ventures, clubs, 12559
societies, corporations, the state and its political subdivisions, 12560
and combinations of individuals of any form. 12561

(B) "Sale" and "selling" include all of the following 12562
transactions for a consideration in any manner, whether absolutely 12563
or conditionally, whether for a price or rental, in money or by 12564
exchange, and by any means whatsoever: 12565

(1) All transactions by which title or possession, or both, 12566
of tangible personal property, is or is to be transferred, or a 12567
license to use or consume tangible personal property is or is to 12568
be granted; 12569

(2) All transactions by which lodging by a hotel is or is to 12570
be furnished to transient guests; 12571

(3) All transactions by which: 12572

(a) An item of tangible personal property is or is to be 12573
repaired, except property, the purchase of which would not be 12574
subject to the tax imposed by section 5739.02 of the Revised Code; 12575

(b) An item of tangible personal property is or is to be 12576
installed, except property, the purchase of which would not be 12577
subject to the tax imposed by section 5739.02 of the Revised Code 12578
or property that is or is to be incorporated into and will become 12579
a part of a production, transmission, transportation, or 12580
distribution system for the delivery of a public utility service; 12581

(c) The service of washing, cleaning, waxing, polishing, or 12582
painting a motor vehicle is or is to be furnished; 12583

(d) Until August 1, 2003, industrial laundry cleaning 12584
services are or are to be provided and, on and after August 1, 12585

2003, laundry and dry cleaning services are or are to be provided; 12586

(e) Automatic data processing, computer services, or 12587
electronic information services are or are to be provided for use 12588
in business when the true object of the transaction is the receipt 12589
by the consumer of automatic data processing, computer services, 12590
or electronic information services rather than the receipt of 12591
personal or professional services to which automatic data 12592
processing, computer services, or electronic information services 12593
are incidental or supplemental. Notwithstanding any other 12594
provision of this chapter, such transactions that occur between 12595
members of an affiliated group are not sales. An affiliated group 12596
means two or more persons related in such a way that one person 12597
owns or controls the business operation of another member of the 12598
group. In the case of corporations with stock, one corporation 12599
owns or controls another if it owns more than fifty per cent of 12600
the other corporation's common stock with voting rights. 12601

(f) Telecommunications service, including prepaid calling 12602
service, prepaid wireless calling service, or ancillary service, 12603
is or is to be provided, but not including coin-operated telephone 12604
service; 12605

(g) Landscaping and lawn care service is or is to be 12606
provided; 12607

(h) Private investigation and security service is or is to be 12608
provided; 12609

(i) Information services or tangible personal property is 12610
provided or ordered by means of a nine hundred telephone call; 12611

(j) Building maintenance and janitorial service is or is to 12612
be provided; 12613

(k) Employment service is or is to be provided; 12614

(l) Employment placement service is or is to be provided; 12615

(m) Exterminating service is or is to be provided; 12616

(n) Physical fitness facility service is or is to be 12617
provided; 12618

(o) Recreation and sports club service is or is to be 12619
provided~~.~~; 12620

(p) On and after August 1, 2003, satellite broadcasting 12621
service is or is to be provided; 12622

(q) On and after August 1, 2003, personal care service is or 12623
is to be provided to an individual. As used in this division, 12624
"personal care service" includes skin care, the application of 12625
cosmetics, manicuring, pedicuring, hair removal, tattooing, body 12626
piercing, tanning, massage, and other similar services. "Personal 12627
care service" does not include a service provided by or on the 12628
order of a licensed physician or licensed chiropractor, or the 12629
cutting, coloring, or styling of an individual's hair. 12630

(r) On and after August 1, 2003, the transportation of 12631
persons by motor vehicle or aircraft is or is to be provided, when 12632
the transportation is entirely within this state, except for 12633
transportation provided by an ambulance service, by a transit bus, 12634
as defined in section 5735.01 of the Revised Code, and 12635
transportation provided by a citizen of the United States holding 12636
a certificate of public convenience and necessity issued under 49 12637
U.S.C. 41102; 12638

(s) On and after August 1, 2003, motor vehicle towing service 12639
is or is to be provided. As used in this division, "motor vehicle 12640
towing service" means the towing or conveyance of a wrecked, 12641
disabled, or illegally parked motor vehicle. 12642

(t) On and after August 1, 2003, snow removal service is or 12643
is to be provided. As used in this division, "snow removal 12644
service" means the removal of snow by any mechanized means, but 12645
does not include the providing of such service by a person that 12646
has less than five thousand dollars in sales of such service 12647
during the calendar year. 12648

(4) All transactions by which printed, imprinted, 12649
overprinted, lithographic, multilithic, blueprinted, photostatic, 12650
or other productions or reproductions of written or graphic matter 12651
are or are to be furnished or transferred; 12652

(5) The production or fabrication of tangible personal 12653
property for a consideration for consumers who furnish either 12654
directly or indirectly the materials used in the production of 12655
fabrication work; and include the furnishing, preparing, or 12656
serving for a consideration of any tangible personal property 12657
consumed on the premises of the person furnishing, preparing, or 12658
serving such tangible personal property. Except as provided in 12659
section 5739.03 of the Revised Code, a construction contract 12660
pursuant to which tangible personal property is or is to be 12661
incorporated into a structure or improvement on and becoming a 12662
part of real property is not a sale of such tangible personal 12663
property. The construction contractor is the consumer of such 12664
tangible personal property, provided that the sale and 12665
installation of carpeting, the sale and installation of 12666
agricultural land tile, the sale and erection or installation of 12667
portable grain bins, or the provision of landscaping and lawn care 12668
service and the transfer of property as part of such service is 12669
never a construction contract. 12670

As used in division (B)(5) of this section: 12671

(a) "Agricultural land tile" means fired clay or concrete 12672
tile, or flexible or rigid perforated plastic pipe or tubing, 12673

incorporated or to be incorporated into a subsurface drainage 12674
system appurtenant to land used or to be used directly in 12675
production by farming, agriculture, horticulture, or floriculture. 12676
The term does not include such materials when they are or are to 12677
be incorporated into a drainage system appurtenant to a building 12678
or structure even if the building or structure is used or to be 12679
used in such production. 12680

(b) "Portable grain bin" means a structure that is used or to 12681
be used by a person engaged in farming or agriculture to shelter 12682
the person's grain and that is designed to be disassembled without 12683
significant damage to its component parts. 12684

(6) All transactions in which all of the shares of stock of a 12685
closely held corporation are transferred, if the corporation is 12686
not engaging in business and its entire assets consist of boats, 12687
planes, motor vehicles, or other tangible personal property 12688
operated primarily for the use and enjoyment of the shareholders; 12689

(7) All transactions in which a warranty, maintenance or 12690
service contract, or similar agreement by which the vendor of the 12691
warranty, contract, or agreement agrees to repair or maintain the 12692
tangible personal property of the consumer is or is to be 12693
provided; 12694

(8) The transfer of copyrighted motion picture films used 12695
solely for advertising purposes, except that the transfer of such 12696
films for exhibition purposes is not a sale. 12697

(9) On and after August 1, 2003, all transactions by which 12698
tangible personal property is or is to be stored, except such 12699
property that the consumer of the storage holds for sale in the 12700
regular course of business. 12701

Except as provided in this section, "sale" and "selling" do 12702
not include transfers of interest in leased property where the 12703

original lessee and the terms of the original lease agreement 12704
remain unchanged, or professional, insurance, or personal service 12705
transactions that involve the transfer of tangible personal 12706
property as an inconsequential element, for which no separate 12707
charges are made. 12708

(C) "Vendor" means the person providing the service or by 12709
whom the transfer effected or license given by a sale is or is to 12710
be made or given and, for sales described in division (B)(3)(i) of 12711
this section, the telecommunications service vendor that provides 12712
the nine hundred telephone service; if two or more persons are 12713
engaged in business at the same place of business under a single 12714
trade name in which all collections on account of sales by each 12715
are made, such persons shall constitute a single vendor. 12716

Physicians, dentists, hospitals, and veterinarians who are 12717
engaged in selling tangible personal property as received from 12718
others, such as eyeglasses, mouthwashes, dentifrices, or similar 12719
articles, are vendors. Veterinarians who are engaged in 12720
transferring to others for a consideration drugs, the dispensing 12721
of which does not require an order of a licensed veterinarian or 12722
physician under federal law, are vendors. 12723

(D)(1) "Consumer" means the person for whom the service is 12724
provided, to whom the transfer effected or license given by a sale 12725
is or is to be made or given, to whom the service described in 12726
division (B)(3)(f) or (i) of this section is charged, or to whom 12727
the admission is granted. 12728

(2) Physicians, dentists, hospitals, and blood banks operated 12729
by nonprofit institutions and persons licensed to practice 12730
veterinary medicine, surgery, and dentistry are consumers of all 12731
tangible personal property and services purchased by them in 12732
connection with the practice of medicine, dentistry, the rendition 12733
of hospital or blood bank service, or the practice of veterinary 12734
medicine, surgery, and dentistry. In addition to being consumers 12735

of drugs administered by them or by their assistants according to 12736
their direction, veterinarians also are consumers of drugs that 12737
under federal law may be dispensed only by or upon the order of a 12738
licensed veterinarian or physician, when transferred by them to 12739
others for a consideration to provide treatment to animals as 12740
directed by the veterinarian. 12741

(3) A person who performs a facility management, or similar 12742
service contract for a contractee is a consumer of all tangible 12743
personal property and services purchased for use in connection 12744
with the performance of such contract, regardless of whether title 12745
to any such property vests in the contractee. The purchase of such 12746
property and services is not subject to the exception for resale 12747
under division (E)(1) of this section. 12748

(4)(a) In the case of a person who purchases printed matter 12749
for the purpose of distributing it or having it distributed to the 12750
public or to a designated segment of the public, free of charge, 12751
that person is the consumer of that printed matter, and the 12752
purchase of that printed matter for that purpose is a sale. 12753

(b) In the case of a person who produces, rather than 12754
purchases, printed matter for the purpose of distributing it or 12755
having it distributed to the public or to a designated segment of 12756
the public, free of charge, that person is the consumer of all 12757
tangible personal property and services purchased for use or 12758
consumption in the production of that printed matter. That person 12759
is not entitled to claim exemption under division (B)(42)(f) of 12760
section 5739.02 of the Revised Code for any material incorporated 12761
into the printed matter or any equipment, supplies, or services 12762
primarily used to produce the printed matter. 12763

(c) The distribution of printed matter to the public or to a 12764
designated segment of the public, free of charge, is not a sale to 12765
the members of the public to whom the printed matter is 12766
distributed or to any persons who purchase space in the printed 12767

matter for advertising or other purposes. 12768

(5) A person who makes sales of any of the services listed in 12769
division (B)(3) of this section is the consumer of any tangible 12770
personal property used in performing the service. The purchase of 12771
that property is not subject to the resale exception under 12772
division (E)(1) of this section. 12773

(6) A person who engages in highway transportation for hire 12774
is the consumer of all packaging materials purchased by that 12775
person and used in performing the service, except for packaging 12776
materials sold by such person in a transaction separate from the 12777
service. 12778

(E) "Retail sale" and "sales at retail" include all sales, 12779
except those in which the purpose of the consumer is to resell the 12780
thing transferred or benefit of the service provided, by a person 12781
engaging in business, in the form in which the same is, or is to 12782
be, received by the person. 12783

(F) "Business" includes any activity engaged in by any person 12784
with the object of gain, benefit, or advantage, either direct or 12785
indirect. "Business" does not include the activity of a person in 12786
managing and investing the person's own funds. 12787

(G) "Engaging in business" means commencing, conducting, or 12788
continuing in business, and liquidating a business when the 12789
liquidator thereof holds itself out to the public as conducting 12790
such business. Making a casual sale is not engaging in business. 12791

(H)(1)(a) "Price," except as provided in divisions (H)(2) and 12792
(3) of this section, means the total amount of consideration, 12793
including cash, credit, property, and services, for which tangible 12794
personal property or services are sold, leased, or rented, valued 12795
in money, whether received in money or otherwise, without any 12796
deduction for any of the following: 12797

(i) The vendor's cost of the property sold; 12798

(ii) The cost of materials used, labor or service costs, 12799
interest, losses, all costs of transportation to the vendor, all 12800
taxes imposed on the vendor, including the tax imposed under 12801
Chapter 5751. of the Revised Code, and any other expense of the 12802
vendor; 12803

(iii) Charges by the vendor for any services necessary to 12804
complete the sale; 12805

(iv) On and after August 1, 2003, delivery charges. As used 12806
in this division, "delivery charges" means charges by the vendor 12807
for preparation and delivery to a location designated by the 12808
consumer of tangible personal property or a service, including 12809
transportation, shipping, postage, handling, crating, and packing. 12810

(v) Installation charges; 12811

(vi) Credit for any trade-in. 12812

(b) "Price" includes consideration received by the vendor 12813
from a third party, if the vendor actually receives the 12814
consideration from a party other than the consumer, and the 12815
consideration is directly related to a price reduction or discount 12816
on the sale; the vendor has an obligation to pass the price 12817
reduction or discount through to the consumer; the amount of the 12818
consideration attributable to the sale is fixed and determinable 12819
by the vendor at the time of the sale of the item to the consumer; 12820
and one of the following criteria is met: 12821

(i) The consumer presents a coupon, certificate, or other 12822
document to the vendor to claim a price reduction or discount 12823
where the coupon, certificate, or document is authorized, 12824
distributed, or granted by a third party with the understanding 12825

that the third party will reimburse any vendor to whom the coupon, 12826
certificate, or document is presented; 12827

(ii) The consumer identifies the consumer's self to the 12828
seller as a member of a group or organization entitled to a price 12829
reduction or discount. A preferred customer card that is available 12830
to any patron does not constitute membership in such a group or 12831
organization. 12832

(iii) The price reduction or discount is identified as a 12833
third party price reduction or discount on the invoice received by 12834
the consumer, or on a coupon, certificate, or other document 12835
presented by the consumer. 12836

(c) "Price" does not include any of the following: 12837

(i) Discounts, including cash, term, or coupons that are not 12838
reimbursed by a third party that are allowed by a vendor and taken 12839
by a consumer on a sale; 12840

(ii) Interest, financing, and carrying charges from credit 12841
extended on the sale of tangible personal property or services, if 12842
the amount is separately stated on the invoice, bill of sale, or 12843
similar document given to the purchaser; 12844

(iii) Any taxes legally imposed directly on the consumer that 12845
are separately stated on the invoice, bill of sale, or similar 12846
document given to the consumer. For the purpose of this division, 12847
the tax imposed under Chapter 5751. of the Revised Code is not a 12848
tax directly on the consumer, even if the tax or a portion thereof 12849
is separately stated. 12850

(iv) Notwithstanding divisions (H)(1)(b)(i) to (iii) of this 12851
section, any discount allowed by an automobile manufacturer to its 12852
employee, or to the employee of a supplier, on the purchase of a 12853
new motor vehicle from a new motor vehicle dealer in this state. 12854

(2) In the case of a sale of any new motor vehicle by a new 12855
motor vehicle dealer, as defined in section 4517.01 of the Revised 12856
Code, in which another motor vehicle is accepted by the dealer as 12857
part of the consideration received, "price" has the same meaning 12858
as in division (H)(1) of this section, reduced by the credit 12859
afforded the consumer by the dealer for the motor vehicle received 12860
in trade. 12861

(3) In the case of a sale of any watercraft or outboard motor 12862
by a watercraft dealer licensed in accordance with section 12863
1547.543 of the Revised Code, in which another watercraft, 12864
watercraft and trailer, or outboard motor is accepted by the 12865
dealer as part of the consideration received, "price" has the same 12866
meaning as in division (H)(1) of this section, reduced by the 12867
credit afforded the consumer by the dealer for the watercraft, 12868
watercraft and trailer, or outboard motor received in trade. As 12869
used in this division, "watercraft" includes an outdrive unit 12870
attached to the watercraft. 12871

(I) "Receipts" means the total amount of the prices of the 12872
sales of vendors, provided that cash discounts allowed and taken 12873
on sales at the time they are consummated are not included, minus 12874
any amount deducted as a bad debt pursuant to section 5739.121 of 12875
the Revised Code. "Receipts" does not include the sale price of 12876
property returned or services rejected by consumers when the full 12877
sale price and tax are refunded either in cash or by credit. 12878

(J) "Place of business" means any location at which a person 12879
engages in business. 12880

(K) "Premises" includes any real property or portion thereof 12881
upon which any person engages in selling tangible personal 12882
property at retail or making retail sales and also includes any 12883
real property or portion thereof designated for, or devoted to, 12884
use in conjunction with the business engaged in by such person. 12885

(L) "Casual sale" means a sale of an item of tangible 12886
personal property that was obtained by the person making the sale, 12887
through purchase or otherwise, for the person's own use and was 12888
previously subject to any state's taxing jurisdiction on its sale 12889
or use, and includes such items acquired for the seller's use that 12890
are sold by an auctioneer employed directly by the person for such 12891
purpose, provided the location of such sales is not the 12892
auctioneer's permanent place of business. As used in this 12893
division, "permanent place of business" includes any location 12894
where such auctioneer has conducted more than two auctions during 12895
the year. 12896

(M) "Hotel" means every establishment kept, used, maintained, 12897
advertised, or held out to the public to be a place where sleeping 12898
accommodations are offered to guests, in which five or more rooms 12899
are used for the accommodation of such guests, whether the rooms 12900
are in one or several structures. 12901

(N) "Transient guests" means persons occupying a room or 12902
rooms for sleeping accommodations for less than thirty consecutive 12903
days. 12904

(O) "Making retail sales" means the effecting of transactions 12905
wherein one party is obligated to pay the price and the other 12906
party is obligated to provide a service or to transfer title to or 12907
possession of the item sold. "Making retail sales" does not 12908
include the preliminary acts of promoting or soliciting the retail 12909
sales, other than the distribution of printed matter which 12910
displays or describes and prices the item offered for sale, nor 12911
does it include delivery of a predetermined quantity of tangible 12912
personal property or transportation of property or personnel to or 12913
from a place where a service is performed, regardless of whether 12914
the vendor is a delivery vendor. 12915

(P) "Used directly in the rendition of a public utility 12916

service" means that property that is to be incorporated into and 12917
will become a part of the consumer's production, transmission, 12918
transportation, or distribution system and that retains its 12919
classification as tangible personal property after such 12920
incorporation; fuel or power used in the production, transmission, 12921
transportation, or distribution system; and tangible personal 12922
property used in the repair and maintenance of the production, 12923
transmission, transportation, or distribution system, including 12924
only such motor vehicles as are specially designed and equipped 12925
for such use. Tangible personal property and services used 12926
primarily in providing highway transportation for hire are not 12927
used directly in the rendition of a public utility service. In 12928
this definition, "public utility" includes a citizen of the United 12929
States holding, and required to hold, a certificate of public 12930
convenience and necessity issued under 49 U.S.C. 41102. 12931

(Q) "Refining" means removing or separating a desirable 12932
product from raw or contaminated materials by distillation or 12933
physical, mechanical, or chemical processes. 12934

(R) "Assembly" and "assembling" mean attaching or fitting 12935
together parts to form a product, but do not include packaging a 12936
product. 12937

(S) "Manufacturing operation" means a process in which 12938
materials are changed, converted, or transformed into a different 12939
state or form from which they previously existed and includes 12940
refining materials, assembling parts, and preparing raw materials 12941
and parts by mixing, measuring, blending, or otherwise committing 12942
such materials or parts to the manufacturing process. 12943
"Manufacturing operation" does not include packaging. 12944

(T) "Fiscal officer" means, with respect to a regional 12945
transit authority, the secretary-treasurer thereof, and with 12946
respect to a county that is a transit authority, the fiscal 12947
officer of the county transit board if one is appointed pursuant 12948

to section 306.03 of the Revised Code or the county auditor if the 12949
board of county commissioners operates the county transit system. 12950

(U) "Transit authority" means a regional transit authority 12951
created pursuant to section 306.31 of the Revised Code or a county 12952
in which a county transit system is created pursuant to section 12953
306.01 of the Revised Code. For the purposes of this chapter, a 12954
transit authority must extend to at least the entire area of a 12955
single county. A transit authority that includes territory in more 12956
than one county must include all the area of the most populous 12957
county that is a part of such transit authority. County population 12958
shall be measured by the most recent census taken by the United 12959
States census bureau. 12960

(V) "Legislative authority" means, with respect to a regional 12961
transit authority, the board of trustees thereof, and with respect 12962
to a county that is a transit authority, the board of county 12963
commissioners. 12964

(W) "Territory of the transit authority" means all of the 12965
area included within the territorial boundaries of a transit 12966
authority as they from time to time exist. Such territorial 12967
boundaries must at all times include all the area of a single 12968
county or all the area of the most populous county that is a part 12969
of such transit authority. County population shall be measured by 12970
the most recent census taken by the United States census bureau. 12971

(X) "Providing a service" means providing or furnishing 12972
anything described in division (B)(3) of this section for 12973
consideration. 12974

(Y)(1)(a) "Automatic data processing" means processing of 12975
others' data, including keypunching or similar data entry services 12976
together with verification thereof, or providing access to 12977
computer equipment for the purpose of processing data. 12978

(b) "Computer services" means providing services consisting 12979
of specifying computer hardware configurations and evaluating 12980
technical processing characteristics, computer programming, and 12981
training of computer programmers and operators, provided in 12982
conjunction with and to support the sale, lease, or operation of 12983
taxable computer equipment or systems. 12984

(c) "Electronic information services" means providing access 12985
to computer equipment by means of telecommunications equipment for 12986
the purpose of either of the following: 12987

(i) Examining or acquiring data stored in or accessible to 12988
the computer equipment; 12989

(ii) Placing data into the computer equipment to be retrieved 12990
by designated recipients with access to the computer equipment. 12991

(d) "Automatic data processing, computer services, or 12992
electronic information services" shall not include personal or 12993
professional services. 12994

(2) As used in divisions (B)(3)(e) and (Y)(1) of this 12995
section, "personal and professional services" means all services 12996
other than automatic data processing, computer services, or 12997
electronic information services, including but not limited to: 12998

(a) Accounting and legal services such as advice on tax 12999
matters, asset management, budgetary matters, quality control, 13000
information security, and auditing and any other situation where 13001
the service provider receives data or information and studies, 13002
alters, analyzes, interprets, or adjusts such material; 13003

(b) Analyzing business policies and procedures; 13004

(c) Identifying management information needs; 13005

(d) Feasibility studies, including economic and technical analysis of existing or potential computer hardware or software needs and alternatives;

(e) Designing policies, procedures, and custom software for collecting business information, and determining how data should be summarized, sequenced, formatted, processed, controlled, and reported so that it will be meaningful to management;

(f) Developing policies and procedures that document how business events and transactions are to be authorized, executed, and controlled;

(g) Testing of business procedures;

(h) Training personnel in business procedure applications;

(i) Providing credit information to users of such information by a consumer reporting agency, as defined in the "Fair Credit Reporting Act," 84 Stat. 1114, 1129 (1970), 15 U.S.C. 1681a(f), or as hereafter amended, including but not limited to gathering, organizing, analyzing, recording, and furnishing such information by any oral, written, graphic, or electronic medium;

(j) Providing debt collection services by any oral, written, graphic, or electronic means.

The services listed in divisions (Y)(2)(a) to (j) of this section are not automatic data processing or computer services.

(Z) "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in

transportation of personal property belonging to others for 13033
consideration over or on highways, roadways, streets, or any 13034
similar public thoroughfare; 13035

(2) A person who engages in the transportation of personal 13036
property belonging to others for consideration over or on 13037
highways, roadways, streets, or any similar public thoroughfare 13038
but who could not have engaged in such transportation on December 13039
11, 1985, unless the person was the holder of a permit or 13040
certificate of the types described in division (Z)(1) of this 13041
section; 13042

(3) A person who leases a motor vehicle to and operates it 13043
for a person described by division (Z)(1) or (2) of this section. 13044

(AA)(1) "Telecommunications service" means the electronic 13045
transmission, conveyance, or routing of voice, data, audio, video, 13046
or any other information or signals to a point, or between or 13047
among points. "Telecommunications service" includes such 13048
transmission, conveyance, or routing in which computer processing 13049
applications are used to act on the form, code, or protocol of the 13050
content for purposes of transmission, conveyance, or routing 13051
without regard to whether the service is referred to as voice-over 13052
internet protocol service or is classified by the federal 13053
communications commission as enhanced or value-added. 13054
"Telecommunications service" does not include any of the 13055
following: 13056

(a) Data processing and information services that allow data 13057
to be generated, acquired, stored, processed, or retrieved and 13058
delivered by an electronic transmission to a consumer where the 13059
consumer's primary purpose for the underlying transaction is the 13060
processed data or information; 13061

(b) Installation or maintenance of wiring or equipment on a 13062
customer's premises; 13063

(c) Tangible personal property; 13064

(d) Advertising, including directory advertising; 13065

(e) Billing and collection services provided to third 13066
parties; 13067

(f) Internet access service; 13068

(g) Radio and television audio and video programming 13069
services, regardless of the medium, including the furnishing of 13070
transmission, conveyance, and routing of such services by the 13071
programming service provider. Radio and television audio and video 13072
programming services include, but are not limited to, cable 13073
service, as defined in 47 U.S.C. 522(6), and audio and video 13074
programming services delivered by commercial mobile radio service 13075
providers, as defined in 47 C.F.R. 20.3; 13076

(h) Ancillary service; 13077

(i) Digital products delivered electronically, including 13078
software, music, video, reading materials, or ring tones. 13079

(2) "Ancillary service" means a service that is associated 13080
with or incidental to the provision of telecommunications service, 13081
including conference bridging service, detailed telecommunications 13082
billing service, directory assistance, vertical service, and voice 13083
mail service. As used in this division: 13084

(a) "Conference bridging service" means an ancillary service 13085
that links two or more participants of an audio or video 13086
conference call, including providing a telephone number. 13087
"Conference bridging service" does not include telecommunications 13088
services used to reach the conference bridge. 13089

(b) "Detailed telecommunications billing service" means an 13090

ancillary service of separately stating information pertaining to 13091
individual calls on a customer's billing statement. 13092

(c) "Directory assistance" means an ancillary service of 13093
providing telephone number or address information. 13094

(d) "Vertical service" means an ancillary service that is 13095
offered in connection with one or more telecommunications 13096
services, which offers advanced calling features that allow 13097
customers to identify callers and manage multiple calls and call 13098
connections, including conference bridging service. 13099

(e) "Voice mail service" means an ancillary service that 13100
enables the customer to store, send, or receive recorded messages. 13101
"Voice mail service" does not include any vertical services that 13102
the customer may be required to have in order to utilize the voice 13103
mail service. 13104

(3) "900 service" means an inbound toll telecommunications 13105
service purchased by a subscriber that allows the subscriber's 13106
customers to call in to the subscriber's prerecorded announcement 13107
or live service, and which is typically marketed under the name 13108
"900" service and any subsequent numbers designated by the federal 13109
communications commission. "900 service" does not include the 13110
charge for collection services provided by the seller of the 13111
telecommunications service to the subscriber, or services or 13112
products sold by the subscriber to the subscriber's customer. 13113

(4) "Prepaid calling service" means the right to access 13114
exclusively telecommunications services, which must be paid for in 13115
advance and which enables the origination of calls using an access 13116
number or authorization code, whether manually or electronically 13117
dialed, and that is sold in predetermined units of dollars of 13118
which the number declines with use in a known amount. 13119

(5) "Prepaid wireless calling service" means a 13120

telecommunications service that provides the right to utilize 13121
mobile telecommunications service as well as other 13122
non-telecommunications services, including the download of digital 13123
products delivered electronically, and content and ancillary 13124
services, that must be paid for in advance and that is sold in 13125
predetermined units of dollars of which the number declines with 13126
use in a known amount. 13127

(6) "Value-added non-voice data service" means a 13128
telecommunications service in which computer processing 13129
applications are used to act on the form, content, code, or 13130
protocol of the information or data primarily for a purpose other 13131
than transmission, conveyance, or routing. 13132

(7) "Coin-operated telephone service" means a 13133
telecommunications service paid for by inserting money into a 13134
telephone accepting direct deposits of money to operate. 13135

(8) "Customer" has the same meaning as in section 5739.034 of 13136
the Revised Code. 13137

(BB) "Laundry and dry cleaning services" means removing soil 13138
or dirt from towels, linens, articles of clothing, or other fabric 13139
items that belong to others and supplying towels, linens, articles 13140
of clothing, or other fabric items. "Laundry and dry cleaning 13141
services" does not include the provision of self-service 13142
facilities for use by consumers to remove soil or dirt from 13143
towels, linens, articles of clothing, or other fabric items. 13144

(CC) "Magazines distributed as controlled circulation 13145
publications" means magazines containing at least twenty-four 13146
pages, at least twenty-five per cent editorial content, issued at 13147
regular intervals four or more times a year, and circulated 13148
without charge to the recipient, provided that such magazines are 13149
not owned or controlled by individuals or business concerns which 13150
conduct such publications as an auxiliary to, and essentially for 13151

the advancement of the main business or calling of, those who own 13152
or control them. 13153

(DD) "Landscaping and lawn care service" means the services 13154
of planting, seeding, sodding, removing, cutting, trimming, 13155
pruning, mulching, aerating, applying chemicals, watering, 13156
fertilizing, and providing similar services to establish, promote, 13157
or control the growth of trees, shrubs, flowers, grass, ground 13158
cover, and other flora, or otherwise maintaining a lawn or 13159
landscape grown or maintained by the owner for ornamentation or 13160
other nonagricultural purpose. However, "landscaping and lawn care 13161
service" does not include the providing of such services by a 13162
person who has less than five thousand dollars in sales of such 13163
services during the calendar year. 13164

(EE) "Private investigation and security service" means the 13165
performance of any activity for which the provider of such service 13166
is required to be licensed pursuant to Chapter 4749. of the 13167
Revised Code, or would be required to be so licensed in performing 13168
such services in this state, and also includes the services of 13169
conducting polygraph examinations and of monitoring or overseeing 13170
the activities on or in, or the condition of, the consumer's home, 13171
business, or other facility by means of electronic or similar 13172
monitoring devices. "Private investigation and security service" 13173
does not include special duty services provided by off-duty police 13174
officers, deputy sheriffs, and other peace officers regularly 13175
employed by the state or a political subdivision. 13176

(FF) "Information services" means providing conversation, 13177
giving consultation or advice, playing or making a voice or other 13178
recording, making or keeping a record of the number of callers, 13179
and any other service provided to a consumer by means of a nine 13180
hundred telephone call, except when the nine hundred telephone 13181
call is the means by which the consumer makes a contribution to a 13182
recognized charity. 13183

(GG) "Research and development" means designing, creating, or formulating new or enhanced products, equipment, or manufacturing processes, and also means conducting scientific or technological inquiry and experimentation in the physical sciences with the goal of increasing scientific knowledge which may reveal the bases for new or enhanced products, equipment, or manufacturing processes.

(HH) "Qualified research and development equipment" means capitalized tangible personal property, and leased personal property that would be capitalized if purchased, used by a person primarily to perform research and development. Tangible personal property primarily used in testing, as defined in division (A)(4) of section 5739.011 of the Revised Code, or used for recording or storing test results, is not qualified research and development equipment unless such property is primarily used by the consumer in testing the product, equipment, or manufacturing process being created, designed, or formulated by the consumer in the research and development activity or in recording or storing such test results.

(II) "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. However, "building maintenance and janitorial service" does not include the providing of such service by a person who has less than five thousand dollars in sales of such service during the calendar year.

(JJ) "Employment service" means providing or supplying personnel, on a temporary or long-term basis, to perform work or labor under the supervision or control of another, when the personnel so supplied receive their wages, salary, or other compensation from the provider of the service. "Employment service" does not include:

(1) Acting as a contractor or subcontractor, where the 13216
personnel performing the work are not under the direct control of 13217
the purchaser. 13218

(2) Medical and health care services. 13219

(3) Supplying personnel to a purchaser pursuant to a contract 13220
of at least one year between the service provider and the 13221
purchaser that specifies that each employee covered under the 13222
contract is assigned to the purchaser on a permanent basis. 13223

(4) Transactions between members of an affiliated group, as 13224
defined in division (B)(3)(e) of this section. 13225

(KK) "Employment placement service" means locating or finding 13226
employment for a person or finding or locating an employee to fill 13227
an available position. 13228

(LL) "Exterminating service" means eradicating or attempting 13229
to eradicate vermin infestations from a building or structure, or 13230
the area surrounding a building or structure, and includes 13231
activities to inspect, detect, or prevent vermin infestation of a 13232
building or structure. 13233

(MM) "Physical fitness facility service" means all 13234
transactions by which a membership is granted, maintained, or 13235
renewed, including initiation fees, membership dues, renewal fees, 13236
monthly minimum fees, and other similar fees and dues, by a 13237
physical fitness facility such as an athletic club, health spa, or 13238
gymnasium, which entitles the member to use the facility for 13239
physical exercise. 13240

(NN) "Recreation and sports club service" means all 13241
transactions by which a membership is granted, maintained, or 13242
renewed, including initiation fees, membership dues, renewal fees, 13243
monthly minimum fees, and other similar fees and dues, by a 13244

recreation and sports club, which entitles the member to use the 13245
facilities of the organization. "Recreation and sports club" means 13246
an organization that has ownership of, or controls or leases on a 13247
continuing, long-term basis, the facilities used by its members 13248
and includes an aviation club, gun or shooting club, yacht club, 13249
card club, swimming club, tennis club, golf club, country club, 13250
riding club, amateur sports club, or similar organization. 13251

(OO) "Livestock" means farm animals commonly raised for food 13252
or food production, and includes but is not limited to cattle, 13253
sheep, goats, swine, and poultry. "Livestock" does not include 13254
invertebrates, fish, amphibians, reptiles, horses, domestic pets, 13255
animals for use in laboratories or for exhibition, or other 13256
animals not commonly raised for food or food production. 13257

(PP) "Livestock structure" means a building or structure used 13258
exclusively for the housing, raising, feeding, or sheltering of 13259
livestock, and includes feed storage or handling structures and 13260
structures for livestock waste handling. 13261

(QQ) "Horticulture" means the growing, cultivation, and 13262
production of flowers, fruits, herbs, vegetables, sod, mushrooms, 13263
and nursery stock. As used in this division, "nursery stock" has 13264
the same meaning as in section 927.51 of the Revised Code. 13265

(RR) "Horticulture structure" means a building or structure 13266
used exclusively for the commercial growing, raising, or 13267
overwintering of horticultural products, and includes the area 13268
used for stocking, storing, and packing horticultural products 13269
when done in conjunction with the production of those products. 13270

(SS) "Newspaper" means an unbound publication bearing a title 13271
or name that is regularly published, at least as frequently as 13272
biweekly, and distributed from a fixed place of business to the 13273
public in a specific geographic area, and that contains a 13274
substantial amount of news matter of international, national, or 13275

local events of interest to the general public. 13276

(TT) "Professional racing team" means a person that employs 13277
at least twenty full-time employees for the purpose of conducting 13278
a motor vehicle racing business for profit. The person must 13279
conduct the business with the purpose of racing one or more motor 13280
racing vehicles in at least ten competitive professional racing 13281
events each year that comprise all or part of a motor racing 13282
series sanctioned by one or more motor racing sanctioning 13283
organizations. A "motor racing vehicle" means a vehicle for which 13284
the chassis, engine, and parts are designed exclusively for motor 13285
racing, and does not include a stock or production model vehicle 13286
that may be modified for use in racing. For the purposes of this 13287
division: 13288

(1) A "competitive professional racing event" is a motor 13289
vehicle racing event sanctioned by one or more motor racing 13290
sanctioning organizations, at which aggregate cash prizes in 13291
excess of eight hundred thousand dollars are awarded to the 13292
competitors. 13293

(2) "Full-time employee" means an individual who is employed 13294
for consideration for thirty-five or more hours a week, or who 13295
renders any other standard of service generally accepted by custom 13296
or specified by contract as full-time employment. 13297

(UU)(1) "Lease" or "rental" means any transfer of the 13298
possession or control of tangible personal property for a fixed or 13299
indefinite term, for consideration. "Lease" or "rental" includes 13300
future options to purchase or extend, and agreements described in 13301
26 U.S.C. 7701(h)(1) covering motor vehicles and trailers where 13302
the amount of consideration may be increased or decreased by 13303
reference to the amount realized upon the sale or disposition of 13304
the property. "Lease" or "rental" does not include: 13305

(a) A transfer of possession or control of tangible personal 13306

property under a security agreement or a deferred payment plan 13307
that requires the transfer of title upon completion of the 13308
required payments; 13309

(b) A transfer of possession or control of tangible personal 13310
property under an agreement that requires the transfer of title 13311
upon completion of required payments and payment of an option 13312
price that does not exceed the greater of one hundred dollars or 13313
one per cent of the total required payments; 13314

(c) Providing tangible personal property along with an 13315
operator for a fixed or indefinite period of time, if the operator 13316
is necessary for the property to perform as designed. For purposes 13317
of this division, the operator must do more than maintain, 13318
inspect, or set-up the tangible personal property. 13319

(2) "Lease" and "rental," as defined in division (UU) of this 13320
section, shall not apply to leases or rentals that exist before 13321
June 26, 2003. 13322

(3) "Lease" and "rental" have the same meaning as in division 13323
(UU)(1) of this section regardless of whether a transaction is 13324
characterized as a lease or rental under generally accepted 13325
accounting principles, the Internal Revenue Code, Title XIII of 13326
the Revised Code, or other federal, state, or local laws. 13327

(VV) "Mobile telecommunications service" has the same meaning 13328
as in the "Mobile Telecommunications Sourcing Act," Pub. L. No. 13329
106-252, 114 Stat. 631 (2000), 4 U.S.C.A. 124(7), as amended, and, 13330
on and after August 1, 2003, includes related fees and ancillary 13331
services, including universal service fees, detailed billing 13332
service, directory assistance, service initiation, voice mail 13333
service, and vertical services, such as caller ID and three-way 13334
calling. 13335

(WW) "Certified service provider" has the same meaning as in 13336

section 5740.01 of the Revised Code. 13337

(XX) "Satellite broadcasting service" means the distribution 13338
or broadcasting of programming or services by satellite directly 13339
to the subscriber's receiving equipment without the use of ground 13340
receiving or distribution equipment, except the subscriber's 13341
receiving equipment or equipment used in the uplink process to the 13342
satellite, and includes all service and rental charges, premium 13343
channels or other special services, installation and repair 13344
service charges, and any other charges having any connection with 13345
the provision of the satellite broadcasting service. 13346

(YY) "Tangible personal property" means personal property 13347
that can be seen, weighed, measured, felt, or touched, or that is 13348
in any other manner perceptible to the senses. For purposes of 13349
this chapter and Chapter 5741. of the Revised Code, "tangible 13350
personal property" includes motor vehicles, electricity, water, 13351
gas, steam, and prewritten computer software. 13352

(ZZ) "Direct mail" means printed material delivered or 13353
distributed by United States mail or other delivery service to a 13354
mass audience or to addressees on a mailing list provided by the 13355
consumer or at the direction of the consumer when the cost of the 13356
items are not billed directly to the recipients. "Direct mail" 13357
includes tangible personal property supplied directly or 13358
indirectly by the consumer to the direct mail vendor for inclusion 13359
in the package containing the printed material. "Direct mail" does 13360
not include multiple items of printed material delivered to a 13361
single address. 13362

(AAA) "Computer" means an electronic device that accepts 13363
information in digital or similar form and manipulates it for a 13364
result based on a sequence of instructions. 13365

(BBB) "Computer software" means a set of coded instructions 13366
designed to cause a computer or automatic data processing 13367

equipment to perform a task. 13368

(CCC) "Delivered electronically" means delivery of computer 13369
software from the seller to the purchaser by means other than 13370
tangible storage media. 13371

(DDD) "Prewritten computer software" means computer software, 13372
including prewritten upgrades, that is not designed and developed 13373
by the author or other creator to the specifications of a specific 13374
purchaser. The combining of two or more prewritten computer 13375
software programs or prewritten portions thereof does not cause 13376
the combination to be other than prewritten computer software. 13377
"Prewritten computer software" includes software designed and 13378
developed by the author or other creator to the specifications of 13379
a specific purchaser when it is sold to a person other than the 13380
purchaser. If a person modifies or enhances computer software of 13381
which the person is not the author or creator, the person shall be 13382
deemed to be the author or creator only of such person's 13383
modifications or enhancements. Prewritten computer software or a 13384
prewritten portion thereof that is modified or enhanced to any 13385
degree, where such modification or enhancement is designed and 13386
developed to the specifications of a specific purchaser, remains 13387
prewritten computer software; provided, however, that where there 13388
is a reasonable, separately stated charge or an invoice or other 13389
statement of the price given to the purchaser for the modification 13390
or enhancement, the modification or enhancement shall not 13391
constitute prewritten computer software. 13392

(EEE)(1) "Food" means substances, whether in liquid, 13393
concentrated, solid, frozen, dried, or dehydrated form, that are 13394
sold for ingestion or chewing by humans and are consumed for their 13395
taste or nutritional value. "Food" does not include alcoholic 13396
beverages, dietary supplements, soft drinks, or tobacco. 13397

(2) As used in division (EEE)(1) of this section: 13398

(a) "Alcoholic beverages" means beverages that are suitable 13399
for human consumption and contain one-half of one per cent or more 13400
of alcohol by volume. 13401

(b) "Dietary supplements" means any product, other than 13402
tobacco, that is intended to supplement the diet and that is 13403
intended for ingestion in tablet, capsule, powder, softgel, 13404
gelcap, or liquid form, or, if not intended for ingestion in such 13405
a form, is not represented as conventional food for use as a sole 13406
item of a meal or of the diet; that is required to be labeled as a 13407
dietary supplement, identifiable by the "supplement facts" box 13408
found on the label, as required by 21 C.F.R. 101.36; and that 13409
contains one or more of the following dietary ingredients: 13410

(i) A vitamin; 13411

(ii) A mineral; 13412

(iii) An herb or other botanical; 13413

(iv) An amino acid; 13414

(v) A dietary substance for use by humans to supplement the 13415
diet by increasing the total dietary intake; 13416

(vi) A concentrate, metabolite, constituent, extract, or 13417
combination of any ingredient described in divisions 13418
(EEE)(2)(b)(i) to (v) of this section. 13419

(c) "Soft drinks" means nonalcoholic beverages that contain 13420
natural or artificial sweeteners. "Soft drinks" does not include 13421
beverages that contain milk or milk products, soy, rice, or 13422
similar milk substitutes, or that contains greater than fifty per 13423
cent vegetable or fruit juice by volume. 13424

(d) "Tobacco" means cigarettes, cigars, chewing or pipe 13425

tobacco, or any other item that contains tobacco. 13426

(FFF) "Drug" means a compound, substance, or preparation, and 13427
any component of a compound, substance, or preparation, other than 13428
food, dietary supplements, or alcoholic beverages that is 13429
recognized in the official United States pharmacopoeia, official 13430
homeopathic pharmacopoeia of the United States, or official 13431
national formulary, and supplements to them; is intended for use 13432
in the diagnosis, cure, mitigation, treatment, or prevention of 13433
disease; or is intended to affect the structure or any function of 13434
the body. 13435

(GGG) "Prescription" means an order, formula, or recipe 13436
issued in any form of oral, written, electronic, or other means of 13437
transmission by a duly licensed practitioner authorized by the 13438
laws of this state to issue a prescription. 13439

(HHH) "Durable medical equipment" means equipment, including 13440
repair and replacement parts for such equipment, that can 13441
withstand repeated use, is primarily and customarily used to serve 13442
a medical purpose, generally is not useful to a person in the 13443
absence of illness or injury, and is not worn in or on the body. 13444
"Durable medical equipment" does not include mobility enhancing 13445
equipment. 13446

(III) "Mobility enhancing equipment" means equipment, 13447
including repair and replacement parts for such equipment, that is 13448
primarily and customarily used to provide or increase the ability 13449
to move from one place to another and is appropriate for use 13450
either in a home or a motor vehicle, that is not generally used by 13451
persons with normal mobility, and that does not include any motor 13452
vehicle or equipment on a motor vehicle normally provided by a 13453
motor vehicle manufacturer. "Mobility enhancing equipment" does 13454
not include durable medical equipment. 13455

(JJJ) "Prosthetic device" means a replacement, corrective, or 13456

supportive device, including repair and replacement parts for the 13457
device, worn on or in the human body to artificially replace a 13458
missing portion of the body, prevent or correct physical deformity 13459
or malfunction, or support a weak or deformed portion of the body. 13460
As used in this division, "prosthetic device" does not include 13461
corrective eyeglasses, contact lenses, or dental prosthesis. 13462

(KKK)(1) "Fractional aircraft ownership program" means a 13463
program in which persons within an affiliated group sell and 13464
manage fractional ownership program aircraft, provided that at 13465
least one hundred airworthy aircraft are operated in the program 13466
and the program meets all of the following criteria: 13467

(a) Management services are provided by at least one program 13468
manager within an affiliated group on behalf of the fractional 13469
owners. 13470

(b) Each program aircraft is owned or possessed by at least 13471
one fractional owner. 13472

(c) Each fractional owner owns or possesses at least a 13473
one-sixteenth interest in at least one fixed-wing program 13474
aircraft. 13475

(d) A dry-lease aircraft interchange arrangement is in effect 13476
among all of the fractional owners. 13477

(e) Multi-year program agreements are in effect regarding the 13478
fractional ownership, management services, and dry-lease aircraft 13479
interchange arrangement aspects of the program. 13480

(2) As used in division (KKK)(1) of this section: 13481

(a) "Affiliated group" has the same meaning as in division 13482
(B)(3)(e) of this section. 13483

(b) "Fractional owner" means a person that owns or possesses 13484
at least a one-sixteenth interest in a program aircraft and has 13485
entered into the agreements described in division (KKK)(1)(e) of 13486
this section. 13487

(c) "Fractional ownership program aircraft" or "program 13488
aircraft" means a turbojet aircraft that is owned or possessed by 13489
a fractional owner and that has been included in a dry-lease 13490
aircraft interchange arrangement and agreement under divisions 13491
(KKK)(1)(d) and (e) of this section, or an aircraft a program 13492
manager owns or possesses primarily for use in a fractional 13493
aircraft ownership program. 13494

(d) "Management services" means administrative and aviation 13495
support services furnished under a fractional aircraft ownership 13496
program in accordance with a management services agreement under 13497
division (KKK)(1)(e) of this section, and offered by the program 13498
manager to the fractional owners, including, at a minimum, the 13499
establishment and implementation of safety guidelines; the 13500
coordination of the scheduling of the program aircraft and crews; 13501
program aircraft maintenance; program aircraft insurance; crew 13502
training for crews employed, furnished, or contracted by the 13503
program manager or the fractional owner; the satisfaction of 13504
record-keeping requirements; and the development and use of an 13505
operations manual and a maintenance manual for the fractional 13506
aircraft ownership program. 13507

(e) "Program manager" means the person that offers management 13508
services to fractional owners pursuant to a management services 13509
agreement under division (KKK)(1)(e) of this section. 13510

as the records exist when the service is provided or within a 15134
reasonable period of time thereafter. 15135

(J) If the situsing provisions of divisions (A) to (H) of 15136
this section do not fairly represent the extent of a person's 15137
activity in this state, the person may request, or the tax 15138
commissioner may require or permit, an alternative method. Such 15139
request by a person must be made within the applicable statute of 15140
limitations set forth in this chapter. 15141

(K) The tax commissioner may adopt rules to provide 15142
additional guidance to the application of this section, and 15143
provide alternative methods of situsing gross receipts that apply 15144
to all persons, or subset of persons, that are engaged in similar 15145
business or trade activities. 15146

* * * *

APPENDIX

United States Code Annotated
Title 49. Transportation (Refs & Annos)
Subtitle VII. Aviation Programs
Part A. Air Commerce and Safety (Refs & Annos)
Subpart II. Economic Regulation (Refs & Annos)
Chapter 411. Air Carrier Certificates (Refs & Annos)

49 U.S.C.A. § 41102

§ 41102. General, temporary, and charter air transportation certificates of air carriers

Currentness

(a) Issuance.--The Secretary of Transportation may issue a certificate of public convenience and necessity to a citizen of the United States authorizing the citizen to provide any part of the following air transportation the citizen has applied for under section 41108 of this title:

(1) air transportation as an air carrier.

(2) temporary air transportation as an air carrier for a limited period.

(3) charter air transportation as a charter air carrier.

(b) Findings required for issuance.--(1) Before issuing a certificate under subsection (a) of this section, the Secretary must find that the citizen is fit, willing, and able to provide the transportation to be authorized by the certificate and to comply with this part and regulations of the Secretary.

(2) In addition to the findings under paragraph (1) of this subsection, the Secretary, before issuing a certificate under subsection (a) of this section for foreign air transportation, must find that the transportation is consistent with the public convenience and necessity.

(c) Temporary certificates.--The Secretary may issue a certificate under subsection (a) of this section for interstate air transportation (except the transportation of passengers) or foreign air transportation for a temporary period of time (whether the application is for permanent or temporary authority) when the Secretary decides that a test period is desirable--

(1) to decide if the projected services, efficiencies, methods, and prices and the projected results will materialize and remain for a sustained period of time; or

(2) to evaluate the new transportation.

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(d) Foreign air transportation.--The Secretary shall submit each decision authorizing the provision of foreign air transportation to the President under section 41307 of this title.

CREDIT(S)

(Added Pub.L. 103-272, § 1(e), July 5, 1994, 108 Stat. 1119.)

Notes of Decisions (15)

49 U.S.C.A. § 41102, 49 USCA § 41102
Current through P.L. 113-290 (excluding P.L. 113-235, 113-281, 113-283, and 113-287) approved 12-19-2014

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APPENDIX

Baldwin's Ohio Revised Code Annotated
General Provisions
Chapter 1. Definitions; Rules of Construction (Refs & Annos)
Statutory Provisions

R.C. § 1.49

1.49 Aids in construction of ambiguous statutes

Currentness

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

(A) The object sought to be attained;

(B) The circumstances under which the statute was enacted;

(C) The legislative history;

(D) The common law or former statutory provisions, including laws upon the same or similar subjects;

(E) The consequences of a particular construction;

(F) The administrative construction of the statute.

CREDIT(S)
(1971 H 607, eff. 1-3-72)

Notes of Decisions (99)

R.C. § 1.49, OH ST § 1.49
Current through Files 1 to 146, 148 to 190, 192 to 195 and Statewide Issue 1 of the 130th GA (2013-2014).

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