

In the
Supreme Court of Ohio

A.M. CASTLE & CO., :
Appellee, : Case No. 2015-0551
v. : Appeal from the Ohio Board of Tax Appeals
JOSEPH W. TESTA, : BTA Case No. 2013-5851
TAX COMMISSIONER OF OHIO, :
Appellant. :

**MERIT BRIEF OF APPELLANT
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO**

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INTRODUCTION

Under Ohio law, when an employer engages in a transaction with an employment services provider, and the employment services provider arranges for either short-term or long-term temporary workers to work with the employer and pays those workers, the transaction between the employer and the employment services provider are taxable. R.C. 5739.01(B)(3)(k); R.C. 5739.01(JJ).

This case involves just such a transaction. Pursuant to an employment services contract, A.M. Castle & Co. (“AM Castle”) obtained short and long-term temporary truck drivers from DC Transportation. DC Transportation paid the drivers and provided their benefits, such as health insurance and retirement savings. AM Castle provided the supervision and control of those drivers. The Tax Commissioner determined this to be a taxable transaction and issued an assessment for unpaid use tax to AM Castle.

On appeal to the Board of Tax Appeals (the Board), AM Castle argued that the purchase was entitled to the exclusion from tax contained in R.C. 5739.01(JJ)(3) for the provision of “permanent” employees. Under well-settled precedent that applies the plain language of the statutory exclusion, such purchases are taxable, unless the purchaser proves “two elements: (1) a contract of at least one year between the service provider and the purchaser, and (2) a contract that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, ¶ 18, clarified on reconsideration by *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004-Ohio-2085.¹

¹ The clarification addressed the standard for an exclusion from taxation: “Because R.C. 5739.01(JJ)(3) represents an exclusion from taxation, it must be construed strictly against the taxpayer. *In re Estate of Roberts* (2002), 94 Ohio St.3d 311, 316, 762 N.E.2d 1001.” *H.R. Options, Inc.*, 102 Ohio St.3d 1214, 2004-Ohio-2085, at ¶ 2.

The Board sided with AM Castle, concluding that the transaction for employment services in this case was for “permanent” employees, and therefore was excluded from sales and use tax pursuant to R.C. 5739.01(JJ)(3). The Board is incorrect.

The Board’s fundamental error was to conclude that the personnel supplied to AM Castle met the statutory elements for non-taxable provision of employees on a permanent basis. By its own terms, the contract between AM Castle and DC Transportation failed to meet this threshold, statutory requirement for exclusion: the contract did not assign each driver to AM Castle on a permanent basis. R.C. 5739.01(JJ)(3).

Ohio law is well-established that clear and unambiguous words in a statute are to be applied as written and not interpreted. *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545 (1996). Ohio law is also well-established that where contract terms are clear and unambiguous, the contract itself establishes the terms of that agreement. *Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, ¶ 12 (2006); *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638 (1992).

In this case, the clear and unambiguous language of the statute requires personnel to be supplied pursuant to a contract “that specified that each employee covered under the contract is assigned to the purchaser [of the employment services] on a permanent basis.” R.C. 5739.01(JJ)(3). Also, the clear and unambiguous language in the agreement between AM Castle and DC Transportation does not assign any driver to AM Castle on a permanent basis, or otherwise suggest the permanency of an assignment. Thus, the Board should have determined that the agreement did not meet the necessary statutory requirements for statutory exclusion.

There was no need for the Board to further consider the meaning of the word “permanent” in the AM Castle contract through a facts and circumstances analysis because the

contract never anticipated any driver assignment to be permanent. The Board should have ended its analysis on the face of the contract and concluded that AM Castle's employment service purchases were taxable.

However, even if the facts and circumstances in this employment services transaction were relevant, the Board made two additional errors. First, the Board erroneously considered the "intent" of the parties to determine that individual drivers were assigned on a permanent basis. Decision at 4. The Board's injection of intent into a facts and circumstances analysis is not an element of the analysis under this Court's precedent. In fact, this Court has rejected such a prior attempt by the Board. Further, the consideration of subjective intent of the parties is inconsistent with the exclusion provision in the statute and principles of statutory and contract construction. Rather, the focus of any facts and circumstances inquiry should have been on the actual practice of the assignments.

Second, the Board improperly evaluated the facts and circumstances of the assignments. The Board did not ascertain the parties' actual practices regarding the provision of employees. *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, ¶ 19; *H.R. Options, Inc.*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 22. AM Castle's own documentary evidence, including the contract, an affidavit from AM Castle's Vice President of Operations, and the three-way collective bargaining agreement between AM Castle, DC Transportation and Teamsters Local Union, does not demonstrate that any drivers were assigned to AM Castle on a permanent basis, and demonstrated instead, that the drivers were non-permanent.

In short, the Board failed to apply the unambiguous language of R.C. 5739.01(B)(3)(k) and R.C. 5739.01(JJ)(3) to conclude that AM Castle purchased taxable employment services. The Board's decision is based on incorrect legal conclusions and is unreasonable and unlawful.

Satullo v. Wilkins, 111 Ohio St.3d 339, 2006-Ohio-5856, ¶ 14. And even if the Board’s evaluation of the facts and circumstances in this matter was proper, the Board’s evidentiary conclusions are not supported with reliable and probative evidence. *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, ¶ 15.

The Board unreasonably and unlawfully excluded AM Castle’s purchases of employment services from taxation. This Court should reverse.

STATEMENT OF FACTS AND CASE

AM Castle is a steel house located near Cleveland, in Bedford Heights, Ohio (the “Cleveland facility”). Supp. at 108.²

AM Castle has an employment services contract with DC Transportation, in which DC Transportation provides truck drivers to AM Castle who transport AM Castle’s metal products from the Cleveland facility to AM Castle customers. Supp. at 3, 48, 112. DC Transportation is located in Cleveland and its business is to provide transportation personnel. Supp. at 152. AM Castle and DC Transportation executed the contract in March 2000. Supp. at 48. The term of the contract was “for one (1) year from March 24, 2000, and * * * continue in full force until March 23, 2001, and from year to year thereafter[.]” Supp. at 50. The contract did not provide that DC Transportation assigned any drivers to AM Castle on a permanent basis. Supp. at 48-60.

AM Castle also entered a three-way collective bargaining agreement with DC Transportation, and the Teamsters Local Union (“CBA”). Supp. at 61, 71. The union represents the truck drivers assigned by DC Transportation to AM Castle. CBA at 3.

In 2010, the Ohio Department of Taxation (the “Department”) conducted a tax audit of AM Castle. The Department reviewed AM Castle’s use of labor pursuant to its employment

² The record citations are contained within the Supplement.

services contract with DC Transportation. Supp. at 59, 60. At the conclusion of the audit, the Tax Commissioner assessed AM Castle \$357,111.80, inclusive of tax, interest, and penalty. Supp. at 21. About two-thirds of the assessment pertained to employment services transactions and the remainder to asset and expense transactions. Supp. at 69.³

AM Castle filed a petition for reassessment, challenging only the employment services portion of the assessment. Before the Tax Commissioner, AM Castle additionally presented an affidavit from its Vice President of Operations, Ronald Knopp (the “Knopp Affidavit”) and a detail of 20 of the DC Transportation drivers assigned to AM Castle (the “Driver Detail”). Supp. at 16, 17.⁴ This Driver Detail noted, among other things, each driver’s start date, number of years driving for AM Castle (as of the end of the audit period), and each driver’s last day of service if no longer driving for AM Castle. Supp. at 16.

In his final determination, the Tax Commissioner concluded that the contract did not meet the two prongs of the employment services exclusion set forth in R.C. 5739.01(JJ)(3). Supp. at 4. The contract term was for at least one year, but the contract did not meet the “assigned to the purchaser on a permanent basis” element. The contract did not specify that the leased drivers were assigned to AM Castle permanently. Supp. at 4. The contract also left open the number of employees to be assigned to AM Castle at any given time, by providing that DC Transportation will provide AM Castle “with a sufficient number of drivers,” “as required,” within AM Castle’s discretion. Supp. at 4. Similarly, the Knopp Affidavit was silent as to

³ Specifically, the assessment for the employment service transactions:
Tax: \$192,909.94 Penalty: \$28,936.32 Total: \$221,846.26
The assessment for the asset and expense transactions:
Tax: \$84,816.03 Penalty: \$12,722.26 Total: \$97,538.29
The combined pre-assessment interest was \$37,727.25, to total the \$357,111.80 assessment.

⁴ At the time of the creation of the affidavit, Mr. Knopp was Director of Operations at AM Castle. Thereafter, he became Vice President of Operations. Supp. at 109-110.

whether the drivers were permanently assigned to AM Castle and the Driver Detail did not document such a status. Supp. at 4. Rather, the Driver Detail only conclusorily showed that the assigned drivers stayed on the route and was reflective of how the drivers *had been* assigned, and not indicative of how the drivers were *to be* assigned. Supp. at 4. The Tax Commissioner determined that AM Castle presented no evidence to show that the drivers were permanently assigned. Supp. at 4.

AM Castle appealed to the Board. At the Board's hearing, AM Castle presented the testimony of two witnesses and submitted an affidavit from Mr. Thomas Fink, DC Transportation President and Owner. Supp. at 183 (the "Fink Affidavit"). Otherwise, AM Castle relied on the *exact same* supporting documentation that the Tax Commissioner initially considered, and rejected, to find AM Castle's purchases of employment services to be taxable.

The Board reversed the Tax Commissioner's final determination and concluded that the purchased employment services were exempt from the payment of use tax. BTA Decision, p. 4. The Tax Commissioner appealed to this Court. Notice of Appeal to the Supreme Court (April 7, 2015).⁵

LAW AND ARGUMENT

A statute that provides an exclusion from taxation is to be construed strictly against the taxpayer, in favor of taxation. *H.R. Options, Inc.*, 102 Ohio St.3d 1214, 2004-Ohio-2085, at ¶ 2; *Bay Mechanical*, 133 Ohio St.3d 423, 2012-Ohio-4312, at ¶ 18. Where there is any doubt as to the exclusion of the transaction from tax, the doubt is resolved in favor of taxability. *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, ¶ 7. In this case, the Board

⁵ Despite appealing only the employment services portion of the determination and not the asset and expense transactions, AM Castle has made only a \$3000 payment on the whole of this assessment.

reversed this presumption by construing the statute liberally in favor of exemption, and resolving doubt in favor of the exclusion of the transaction from tax.

Before the Board, the “Tax Commissioner’s findings ‘are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.’ ” *A. Schulman, Inc.*, 116 Ohio St.3d 105, 2007-Ohio-5585, at ¶ 7, quoting *Nusseibeh v. Zaino*, 98 Ohio St.3d 292, 2003-Ohio-855, ¶ 10; *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St. 3d 121, 123 (1989). The burden is on the taxpayer to rebut the Tax Commissioner’s determination and the taxpayer must affirmatively show its entitlement to the exclusion. *H.R. Options, Inc.*, 102 Ohio St.3d 1214, 2004-Ohio-2085, at ¶ 2; *National Tube Co. v. Glander*, 157 Ohio St. 407 (1952), paragraph two of the syllabus. In this case, the Board erred by reversing the Tax Commissioner’s findings on *exactly* the same evidence as before the Tax Commissioner, with the only new evidence being the contradictory and self-serving testimony of two witnesses and a new affidavit. The Board erred by relying on this evidence and essentially reviewing the Tax Commissioner’s determination *de novo*, supplying its own judgment for that of the commissioner.

When this Court reviews decisions of the Board, the Court must determine whether the Board’s decision is reasonable and lawful. *Satullo*, 111 Ohio St.3d 339, 2006-Ohio-5856, at ¶ 14. The Court will not hesitate to reverse Board decisions that are based on incorrect legal conclusions. *Id.* The Court also will reverse Board determinations that are not supported with reliable and probative evidence. *Olentangy Local Schools Bd. of Edn.*, 125 Ohio St.3d 103, 2010-Ohio-1040, at ¶ 15. In this case, this Court should reverse the Board’s decision as it is based upon a misunderstanding of the law and a misapplication of the law to the facts, as explained below.

Tax Commissioner’s Proposition of Law:

Purchases of employment services are not excluded from the definition of taxable services when the employment services contract fails to meet the express requirements of R.C. 5739.01(JJ)(3), that the contract “specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” When the employment services contract clearly and unambiguously does not provide for “permanent” employees, it is error to look beyond the elements contained plain language of the statute and inquire into facts and circumstances of the employment relationship to exclude the transaction from tax.

R.C. 5739.01(JJ)(3); *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, clarified on reconsideration by 102 Ohio St.3d 1214, 2004-Ohio-2085 (applied and followed).

In Ohio, a tax is imposed on each retail sale, and certain enumerated services, including employment services. R.C. 5739.01(B)(3)(k). An employment service is an arrangement where personnel are provided or supplied on a temporary or long-term basis, the personnel perform work or labor under the supervision or control of another, and the personnel receive their wages, salary, or other compensation from the provider of the service. R.C. 5739.01(JJ); *Moore Personnel Serv., Inc. v. Zaino*, 98 Ohio St.3d 337, 2003-Ohio-1089, ¶ 14.

In this case, there is no dispute that the three elements of a taxable employment service set forth in R.C. 5739.01(JJ) and described in *Moore Personnel Serv., Inc.*, are satisfied in the relationship between AM Castle and DC Transportation. Thus, AM Castle’s contract with DC Transportation meets the threshold of being a taxable “employment service.” R.C. 5739.01(JJ); *Moore Personnel Serv., Inc.*, 98 Ohio St.3d 337, 2003-Ohio-1089, at ¶ 20.

An exclusion from taxation is afforded to employment services contracts that meet certain statutory requirements. R.C. 5739.01(JJ)(3). According to these requirements, “employment services” do not include:

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.

Id. Thus, there are two requirements for taxpayers who claim exclusion from tax pursuant to their employment services contracts. Under R.C. 5739.01(JJ)(3), the contract must expressly “specify” (1) a term of at least one year, and (2) a permanent assignment of each of employee covered under the contract. *Id.*; *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 18.

“Permanent” means “assigning an employee to a position for an indefinite period, i.e., the employee’s contract does not specify an ending date and the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions.” *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 21. “Permanent” means something more than “long-term,” or “temporary,” as both of those types of employees are included in the definition of taxable employment services. R.C. 5739.01(JJ).

When a contract provides, or suggests, that employees may be permanently assigned, it is appropriate to conduct an inquiry into the actual facts and circumstances of the employment relationship, to determine whether the employees are truly “permanent.” *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 21, 22. But when, as here, there is no doubt under the clear and unambiguous contractual language that the statutory conditions have not been met, there is no need to look further to the facts and circumstances of the relationship.

A. The contract between AM Castle and DC Transportation does not satisfy the “permanent assignment” element of the exclusion in R.C. 5739.01(JJ)(3), because the contract does not establish that each driver covered under the contract is assigned to AM Castle on a permanent basis.

The AM Castle contract does not meet the statutory requirements for the employment services exclusion from taxation. Because the language used in the contract is not “consistent with the requirements set forth at (JJ)(3),” no facts and circumstances inquiry is triggered, and

AM Castle's purchases of employment services are statutorily subject to tax. *Bay Mechanical* at ¶ 19; *H.R. Options, Inc.* at ¶ 22.

The Board disregarded the clear and unambiguous language of the AM Castle and DC Transportation agreement: no driver was permanently assigned to AM Castle by DC Transportation pursuant to the contract. Rather, a "sufficient number of drivers" were assigned on an "as required" basis. Supp. at 48; *Holdeman v. Epperson*, 111 Ohio St.3d 551, 2006-Ohio-6209, ¶ 12 (2006); *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638 (1992); *Kelly v. Medical Life Ins. Co.*, 31 Ohio St.3d 130 (1987), paragraph one of the syllabus. The Board also disregarded the clear and unambiguous requirements of R.C. 5739.01(JJ)(3) itself, disregarded words in the statute, and disregarded the Tax Commissioner's administrative construction of the employment services statute, when it concluded that the contract complied with the requirement that each employee be assigned on a permanent basis. *Estate of Heintzelman v. Air Experts, Inc.*, 126 Ohio St.3d 138, 2010-Ohio-3264, ¶ 15; *Savarese*, 74 Ohio St.3d at 545; *Cleveland Elec. Illum. Co. v. Cleveland*, 37 Ohio St.3d 50 (1988).

The Board should have concluded that this contract was ineligible for an exclusion from taxation as a matter of law because it was statutorily defective, refrained from conducting a facts and circumstances analysis because of this statutory defect, and held that AM Castle purchased taxable employment services. *Bay Mechanical* at ¶ 19.

1. The AM Castle employment services contract fails to meet the requirements of the employment services exclusion because the contract includes no term, or suggestion, that any employee is assigned on a permanent basis.

When a taxpayer claims the employment services exclusion from taxation, the employment services contract is reviewed to ensure its consistency with the requirements of the exclusion. *Bay Mechanical*, 133 Ohio St.3d 423, 2012-Ohio-4312, at ¶ 19; *H.R. Options*, 100

Ohio St.3d 373, 2004-Ohio-1 at ¶ 18. If the contract fails to meet the any of the threshold requirements of the statute, the contract is defective for purposes of the exclusion and the employment service purchases are ineligible for exclusion as a matter of law. *See, e.g.*, ST 1993-08, Employment Service, Revised February, 2007, Ohio Department of Taxation Information Release, Example C-4.

Only when the contract meets the statutory requirements for exclusion, does the inquiry proceed to a facts and circumstances evaluation of the assignment, to ascertain “whether in actual practice the assignment of particular employees was ‘indefinite’ in character, or whether the assignments, were seasonal, substitutional, or designed to meet short-term workload conditions.” *Bay Mechanical*, 133 Ohio St.3d 423, 2012-Ohio-4312, at ¶ 19; *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1 at ¶ 22. The determination of permanency must be made with respect to each person assigned. R.C. 5739.01(JJ)(3).

In this case, the agreement between AM Castle and DC Transportation evidences the parties’ bargain that drivers were not to be assigned to AM Castle on a permanent basis. The contract did not include language that specified that “each employee covered under the contract [was] assigned to [AM Castle] on a permanent basis.” R.C. 5739.01(JJ)(3); Supp. at 48-50. *But see Bay Mechanical* at ¶ 8 (employment service contract referred to indefinite or permanent assignment). Nor did the contract contain language that otherwise suggested any driver was permanently assigned to AM Castle, such as providing an indefinite assignment with a start date and no end date. Supp. at 48-50. *But see H.R. Options* at ¶ 23-25 (certain employment service contracts suggested permanency because of indefinite assignments: start dates, with no end dates, were specified in the contact).

In fact, the contract eschews permanence, in favor of provision of employees “as needed.” Mr. Knopp acknowledged in his hearing testimony that the “word permanent is not in that contract.” Supp. at 48-50, 128. Instead, the contract provides that “a sufficient number of drivers” will be assigned to AM Castle on an “as required” basis. Supp. at 48-50. In other words, AM Castle receives drivers from DC Transportation only as needed, and as according to AM Castle’s business demands. Supp. at 4, 48. Thus, DC Transportation expressly agreed to supply employees to AM Castle on an “as needed” basis, rather than on a permanent basis.

The contract also fails to even suggest that the drivers’ assignments are indefinite, as was the case in *H.R. Options*. There is no language expressing that any driver is subject to indefinite assignment, and there are no starting dates within the agreement for any driver; the only date mentioned is when the document was executed. Supp. at 48-50. The contract lacks any term for the assignment of any driver to AM Castle.

Moreover, the parties’ agreement accommodates AM Castle’s interest in adjusting the “sufficient number of drivers” assigned to it on the “as required” business need: in the event a driver comes to work and does not stay for a full eight-hour day, the driver is still paid, but at a reduced rate. Supp. at 51. The terms of the contract also allow AM Castle to “remove [a] driver from service” upon written request. Supp. at 49. No reason for the removal request is required. Supp. at 49. Again, AM Castle retains the ability to adjust its fleet of drivers according to business need. *Id.*

Nor is there any provision that actually assigns any individual driver to AM Castle. Supp. at 48-50. The contract does not state how many drivers will be provided and there is no indication how many drivers will be assigned to AM Castle at any given time. *Id.* The assignment of each employee is pertinent because if even one employee covered under an

employment services contract is not assigned on a permanent basis, then the entire contract is considered a taxable employment service. R.C. 5739.01(JJ)(3); Information Release, ST 1993-8, Revised February 2007, Example C-5.

Because the contract is clear, the inquiry should have ended there. Without meeting the express, statutory requirements of R.C. 5739.01(JJ), there is no basis for examining the facts and circumstances of each employee's assignment.

Ohio law consistently holds that when the wording of a statute is clear and unambiguous, the court must give effect to the words used. *Dougherty v. Torrence*, 2 Ohio St.3d 69, 70 (1982). Clear and unambiguous words in a statute are applied as written and are not interpreted or modified. *Savarese v.*, 74 Ohio St.3d at 545. The court's role is to enforce the statute as it is written, and to not delete words used, or to insert words not used. *Estate of Heintzelman*, 126 Ohio St.3d 138, 2010-Ohio-3264, at ¶ 15; *Cleveland Elec. Illum. Co.*, 37 Ohio St.3d at 50.

The language in the statute providing the exclusion from taxation for employment services contracts is clear: “ ‘Employment service’ does not include [s]upplying personnel * * * pursuant to a contract * * * that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” R.C. 5739.01(JJ)(3). The contract is not consistent with the clearly expressed statutory requirements for exclusion set forth in R.C. 5739.01(JJ)(3) and does not qualify for an exclusion from taxation. *Bay Mechanical* at ¶ 19; Information Release, ST 1993-08, Employment Service, Revised February, 2007, Ohio Department of Taxation, Example C-4.

When, as here, the statute contains express requirements for exclusion for taxation, those requirements must be followed. And, conversely, when there is *no* provision in the statute, it is

error to add new requirements. By inquiring into the facts and circumstances of each particular employee, the Board failed to enforce R.C. 5739.01(JJ) as written.

Similarly, Ohio law consistently holds that if contract terms are clear and unambiguous, the contract itself establishes the terms of the agreement. *Holdeman*, 111 Ohio St.3d 551, 2006-Ohio-6209, at ¶ 12; *Shifrin*, 64 Ohio St.3d at 638. This is because the language used in a contract is the expression of the parties' intent with respect to their mutual promises. *Kelly*, 31 Ohio St.3d at paragraph one of the syllabus. It is only when the language of a contract is ambiguous that a court will look further into objective manifestations of the parties' agreement. *Shifrin*, 64 Ohio St.3d at 638; *Kelly*, 31 Ohio St.3d at 132.

The language in the contract is clear and unambiguous: the contract, as a representation of AM Castle and DC Transportation's contractual intent, provides that AM Castle would only receive some number of drivers on an as needed basis. Notably absent is any term purporting to "permanently assign," or even suggesting a permanent assignment of, any driver. Moreover, the contract fails to indicate how many drivers would be provided at any given time. These are certainly terms AM Castle and DC Transportation could have included their agreement had they chosen to do so, but they clearly did not. Thus, the contract establishes the terms and intent of the AM Castle and DC Transportation agreement: a "sufficient number of drivers" would be assigned to AM Castle on an "as required" basis. Supp. at 48; *Holdeman* at ¶ 12; *Shifrin* at 638; *Kelly*, at paragraph one of the syllabus.

Thus, when the Board determined that AM Castle purchased exempt employment services pursuant to R.C. 5739.01(JJ)(3), the Board disregarded the plain language of the statute and the contract. The statutorily defective contract means that AM Castle is ineligible for an

exclusion from taxation as a matter of law, and no further consideration of the contract or the circumstances surrounding the contract are required.

2. *Even if the statutory language of the employment services exclusion was ambiguous, the Tax Commissioner's administrative application of the statute is entitled to deference.*

Even if the employment services statute was ambiguous, principles of statutory construction require the Board to consider the Tax Commissioner's administrative construction of a statute. R.C. 1.49. The Tax Commissioner's administrative construction of a statute it has a duty to enforce is entitled to deference, without risk of disruption unless that construction was unreasonable. *UBS Fin. Servs., Inc. v. Levin*, 119 Ohio St.3d 286, 2008-Ohio-3821, ¶ 34-35; *State ex rel. Clark v. Great Lakes Constr. Co.*, 99 Ohio St.3d 320, 2003-Ohio-3802, ¶ 10.

The Tax Commissioner has interpreted R.C. 5739.01(JJ)(3) to require, under its express language, that an employment services contract meet the "permanence" element on its face. His Information Release with respect to employment service contracts indicates that the contract in this matter would be taxable because there is no permanent assignment of any employee. Information Release, ST 1993-08, Employment Service, Revised February, 2007, Ohio Department of Taxation, Examples. The Board failed to give this deference to the Tax Commissioner's final determination.

The Tax Commissioner is responsible for administering and enforcing the state sales and use taxes, among other taxes. In this regard, the Tax Commissioner is charged with interpreting and applying the underlying laws, and "maintaining a continuous study of the practical operation of all taxation and revenue laws of the state." R.C. R.C. 5703.05(G). The Tax Commissioner is further granted the authority to establish and maintain a division of research for this purpose. *Id.*

Under this authority, the Tax Commissioner issues Information Releases “available to members * * * of the public.” *Id.*

In 2007, the Tax Commissioner issued an Information Release to “clarify the law with regard to employment service.” Included within the Information Release were examples of circumstances which were either taxable employment services, or which qualified for an exclusion. Example C-4 details a situation nearly identical to that presented by AM Castle, where a company:

enters into a written contract with an employment agency. The terms of the contract provide that the contract is for a duration of one year and that the employment agency will be the exclusive provider of all employees to [the company] as needed.

This situation does not meet the third exclusion [, R.C. 5739.01(JJ)(3),] because the employees are not permanently assigned to [the company]. Accordingly, this is an employment service.

Based on Example C-4, the contract does not permanently assign employees to AM Castle, indicating the presence of an employment service.

Another example pertinent to this appeal is set forth in Example C-5. In this example, a company:

enters into a contract with an employment agency. The terms of the contract indicate that the employees will be permanently assigned and the contract is for the length of one year. Upon audit, the company records indicate that the service provides six full time workers under that contract that are indeed permanently assigned as well as additional workers as needed.

In this example the contract would not fit within the third exclusion [, R.C. 5739.01(JJ)(3),] because each worker covered by the contract is not assigned on a permanent basis to [the company]. This is an employment service.

Based on Example C-5, each worker covered by the contract is not assigned to AM Castle on a permanent basis, again indicating the presence of an employment service.

The Tax Commissioner's construction of R.C. 5739.01(JJ)(3) as set forth in Information Release ST 1993-08 is entitled to deference. *UBS Fin. Servs., Inc.*, 119 Ohio St.3d 286, 2008-Ohio-3821, at ¶ 34-35; *Clark*, 99 Ohio St.3d 320, 2003-Ohio-3802, at ¶ 10. The Tax Commissioner's construction of the employment services exclusion is reasonable and consistent with Ohio law: the provisions of Information Release ST 1993-08 apply the plain language of the employment services exclusion at R.C. 5739.01(JJ)(3) and ensure that only employment service transactions that meet the statutory requirements for exclusion are granted an exclusion from taxation.

3. *Because the AM Castle employment services contract fails to meet the statutory requirements of the employment services exclusion, no evaluation into the facts and circumstances is required.*

The agreement between AM Castle and DC Transportation did not explicitly, or by suggestion, assign any employee on a permanent basis to AM Castle. Therefore, the contract agreement failed to permanently assign any employee and, therefore, failed to meet the statutory requirements for an exclusion from taxation. *Bay Mechanical*, 133 Ohio St.3d 423, 2012-Ohio-4312, at ¶ 19; *H.R.Options*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 22. As a result, this Court's directive to assess the facts and circumstances of the assignment, "in order to ascertain whether in actual practice the assignment of the particular employees was "indefinite" in character" is inapposite. *Bay Mechanical* at ¶ 19.

The lack of any assignment of drivers on a permanent basis in the AM Castle contract makes this matter distinguishable from the contrasts in the *Bay Mechanical* and *H.R. Options* cases. For example, in *Bay Mechanical*, the contracts *explicitly* provided for permanent or indefinite assignment of employees. *Bay Mechanical* at ¶ 8, 21. And in *H.R. Options*, the contracts suggested a permanency of assignment: the contracts stated that the term of the

assignment was indefinite and provided for a start, but no ending dates. *H.R. Options* at ¶ 22-25. The Court specifically disqualified from the employment services exclusion the contracts that referred to seasonal positions. *Id.* at 25.

The contracts in *Bay Mechanical* and *H.R. Options* required an additional facts and circumstance inquiry to ensure that no “magic words” were included in a contract simply to cover up actual substance of the transaction between the parties in an attempt to avoid imposition of sales tax. *Bay Mechanical* at ¶ 23. This Court articulated the policy in this regard: in order to qualify for exclusion from taxation the contract terms indicating “permanence” must be consistent with the practice of the parties; i.e., the provider must actually supply the assigned personnel on a permanent basis. *Id.*

Here, however, there are no contract terms suggesting permanence whatsoever, and therefore, no need to look into the actual conduct of the parties. Because the clear and unambiguous language of the agreement created by AM Castle and DC Transportation failed to include a term of permanent assignment, or otherwise suggest permanent assignment, for each driver provided, the contract is inconsistent with the requirements set forth at R.C. 5739.01(JJ)(3) and fails to meet the threshold statutory requirements for an exclusion from taxation. *Bay Mechanical* at ¶ 19; *H.R. Options* at ¶ 22.

Thus, no further inquiry into the facts and circumstances of the assignment is warranted. A facts and circumstances analysis cannot be used to supplant the terms in a contract that fails to qualify for an exclusion from taxation. Nor can such an analysis be used to “fill in the gaps” of a negotiated, at arms-length contract so to qualify for the exclusion. Otherwise, the previously cited principles of statutory interpretation are ignored: clear and unambiguous words are applied as written and a court may not delete or insert words not used by the legislature. *Estate of*

Heintzelman, 126 Ohio St.3d 138, 2010-Ohio-3264, at ¶ 15; *Savarese*, 74 Ohio St.3d at 545; *Cleveland Elec. Illum. Co.*, 37 Ohio St.3d at 50. Moreover, conducting such an analysis is at odds with the principle of contract interpretation that the contract is the expression of the parties' intent with respect to their mutual promises. *Holdeman* at ¶ 12; *Shifrin* at 638; *Kelly*, at paragraph one of the syllabus.

Thus, unlike the *HR Options* and *Bay Mechanical* cases, there was no basis upon which to conduct the facts and circumstances inquiry in this matter. The Board's analyses and conclusions to the contrary are in error.

B. Even if the Board properly engaged in a facts and circumstances analysis, the Board failed to recognize that the actual practice of the assignments demonstrated that no driver was assigned to AM Castle on a permanent basis.

Even if this Court should set aside the plain language of R.C. 5739.01(JJ)(3) and the plain language of the employment services contract in this case, the employment services would still be taxable. First, the Board failed to focus on the "actual practice," considering instead the vague concept of the parties' intent. Second, the facts and circumstances in this case, established by evidence in the record, demonstrates that the AM Castle drivers were not "permanent" within the meaning of R.C. 5739.01(JJ)(3).

1. A facts and circumstances inquiry under R.C. 5739.01(JJ)(3) does not include a determination of intent for purposes of the exclusion from employment services. Intent is not an element derived from the applicable precedent, and it is inconsistent with the statute excluding employment services from taxation, and principles of statutory or contract construction.

In determining the facts and circumstances of the employment services in this case, the Board improperly focused on the amorphous concept of "intent." But intent is not a consideration in the applicable precedent, and the consideration of "intent" is inconsistent with

the exclusion statute, the precedent of this Court applying that statute, and with principles of both statutory construction and contract interpretation.

Because the Board's decision is based on an improper consideration of "intent," the decision is based on an incorrect legal conclusion and is, therefore, unlawful. *Satullo*, 111 Ohio St.3d 339, 2006-Ohio-5856, at ¶ 14.

a. The facts and circumstances inquiry focuses on the actual practice of the assignment, not on the parties' intentions with respect to the assignment.

The requirement to conduct a facts and circumstances inquiry arises from the *HR Options* decision. In that decision, this Court advised that after the employment services contract was determined to be consistent with the statutory requirements of the exclusion, a facts and circumstances inquiry should be conducted "to ascertain whether in *actual practice* the assignment of particular employees was 'indefinite' in character," and to determine if employees were "truly [provided] in an exempt manner." *Bay Mechanical* at ¶ 19. See also *H.R. Options, Inc.* at ¶ 21. For the purposes of the exemption, this Court was unwilling to allow the "magic words" of permanent assignment in a contract to be determinative of the applicability of the exclusion. *Bay Mechanical* at 23. The parties' actual practices under the contract must demonstrate that the provider actually supplied the assigned personnel on a permanent basis. *Id.* This is consistent with the principle that exclusion statutes are strictly construed against non-taxability, and it is the burden of the taxpayer to prove entitlement to exclusion. *H.R. Options, Inc.*, 102 Ohio St.3d 1214, 2004-Ohio-2085, at ¶ 2; *National Tube Co.*, 157 Ohio St. at paragraph two of the syllabus.

The facts and circumstances inquiry focuses on the actual practice – or the *past* practices and procedures – of the assignment. For example, in *HR Options*, the Court reviewed executed contracts between HR Options and its clients, as well as the executed contracts between HR

Options and its actual employees. *HR Options* at ¶ 23. In *Bay Mechanical*, documents such as the employment-services invoices were sought to be reviewed by the Tax Commissioner. *Bay Mechanical* at 30.

In this case, rather than reviewing the past practices and procedures through the documentary evidence contained in the Statutory Transcript, the Board instead analyzed the parties' intent with respect to the driver assignments. At the hearing, the hearing examiner specifically asked Mr. Fink of his *intentions* with respect to the driver assignment. Supp. at 172-174. The Board reflected this discussion in its decision, finding that the statute "requires the taxpayer claiming [an exclusion from taxation] to have the intent to maintain the employees provided to it" and that "it was both [AM Castle's and DC Transportation's] intent for [DC Transportation] to provide permanent drivers to [AM Castle]." Decision at 4.

The problem with the Board's consideration of intent, however, is that intent is not indicative of the actual practice, i.e., the past practices and procedures, of the assignment. The word "intend" is defined as "to have in mind something to be done or brought about; plan . . . to have a purpose or design." Webster's Unabridged Dictionary, 991 (2001). Moreover, an intention is subjective and seldom able to be proven by direct evidence. *Hawkins v. Hawkins* (10th Dist., May 13, 1986), 1986 WL 5570; *State v. Johnson* (10th Dist., Feb. 28, 1980), 1980 WL 353301.

The lesson of *HR Options* and *Bay Mechanical* is that the inquiry in the actual practice of an assignment involves reviewing objective measures, such the documentation that creates, establishes, or verifies the assignment. Testimony of *intent* does not meet this threshold. Intent is neither objectively determined nor a measure of past practices or procedures. Intent concerns a subjective perspective of a hoped or planned outcome. Such an inquiry fails to comport with

the *HR Options* directive to “to ascertain whether in *actual practice* the assignment of particular employees was ‘indefinite’ in character,” and to determine if employees were “truly [provided] in an exempt manner.” *Bay Mechanical* at ¶ 19 (emphasis added). *See also H.R. Options, Inc.* at ¶ 21.

Accordingly, the Board’s consideration of intent is not the facts and circumstances inquiry that was contemplated by this Court in *HR Options*.

b. A facts and circumstances inquiry that includes a consideration of intent is inconsistent with the exclusion statute and principles of statutory construction.

The Board’s construction of R.C. 5739.01(JJ)(3) to include a consideration of intent is also inconsistent with the plain words used in the statute and with principles of statutory construction, as set discussed above. *See, e.g., Estate of Heintzelman*, 126 Ohio St.3d 138, 2010-Ohio-3264, at ¶ 15; *Savarese*, 74 Ohio St.3d at 545; *Dougherty*, 2 Ohio St.3d at 70.

Here, the language of the statute providing the exclusion from taxation is clear, definite, and unambiguous. The statute clearly provides that an exclusion from taxation may be granted when employees are provided “pursuant to a contract of at least one year” and the contract “specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” R.C. 5739.01(JJ)(3). The word “intent” or “intend” is not present. And because the General Assembly is presumed to have used words and language that advisedly and intelligently express the meaning of its legislation, if the General Assembly had meant for “intent” to be a consideration, it would have included the term. *Watson v. Doolittle*, 10 Ohio App.2d 143, 147 (6th Dist. 1967) (the legislature is presumed to use language that advisedly expresses its intent). But it did not.

Because the language of R.C. 5739.01(JJ)(3) is clear and does not include the word “intent,” the Board should only have applied the terms of this statute as written.⁶ *Estate of Heintzelman*, 126 Ohio St.3d 138, 2010-Ohio-3264, at ¶ 15; *Cleveland Elec. Illum. Co.*, 37 Ohio St.3d at 50. But the Board did not.

Instead, the Board first deleted the “assigned on a permanent basis” statutory requirement, and next it inserted a nonexistent word - “intent” - into the statute. *Id.* Then, after changing the plain language of the statute and disrupting basic principles of statutory construction, the Board engaged in an *interpretation* of its newly inserted term, rather than considering the *actual practice* of the assignments. *State ex rel. Savarese v.*, 74 Ohio St.3d at 545. See also *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus (“Where the language of a statute is plain and unambiguous and conveys a clear and definite meaning there is no occasion for resorting to rules of statutory interpretation. An unambiguous statute is to be applied, not interpreted.”). The Board’s facts and circumstances analysis, with its consideration of the parties’ intent, to conclude that the statute “requires the taxpayer claiming [an exclusion] to have the intent to maintain the employees provided to it,” contravenes to the plain language of the statute and is inconsistent with principles of statutory construction. Decision at 4.

Moreover, this is not the first time the Board has attempted to insert an “intent” requirement in the statute. In *H.R. Options*, “the Board found that permanency connoted the expectation that the employees supplied are *intended* to remain for the contracted-for-period.” *Id.* at 20 (emphasis added). This Court disapproved of the Board’s analysis, explaining that permanent meant, instead, to “assign[] an employee to an indefinite period, i.e., the employee’s

⁶ Based on the Board’s discussion, it did not consider the language of R.C. 5739.01(JJ)(3) to be ambiguous. *See Decision*.

contract does not specify an end date and the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions.” *Id.* at ¶ 21. Thus, this Court has already declined to accept an analysis based on “intent” and rejected the Board’s attempted statutory modification. *Id.* at ¶ 21, 26. This Court should reject the Board’s renewed attempt to inject a consideration of “intent” into the facts and circumstances evaluation and the Board’s resulting action of statutory modification.

c. A facts and circumstances inquiry that includes a consideration of intent is inconsistent with principles of contract construction.

Finally, the Board’s facts and circumstances inquiry with respect to AM Castle and DC Transportation’s “intent for [DC Transportation] to provide permanent drivers to [AM Castle],” was also inconsistent with principles of contract construction. Decision at 4. The Board’s consideration of the parties’ intent in this manner, rather than a consideration of the actual past practices and procedures of the assignments, reaches a result that is contrary to the terms of their agreement as expressed in their contract.

As stated above, the language in the contract is clear and unambiguous: the contract is a written representation of AM Castle and DC Transportation’s intent that DC Transportation would provide to AM Castle a “sufficient number of drivers” would be assigned to AM Castle on an “as required” basis. Supp. at 48. “Where the parties following negotiation make mutual promises which thereafter are integrated into an unambiguous contract duly executed by them, courts will not give the contract a construction other than that which the plain language of the contract provides.” *Aultman Hospital Ass’n v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51 (1989), syllabus. This is because “[i]ntentions not expressed in the writing are deemed to have no existence[.]” *Id.* at 53. This forgoing principles holds, and contract terms will not be interpreted or modified, even if “in its operation [the contract] may work a hardship upon one of

the parties.” *Id.* at 55. Similarly, extrinsic evidence of implicit intentions or oral expressions that relate to the subject matter directly addressed in the written contract is disallowed. *Id.* at 53-54 (“there can be no implied covenant in a contract in relation to any matter that is specifically covered by the written terms of the contract”). See also *Kachelmacher v. Laird* (1915), 92 Ohio St. 324, syllabus.

The Board deviated from these principles of contract construction when it considered intent in its facts and circumstances inquiry. Decision at 4. The negotiated contract contains AM Castle and DC Transportation’s mutual promises. The clear and unambiguous language of the contract assigns a “sufficient number of drivers” to AM Castle on an “as required” basis, and allows AM Castle to remove drivers from service for any reason. Supp. at 48-49. Thus, the rules of contract construction hold that the parties’ intentions - as expressed in this contract - were to *not* permanently assign any drivers AM Castle. *Aultman Hospital Ass’n* at 53; *Kelly*, 31 Ohio St.3d 130, at paragraph one of the syllabus. AM Castle and DC Transportation could have included such a term in their contract. But because that term is not included, it is “deemed to have no existence,” and extrinsic evidence of an implicit intention as to that absent term is inadmissible. *Aultman Hospital Ass’n* at 53-54. And this agreement does not become subject to interpretation and modification simply because AM Castle is disappointed that it failed to qualify it for an exclusion from taxation. *Id.* at 55.

The Board’s injection of intent into the facts and circumstances consideration to conclude that providing a “sufficient number of drivers” on an “as required” basis really means that those drivers were permanently assigned to AM Castle also renders meaningless this portion of the contract. Supp. at 48. Under the Board’s interpretation of the term as agreed to by AM Castle and DC Transportation, *any* assignment of an employee would be enough to meet the “assigned

on a permanent basis” requirement of the exclusion. Yet this conclusion is illogical and nonsensical, and in violation of another principle of contract construction: no portion of a contract is to be given meaning and effect to the detriment of another, causing an absurd result. *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, ¶ 29; *Aultman Hospital Ass’n* at syllabus.

In all, the Board’s inclusion of *intent* in its facts and circumstances inquiry is wholly contrary to the basic principles of contract interpretation. Not only does the Board’s intent analysis abrogate the plain meaning of their executed contract, but the Board’s analysis renders parts of the contract meaningless. *In re All Kelley & Ferraro Asbestos Cases*, 104 Ohio St.3d 605, 2004-Ohio-7104, at ¶ 29; *Aultman Hospital Ass’n* at syllabus. The Board’s consideration of the facts and circumstances of the assignment based on some notion of “intent” is inconsistent with principles of contract construction.

2. *The facts and circumstances as contained in record of this matter demonstrate that “a sufficient number of drivers” were assigned to AM Castle on an “as required” and non-permanent basis.*

Finally, even if the Board had properly considered facts and circumstances evidence, the Board’s other error was that it failed to conduct a proper evaluation of those facts and circumstances. Such a proper evaluation would have revealed that, just as the Contract so provides, the actual practice of the assignments to AM Castle was that no driver was permanently assigned to AM Castle. But the Board failed to acknowledge the objective and documentary evidence contained in the Statutory Transcript. As the Tax Commissioner concluded, that evidence demonstrated the actual practice of the assignments: AM Castle accepted a “sufficient number of drivers” on an “as required” basis and no drivers were permanently assigned. And this evidence was, in fact, provided by AM Castle.

Instead, the Board relied on the self-serving hearing testimony provided by the AM Castle and DC Transportation witnesses, and the affidavit evidence provided by the DC Transportation representative that contradicted the Contract, the CBA, and the Driver Detail information contained in the statutory transcript. This self-serving and limited evidence was contradictory to the plain and unambiguous language of the contract and AM Castle's own evidence contained in the statutory transcript in four ways.

First, at the hearing Mr. Knopp stated many AM Castle drivers had been "working for AM Castle for many years." Supp. at 118, 119. But Mr. Knopp made earlier statements in which he only stated that the contract existed, and that its term is for a year, with automatic renewals. Supp. at 17 (the Knopp Affidavit). At the time he made the affidavit, Mr. Knopp did not represent that any driver was assigned to AM Castle on a permanent basis or that any driver had been driving for "many years." *Id.* In other words, Mr. Knopp's hearing testimony was markedly different from, and in contrast to, the prior statements made in his Affidavit, which just like the contract, is silent with respect to the assignment of the drivers and the length of that assignment. *Id.*

Second, the hearing testimony that claimed the drivers are permanently assigned conflicts with the terms of the collective bargaining agreement ("CBA"). According to the CBA, AM Castle may refuse to accept, displace, or discharge drivers provided by DC Transportation for "valid business or economic reasons." CBA at 18. The CBA also provides that AM Castle will have the occasional "casual" driver: one that is "meant to cover situations such as replacements for absenteeism and vacations." CBA at 8. The "casual" drivers are paid less than other drivers. *Id.* at 19, Section D. Thus, similar to the contract, AM Castle retained the ability to adjust the "sufficient number of drivers" from DC Transportation, depending on the "required" business

needs, and to have non-permanent, or “casual,” drivers assigned to it. And the fact that drivers assigned to AM Castle are required to wear an AM Castle uniform is hardly a surprise: the CBA provides that AM Castle will furnish a uniform for the driver. *Id.* at 14.

Third, the individual testimonies of Messes. Knopp and Fink differed with respect to the permanency of the assigned drivers. In support of “permanency,” Mr. Fink stated that he could not recall of a circumstance where staffing adjustments in the form of lay-offs or reductions in hours had taken place. Supp. at 165. Mr. Fink specifically contended that “we’ve never had such a situation occur. It just doesn’t happen with us.” *Id.* In stark contrast, Mr. Knopp stated that over the past seven years, AM Castle *had* requested DC Transportation to lay-off some drivers, demonstrating that AM Castle *does indeed* adjust the number of drivers assigned to it “as required” based on business conditions. Supp. at 143.

Fourth, the Driver Detail, created by AM Castle nearly two years earlier than the Board hearing and contained in the statutory transcript, is also inconsistent with the hearing testimony in several respects. Mr. Knopp unequivocally testified that AM Castle consistently had 11 or 12 drivers assigned to it and that the number did not vary. Supp. at 114, 143. Fink concurred. Supp. at 154. But the Driver Detail lists the names of twenty persons who had been assigned to drive for AM Castle through the end of the audit period. Supp. at 16. And according to this detail, throughout the audit period, the number of drivers assigned to AM Castle varied: on June 1, 2008, 17 persons were assigned; on June 30, 2008, 18 persons were assigned; on January 1, 2009, 8 persons were assigned; and on November 30, 2009, 4 persons were assigned to drive. *Id.* There is conflicting evidence, therefore, with respect to the number of drivers DC Transportation would assign to AM Castle.

Moreover, the question of whether AM Castle drivers are ever assigned to other DC Transportation accounts is a matter that the Driver Detail contradicted, as well. The testimony presented at the hearing was that the AM Castle drivers do not drive for anyone other than AM Castle, and that any deviation from this procedure was *de minimus*. Supp. at 127, 138, 158, 160-162, 183. In support of this “*de minimus*” deviation, the Fink Affidavit identified 4 persons who had been assigned to drive for AM Castle for 22 days during the two year audit period, but who were either full-time for DC Transportation or assigned to another account. Supp. at 185. The conflict, however, is that *these same persons* are also listed by AM Castle in its Driver Detail as a part of *its* assigned drivers for this same time period. Supp. at 16. In other words, how can a driver be permanently assigned to AM Castle when that same person worked full-time someplace else at the same time?

To elaborate, one of these multiply-assigned drivers was identified in the Fink Affidavit as a DC Transportation employee; this person was the office manager. Supp. at 169, 185 (L. Cromleigh; full-time for DC Transportation). According to the Driver Detail, however, the D.C. Transportation office manager drove for AM Castle for 8 years. Another multiply-assigned driver identified in the Fink Affidavit was said to have driven for AM Castle for 15 days and his last day of service was July 26, 2008. Supp. at 185 (C. Finney; full-time for another account). But the Driver Detail lists this person as a *current* driver for AM Castle, having started driving in 2005. Supp. at 16. Yet another multiply-assigned driver in the Fink Affidavit was said to have driven for AM Castle for 3 days in 2009. Supp. at 185 (M. Hoag; full-time for another account). The Driver Detail, however, shows that this driver was already assigned to AM Castle for those three days in 2009 and he averaged 36 hours a week while driving AM Castle assignments in 2008. Supp. at 16.

Finally, the Board rejected the objective and documentary evidence contained in the statutory transcripts and reached its conclusions based on self-serving hearing testimony alone. Decision at 3. Yet in *Bay Mechanical*, the Board held that self-serving testimony and summary documents alone did not rise to the level of proof necessary for a taxpayer to demonstrate error in the Tax Commissioner's determination. *Bay Mechanical*, 133 Ohio St.3d 423, 2012-Ohio-4312, at ¶ 14, 15, 37. Simply stated, it is clear that the Board only summarily reviewed the facts and circumstances of the actual practice of the assignment in this appeal and chose to rely on an evidentiary standard already determined to be insufficient to rebut the Tax Commissioner's conclusions.

The conflicting, self-serving and limited evidence presented by AM Castle at the hearing fails to show that AM Castle is affirmatively entitled to an exclusion and is insufficient to rebut the Tax Commissioner's presumptively valid determination. *A. Schulman, Inc.*, 116 Ohio St.3d 105, 2007-Ohio-5585, at ¶ 7; *Alcan Aluminum Corp.*, 42 Ohio St. 3d at 123; *National Tube Co.*, 157 Ohio St., paragraph two of the syllabus. But even more so, the Board's decision is not supported with reliable and probative evidence and is a demonstration of the Board's failure to afford the proper deference to the Tax Commissioner's final determination. *Id.*; *Olentangy Local Schools Bd. of Edn.*, 125 Ohio St.3d 103, 2010-Ohio-1040, at ¶ 15.

Therefore, the Board's decision is unreasonable. *Satullo*, 111 Ohio St.3d 339, 2006-Ohio-5856, at ¶ 14.

CONCLUSION

Based on the foregoing, the Tax Commissioner respectfully requests this Court to reverse the Board's unreasonable and unlawful decision.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent by regular U.S. mail this 17th day of August, 2015, to upon the following:

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Melissa W. Baldwin

In the
Supreme Court of Ohio

A.M. CASTLE & CO.,	:	
		Case No. 2015-0551
Appellee,	:	
v.	:	Appeal from the Ohio Board of Tax Appeals BTA Case No. 2013-5851
JOSEPH W. TESTA,	:	
TAX COMMISSIONER OF OHIO,	:	
	:	
Appellant.	:	

**APPENDIX TO THE MERIT BRIEF OF APPELLANT
JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO**

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**In The
Supreme Court of Ohio**

A.M. CASTLE & COMPANY,

Appellee,

v.

JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO,

Appellant.

Case No.

15-0551

Appeal from the Ohio Board of Tax Appeals

BTA Case No. 2013-5851

NOTICE OF APPEAL OF JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

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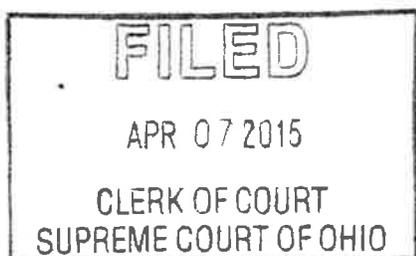
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2015 APR -7 AM 10:52
FILED/RECORDED
BOARD OF TAX APPEALS

NOTICE OF APPEAL OF JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO

Appellant, Joseph W. Testa, Tax Commissioner of Ohio (“Commissioner”), gives notice of his appeal of right to the Supreme Court of Ohio, pursuant to R.C. 5717.04, from a Decision and Order of the Ohio Board of Tax Appeals (the “BTA”) journalized in Case No. 2013-5851 on March 9, 2015 (hereafter “*BTA Decision and Order*”), that reversed the Tax Commissioner’s Final Determination regarding a use tax assessment for A.M. Castle & Company’s use of employment services. A true copy of the *BTA Decision and Order* being appealed is attached hereto and incorporated herein by reference.

The Tax Commissioner complains of the following errors in the Decision and Order of the BTA:

1. The BTA erred by finding that the transactions at issue in this case were excluded from the definition of employment services under R.C. 5739.01(JJ)(3).
2. The BTA erred by finding that the appellee A.M. Castle & Company’s (“AM Castle”) purchases of services from D.C. Transportation, Inc. (“DC Transportation”) were excluded from the definition of employment services under R.C. 5739.01(JJ)(3) and, thus, were not taxable under R.C. 5739.01(B)(3)(k).
3. The BTA erred as a matter of law by misinterpreting and misapplying *H.R.Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, when it held that A.M. Castle’s purchases of services from DC Transportation were excluded from the definition of employment services under R.C. 5739.01(JJ)(3) and, thus, were not taxable under R.C. 5739.01(B)(3)(k).
4. The BTA erred as a matter of law by failing to give a strict construction to R.C. 5739.01(JJ)(3), a provision that represents an exclusion from taxation, as required by the applicable decisional law.
5. The BTA erred as a matter of law by failing to apply the plain terms of the definition of “employment services” at R.C. 5739.01(JJ). In this regard, the BTA erred as a matter of law by imposing an additional inquiry, namely that “the taxpayer claiming the exemption [] have the intent to maintain the employees provided to it,” which is not derived from the language of the statute or the precedent interpreting the statute.

6. The BTA erred by construing R.C. 5739.01(JJ) in a manner at odds with its plain language, in a manner that creates absurd results, and in a manner that renders parts of the statute surplusage.

7. The BTA erred by failing to determine whether A.M. Castle's purchases of employment services were excluded from taxation pursuant to the analysis set forth in *H.R. Options*, which requires a review of: (1) whether the employment-services contract itself meets the requirements set forth at R.C. 5739.01(JJ), and (2) whether the actual performance of the contract shows that each employee provided under the contract was permanently assigned, i.e., assigned for an indefinite period.

8. The BTA erred by failing to engage in the objective analysis set forth in *H.R. Options* and as directed by R.C. 5739.01(JJ) when it injected the subjective consideration of the parties' "intent" to determine that A.M. Castle's purchases of employment services were exempt from taxation.

9. The BTA erred by finding that A.M. Castle had drivers assigned to it on a permanent basis, pursuant to an employment services contract within the meaning of R.C. 5739.01(JJ)(3), when the employment services contract assigned drivers to A.M. Castle on an "as required basis." "As required" is not permanent assignment because the drivers are not assigned for an indefinite period as required by *H.R. Options, supra*.

10. The BTA erred by finding that A.M. Castle had drivers assigned to it on a permanent basis, pursuant to an employment services contract within the meaning of R.C. 5739.01(JJ)(3), when the facts and circumstances surrounding the employment services contract, including the terms of the assigned-driver collective bargaining agreement, affidavit testimony, and actual driver records conflict with self-serving hearing testimony, and demonstrate that the assignments were made to A.M. Castle on an "as required basis."

11. The BTA erred by considering A.M. Castle's intent in obtaining the drivers as a factor in whether the drivers were permanently assigned under R.C. 5739.01(JJ)(3) and the precedent interpreting it.

12. The BTA erred by finding that A.M. Castle "intended" to have drivers assigned to it on a permanent basis, pursuant to an employment services contract within the meaning of R.C. 5739.01(JJ)(3), when the facts and circumstances surrounding the employment services contract demonstrate that the assignments were made to A.M. Castle on an "as required basis."

13. The BTA erred by ignoring the plain language, and by failing to apply the clear and unambiguous language, of the employment services contract which provided that driver assignments were made to A.M. Castle on an "as required basis."

14. The BTA erred by failing to consider the plain and unambiguous language of the employment services contract to be the best evidence of the parties' intent that A.M. Castle's purchases of employment services were on an "as required basis."

15. The BTA erred by allowing A.M. Castle to present evidence of "intent" that was contrary to the plain and unambiguous language of the employment services contract, which provided that A.M. Castle's purchases of employment services were on an "as required basis."

16. The BTA erred by misapplying *H.R. Options* and R.C. 5739.01(JJ) when it failed to determine whether each individual assignment of an employment service purchased by A.M. Castle was exempt from taxation and it instead made a wholesale determination of A.M. Castle's aggregate purchases of employment services.

17. The BTA erred by failing to affirm the assessment entered by the Tax Commissioner in this case.

18. The BTA erred by abating the penalty imposed on A.M. Castle for the failure to maintain a consumer's use tax account and the failure to comply with use tax return requirements. The Tax Commissioner's determination to impose the penalty was within his discretionary authority and A.M. Castle failed to demonstrate that the Tax Commissioner had abused that discretion.

For all these reasons, the Tax Commissioner respectfully requests that the Decision and Order be reversed and the final determination of the Tax Commissioner be affirmed.

Respectfully submitted,

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**In The
Supreme Court of Ohio**

A.M. CASTLE & COMPANY.,

Appellee,

v.

JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO,

Appellant.

Case No.

Appeal from the Ohio Board of Tax Appeals

BTA Case No. 2013-5851

PRAECIPE

TO THE SECRETARY OF THE OHIO BOARD OF TAX APPEALS:

Pursuant to R.C. 5717.04, Appellant, Joseph W. Testa, Tax Commissioner of Ohio, hereby requests that the Ohio Board of Tax Appeals (the "Board") file with the Supreme Court of Ohio, 65 South Front Street, Columbus, Ohio 43215, a certified transcript of the record of the Board's proceedings in the above-captioned matter, including any evidence considered by the Board in rendering its decision in that matter.

Respectfully submitted,

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PROOF OF SERVICE UPON BOARD OF TAX APPEALS

This is to certify that the Notice of Appeal of Appellant, Joseph W. Testa, Tax Commissioner of Ohio, was filed by hand delivery with the Ohio Board of Tax Appeals, State Office Tower, 30 East Broad Street, 24th Floor, Columbus, Ohio 43215, as evidenced by its date stamp as set forth hereon on this 7th day of April, 2015.



Melissa Baldwin

CERTIFICATE OF SERVICE

I hereby certify that the foregoing Notice of Appeal and Praeceptum was filed by hand-delivery with the Ohio Supreme Court, 65 South Front St., Columbus, Ohio 43215, and the Ohio Board of Tax Appeals, 30 E. Broad St., 24th Floor, Columbus, Ohio 43215; and served by certified mail return receipt requested this 25 day of April, 2015, upon:

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Melissa Baldwin

OHIO BOARD OF TAX APPEALS

A.M. CASTLE & COMPANY, (et. al.),

CASE NO(S). 2013-5851

Appellant(s),

(USE TAX)

vs.

DECISION AND ORDER

JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO, (et. al.),

Appellee(s).

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Entered Monday, March 9, 2015

Mr. Williamson and Mr. Harbarger concur.

This matter is considered by the Board of Tax Appeals upon a notice of appeal from a final determination of the Tax Commissioner, filed herein by A.M. Castle & Company ("Castle"). In such determination, the commissioner denied Castle's objections to a use tax assessment that resulted from an audit of Castle's purchases for the period from January 1, 2008 through December 31, 2009. This matter is submitted to the Board of Tax Appeals upon the notice of appeal, the statutory transcript ("S.T.") certified to this board by the Tax Commissioner, the evidence and testimony presented at a hearing before the board ("H.R."), and the written argument from the parties. We acknowledge Castle's motion to strike the commissioner's post hearing reply brief; however, as briefs are provided for the assistance of this board in rendering its determination, and are not required to be filed by the parties, nor required to be considered by the board, Castle's motion is hereby overruled.

In reviewing the instant appeal, we recognize the presumption that the findings of the Tax Commissioner are valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. It is therefore incumbent upon a taxpayer challenging a finding of the Tax Commissioner to rebut the presumption and establish a right to the relief requested. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. Moreover, the taxpayer is assigned the burden of showing in what

manner and to what extent the Tax Commissioner's determination is in error. *Kern v. Tracy* (1995), 72 Ohio St.3d 347; *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213. Where no competent and probative evidence is presented to this board by the appellant to show that the Tax Commissioner's findings are incorrect, then the Board of Tax Appeals must affirm the Tax Commissioner's findings. *Kern, supra*; *Kroger Co. v. Limbach* (1990), 53 Ohio St.3d 245; *Alcan, supra*.

Castle "is a provider of specialty metal products in bar, tube, plate and sheet to metal users," with headquarters in Illinois and offices in various locations, including Ohio. S.T. at 1. It contests the portion of the use tax assessment relating "to services that were provided by a third-party, DC Transportation, Incorporated, under a contract pursuant to which DC Transportation employees operate vehicles owned or leased by A.M. Castle," and specifically claims the charges for such services are excludable from taxable employment services, pursuant to R.C. 5739.01(JJ)(3). H.R. at 7-8.

Pursuant to R.C. 5739.02, "an excise tax is *** levied on each retail sale made in this state," with R.C. 5739.01(B)(3)(k) defining the term "sale" to include "[a]ll transactions by which *** [an e]mployment service is or is to be provided." R.C. 5741.02(A)(1) levies a complementary "excise tax *** on the storage, use, or other consumption in this state of tangible personal property or the benefit realized in this state of any service provided." R.C. 5739.01(JJ) defines "employment service" as "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." Pertinent to the arguments advanced by appellant, R.C. 5739.01(JJ)(3) also states that "[e]mployment service does not include *** [s]upplying 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."

In *Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, the Supreme Court discussed the statutory provisions relating to employment services:

"In *H.R. Options, [Inc. v. Zaino (2004)]*, 100 Ohio St.3d 373, 2004 Ohio 1, ***, ¶ 21, we explained that 'permanent' in the context of (JJ)(3) means that an employee is 'assign[ed] to a position for an indefinite period,' which in turn means that (1) the assignment has no specified ending date and (2) the employee is not being provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions. *Id.* ¶ 21. We also held that R.C. 5739.01(JJ)(3) was to be treated as an exception or exemption from taxation, with the result that it must be strictly construed against the taxpayer's claim for tax relief. *H.R. Options*, ¶ 17, clarified by *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004 Ohio 2085, ***, ¶ 2.

"*H.R. Options* is additionally significant because we construed the exemption as turning on the facts of each employee's assignment rather than on the presence of 'magic words' in the employment-service agreements themselves. *H.R. Options*, 100 Ohio St.3d 373, 2004 Ohio 1, ***, ¶ 21. Instead of requiring that the contracts recite 'permanent' (or 'indefinite') assignment, we viewed the language of the contracts as one element that, along with the facts and circumstances of the individual assignments, established whether the provider was truly 'supplying personnel' in an exempt manner. Indeed, instead of requiring the commissioner to focus on contract language in *H.R. Options*, we directed that official to look at two types of evidence when auditing a claim of exemption: (1) the employment-services contract itself, to see whether it is consistent with the requirements set forth at (JJ)(3), and (2) the facts and circumstances of the assignment, in order to ascertain whether in actual practice the assignment of the particular employees was 'indefinite'

in character, or whether the assignments were seasonal, substitutional, or designed to meet short-term workload conditions. Id., ¶ 22." Id. at ¶18-19.

Thus, in order for the services provided by DC Transportation to qualify for the exemption exception set forth in R.C. 5739.01(JJ)(3), they must meet two criteria: they must be provided subject to a contract of at least one year in duration and DC's employees must be assigned to Castle on a permanent basis. The commissioner, in the final determination, acknowledges that the contract between DC Transportation and Castle meets the durational requirement of at least one year, S.T. at 2; H.R. at 12; accordingly, we need not further address such aspect of its qualification for exemption.

With regard to the second criteria, the commissioner concluded that "[t]he contract does not specify that the employees are assigned on a permanent basis. The contract provides that 'Lessor shall provide Lessee with a sufficient number of drivers to operate the motor vehicles owned or leased by Lessee, as required by Lessee.' This language leaves open the drivers that may be provided indicating that they will be provided on an 'as required' basis." Further, the commissioner determined that contrary to Castle's contentions that the contract in question "assigns employees to AM Castle on a permanent basis," the contract contains no such provision. S.T. at 2.

In support of its argument that, in fact, DC's employees are provided to Castle on a "permanent" basis, Castle offered the testimony of two witnesses before this board. First, Ronald Knopp, the vice president of operations for Castle, testified that in the course of its business, Castle does not employ any truck drivers; it prefers to "use representatives like DC Transportation who have the expertise in the market to secure knowledgeable drivers [to] get us equipment and trucking and trailers to get our material from our facilities to our customers." H.R. at 20. He went on to indicate that the DC drivers are Castle's "connection to our customer. They wear our colors; they drive logo trucks. They are the connection and the representation of Castle to our accounts. They're the ones that knock on the doors, deliver the product, and have the relationship with our customers." H.R. at 21. He elaborated that on average, DC supplies around eleven or twelve drivers, who, under the contract, which is subject to Teamster regulatory requirements, are guaranteed eight hours of work per day, which can include driving and loading/unloading trucks and maintenance of trucks. H.R. at 23-24, 30-31, 40; Ex. 2. The drivers that Castle uses are full-time employees, who work only for Castle; they are neither seasonal, temporary, short-term, nor substitute in nature. H.R. at 25-26.

Next, Castle called Thomas Fink, the president of DC, to testify. He indicated that DC is a "full-time lease provider for transportation personnel," with many clients, including Castle. H.R. at 60. He described the drivers DC provides to Castle as "long-term, full-time employees subject to the collective bargaining agreement with the union." H.R. at 62. He confirmed that the drivers are full-time and permanently assigned to Castle, until Castle no longer needs them, and do not work in a seasonal, substitute, or casual employee capacity. H.R. at 63-64, 66, 80-81. He related that on rare occasions, if a driver was unavailable for work at Castle "at the last moment," e.g., was sick, a "substitute" DC employee would be sent in that driver's stead. H.R. at 64, 69-70.

Castle concedes that in the contract between DC and Castle, the word "permanent," referencing the DC drivers' assignment to Castle, does not appear. H.R. at 36. Further, Castle explained that "casual driver," as referenced in the contract, is a "term *** carried over from the Teamsters as to reflect the junior employee of the full-time employees. *** A casual driver is the one who comes in and does the odd jobs at the low seniority position *** but his benefits, his pay is exactly the same as the remainder of the senior drivers. He's still guaranteed the eight hours, he's full time, he's 40 hours of work." H.R. at 42-43. Mr. Knopp testified that contrary to the reference in the contract for casual/temporary drivers, Castle never had a temporary driver. H.R. at 43. Further, Mr. Knopp indicated that although the contract indicates that when called to work, drivers may not be "put to work," drivers have never not been put to work. H.R. at 47-48.

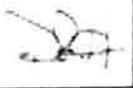
As we review the foregoing, we are mindful that in *Bay Mechanical*, supra, the court reiterated "*H.R.*

Options adopts a consistent theme sounded by the BTA itself when reviewing exemption claims: when "determining whether an exception or exemption to taxation applies, it is not just the form of a contract that is important," but instead, the "crucial inquiry becomes a determination of what the seller is providing and of what the purchaser is paying for in their agreement." *Excel Temporaries, Inc. v. Tracy*, BTA No. 97-T-257, *** (Oct. 30, 1998) (applying the permanent-assignment exception before *H.R. Options*)." *Id.* at ¶23. The court went on to conclude that "*H.R. Options* teaches that supplying personnel on an exempt basis under R.C. 5739.01(JJ)(3) means that the employees are actually provided to work for an indefinite period—i.e., that they are not serving as seasonal workers, as substitutes for regular employees on leave, or as labor needed to meet a short-term workload. It follows that a contract can contain all the right language, but if a particular employee is seasonal, substitutional, or on a short-term-workload assignment, the provider is not "supplying" that employee "pursuant to" the agreement for purposes of qualifying for exemption under R.C. 5739.01(JJ)(3)." *Id.* at ¶24.

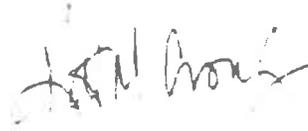
The commissioner argues that "the drivers assigned to AM Castle by DC Transportation were not permanent. AM Castle always retained the ability, and acted on that ability, to adjust to a 'sufficient number of drivers' it had assigned to its fleet, 'as required' at any given time." Commissioner Brief at 8. He goes on to argue that "the Contract provides that drivers will be assigned to AM Castle 'as required,' which indicates that AM Castle requests drivers from DC Transportation only as necessary, and according to AM Castle's business demands. *** The Contract also allows AM Castle to request that DC Transportation 'remove [a] driver from service' upon AM Castle's written request. *** But no reason for the removal request is required. *** Again, this indicates that AM Castle has retained the ability to adjust its fleet of drivers according to business need." Commissioner Brief at 9. Apparently, because the contract does not state, with specificity, how many drivers will ultimately be assigned to Castle, the commissioner concludes that the drivers are not, therefore, assigned "permanently." As further support for that conclusion, the commissioner cites the collective bargaining agreement as giving Castle the right to "refuse to accept, displace, or discharge drivers provided by DC Transportation for 'valid business or economic reasons,' or authorizing the use of 'casual' drivers.

We find no requirement in R.C. 5739.01(JJ)(3), or caselaw interpreting it, that the number of employees, as set out in the contract authorizing employment services, must be a static, specific number, which cannot be varied or adjusted based upon extrinsic factors, such as changes in business/operating conditions or employee performance; such specificity would require a level of certainty, as to the provider's and recipient's future business requirements, that clearly would be difficult, if not impossible, to predict. Instead, we find such provision requires the taxpayer claiming the exemption to have the intent to maintain the employees provided to it, on an ongoing basis, for at least a year, with no particular end in sight to the assignment, beyond the year, as opposed to on a temporary or seasonal basis. Based upon Castle's witnesses' testimony about Castle's and DC's course of action under the contract, as well as the terms of the contract, we conclude that it was both Castle's and DC's intent for DC to provide permanent drivers to Castle, as demonstrated through Castle's ongoing, long-term relationships with many of the same drivers over many years. Ex. 1; H.R. at 26-27, 80-81.

Thus, based upon the foregoing, this board concludes that Castle has met its burden of proof herein, and, as such, we find that the Tax Commissioner's findings were unreasonable and unlawful as they related to the employment services transactions. It is the decision and order of the Board of Tax Appeals that this matter be remanded to the Tax Commissioner to remove from the subject assessment all tax associated with services provided by DC to Castle, as we find they are excluded, pursuant to R.C. 5739.01(JJ)(3), i.e., \$192,909.94, Castle Brief at 9; Commissioner Brief at 4; further, all interest and penalties associated with such tax must also be removed from the assessment.

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



Kathleen M. Crowley, Board Secretary



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April 7, 2015

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RE: *A.M. Castle & Co. v. Joseph W. Testa, Tax Commissioner of Ohio*
Ohio Supreme Court, Case No. 15-0551

Dear Counsel:

Enclosed please find a courtesy copy of the Notice of Appeal of Joseph W. Testa, Tax Commissioner of Ohio. If you have any questions, please do not hesitate to contact me.

Very truly yours,

Melissa W. Baldwin/tb

Melissa W. Baldwin
Assistant Attorney General

MWB:tb

Enclosure

OHIO BOARD OF TAX APPEALS

A.M. CASTLE & COMPANY, (et. al.),

CASE NO(S). 2013-5851

Appellant(s),

(USE TAX)

vs.

ORDER

JOSEPH W. TESTA, TAX COMMISSIONER OF
OHIO, (et. al.),

Appellee(s).

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COLUMBUS, OH 43215

Entered Tuesday, February 3, 2015

This matter is before the Board of Tax Appeals pursuant to a motion for permission to appear pro hac vice. The motion was filed by John M. Allan who seeks permission to appear on behalf of the taxpayer. Attached to said motion is a certificate of pro hac vice registration from the Ohio Supreme Court, acknowledging compliance with the court's rules. See Gov. Bar R. XII. Upon review of the motion and in accordance with Gov. Bar R. XII, Section (2)(A)(3), the Board of Tax Appeals finds that John M. Allan should be, and hereby is, approved to appear before this board pro hac vice and to provide representation as counsel for the taxpayer in the instant matter.

On behalf of the Board of Tax Appeals,
pursuant to Ohio Adm. Code 5717-1-10



Attorney Examiner

5739.01 Sales tax definitions.

As used in this chapter:

- (A) "Person" includes individuals, receivers, assignees, trustees in bankruptcy, estates, firms, partnerships, associations, joint-stock companies, joint ventures, clubs, 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;
 - (e) Automatic data processing, computer services, or electronic information services are or are to be provided for use in business when the true object of the transaction is the receipt by the consumer of automatic data processing, computer services, or electronic information services rather than the receipt of personal or professional services to which automatic data processing, computer services, or electronic information services are incidental or supplemental. Notwithstanding any other provision of this chapter, such transactions that occur between members of an affiliated group are not sales. An "affiliated group" means two or more persons related in such a way that one person owns or controls the business operation of another member of the group. In the case of corporations with stock, one corporation owns or controls another if it owns more than fifty per cent of the other corporation's common stock with voting rights.
 - (f) Telecommunications service, including prepaid calling service, prepaid wireless calling service, or ancillary service, is or is to be provided, but not including coin-operated telephone service;
 - (g) Landscaping and lawn care service is or is to be provided;
 - (h) Private investigation and security service is or is to be provided;
 - (i) Information services or tangible personal property is provided or ordered by means of a nine hundred

telephone call;

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

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

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

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

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

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

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

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

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

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

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

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

(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;

(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.

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.

(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:

(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 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 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.

(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;

(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;

(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.

(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 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.

(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:

(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.

(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.

(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.

(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.

(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.

(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.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 9/29/2013.

Amended by 129th General Assembly File No. 127, HB 487, §101.01, eff. 9/10/2012.

Amended by 129th General Assembly File No. 117, HB 508, §1, eff. 9/6/2012.

Amended by 129th General Assembly File No. 28, HB 153, §101.01, eff. 9/29/2011.

Amended by 128th General Assembly File No. 9, HB 1, §101.01, eff. 7/17/2009.

Effective Date: 10-21-2003; 06-02-2005; 01-01-2006; 01-01-2007; 2006 HB699 03-29-2007; 2007 HB157 12-21-2007; 2008 HB562 09-22-2008

Related Legislative Provision: See 130th General Assembly File No. 25, HB 59, §803.190.

Information Release

ST 1993-08 - Employment Service - Issued September, 1993; Revised October, 1993; Revised December, 2000; Revised May, 2006, Revised February, 2007

This release supersedes all previous versions of information release ST 1993-08 addressing the specifically enumerated taxable service of "employment service."

The purpose of this release is to clarify the law with regard to employment service. Specifically, this revised release as of February, 2007 provides information on the changes to the definition of "employment service" found in R.C. 5739.01(JJ) as amended by Sub. H.B. 293, effective January 1, 2007.

Employment service became a transaction subject to sales and use tax on January 1, 1993. Later, on July 1, 1993, changes were made in the statute as to what is an employment service. Since that time, decisions made by the Ohio Board of Tax Appeals and the Ohio Supreme Court have interpreted the definition of this service. To help you understand these developments and how they may affect you as a potential provider or consumer of employment service, the Department of Taxation has prepared this information release. If after carefully reading it you have any questions or require more specific assistance on your responsibility as a vendor or consumer of this service, please contact any office of the Department of Taxation.

Section 5739.01(B)(3)(k) of the Ohio Revised Code ("R.C.") includes within the definition of a "sale" and "selling" the providing of employment service. As amended by Sub. H.B. 293 of the 126th Ohio General Assembly, effective January 1, 2007, employment service is defined in R.C. 5739.01(JJ) as: . . . 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.

Exclusions

A: R.C. 5739.01(JJ)(1)

"Employment service" does not include "[a]cting as a contractor or subcontractor, where the personnel performing the work are not under the direct control of the purchaser." To determine whether a transaction would qualify for this exclusion it needs to be determined whether the consumer is purchasing qualified personnel to work at the consumer's direction or whether the consumer is purchasing the accomplishment of some specific task which the provider is obligated to perform. The key is the true object of a particular transaction. If the true object of the consumer is to receive personnel to work at the consumer's direction, the transaction is an employment service. On the other hand, if the true object of the consumer is to enter into a contact for a completed task or project, it is not an employment service. While it is true that both situations require work or labor, the difference between them depends on the express or implied responsibilities of the provider of the service as typically stated in the contract.

The following are examples:

Example A1: A general contractor engages various subcontractors to complete the construction of a building. The subcontractors are charged with the responsibility of completing certain aspects of the project. The subcontractors use their own crews whose performance and responsibilities are guided by a contract to perform a specific task. The labor of the crew is spent in completing certain phases as required by the contract.

While the subcontractor may invoice periodically on an hourly basis, it is the completion of the job that is sought and required by the contract, not the hours of labor to accomplish it. Since the "true object" in a construction contract is the completed project, the transaction does not meet the definition of employment service.

Example A2: Using the same facts as in Example A1 except that the subcontractor does not have its own employees to accomplish the project that it has agreed to complete. The subcontractor obtains personnel from an employment agency.

The relationship between the general contractor and the subcontractor is unchanged. The transaction between these two parties is not an employment service as stated in Example A1. However, the transaction between the subcontractor and the employment agency is a taxable employment service. The true object of the subcontractor is to obtain personnel, a work force, that will work at the subcontractor's direction to complete its contractual obligations to the general contractor.

Example A3: An employment agency supplies secretarial staff as needed to its customers. The customers engage its services seeking personnel to handle secretarial duties at its direction. While there may be some skill requirements to accomplish the general secretarial duties needed, there is no responsibility on the part of the agency to perform a specific task. The agency's commitment is limited to supplying personnel capable of doing the work. The true object of the customer here is the receipt of personnel to work as it directs. This is an employment service.

Example A4: An engineering company is engaged by a client to prepare equipment and structural drawings which will be used to solicit bids. The client provides general direction and periodic constructive criticism, but does not provide any other direction to the engineers. The engineering company's work is performed both on and off-site.

This transaction is not a taxable employment service. The true object of the client and the responsibility of the engineering company under the contract is the accomplishment of a specific task. Example A5: A firm specializing in providing engineering personnel is engaged by a client to furnish it with a qualified engineer who will work at the direction of the client on a project or projects as needed. The engineer may or may not work with other engineers of the client.

In contrast to Example A4, the true object of this transaction is the receipt of a person to work as directed. The engineering firm is supplying a professional. The person will work under the direction of others, and the firm is not responsible for any specific results or accomplishments. This is an employment service. The fact that the person is a professional has no bearing on taxability.

Example A6: A talent agency provides models and other talent as requested for its clients. Client hires the agency to provide models to model the client's clothes at its direction.

This is an employment service. The agency is providing models who will work at the direction of the client.

Example A7: An agency provides models and other talent as requested for its clients. Client hires the agency to provide a specific person to perform a particular act or routine; such as a motivational speaker.

This is not an employment service. Here the client wants a particular performer who will perform a specific task. The true object of the client is not to obtain individuals who will work as it directs.

B: R.C. 5739.01(JJ)(2)

"Employment service" does not include "[m]edical and health care services." Included under this exclusion are both professionally trained and licensed medical practitioners and others who provide patient care to persons or otherwise have an active role in patient diagnosis, treatment or care. For example doctors, dentists and nurses qualify as do nurse's aides, x-ray technicians, medical

assistants, orderlies, and lab technicians engaged in human tissue/fluid analysis. Such services may be performed in hospitals, clinics, doctor and dentist offices, off-site in laboratories or wherever else patient care is required. Other related "medical and health care services" personnel include pharmacists dispensing drugs for treatment, nursing home patient care staff, and in-home care or companion personnel who are engaged to sustain the health or well-being of individuals of diminished physical or mental capacity.

Not considered medical and healthcare services, even though they may be purchased by a medical practice, are clerical, secretarial, accounting and computer programming personnel as well as other personnel who are not engaged in patient care. Also included in the non-patient care category are medically trained and licensed personnel employed to review and administer the handling of medical insurance claims or to do research, test or to provide other services not related to the treatment, diagnosis or care of a particular patient. The following are examples:

Example B1: A client of a home companion service engages the company to supply a person to care for an ailing parent while the client is away.

This is a medical and health care service within the exclusion. Therefore, it is not an employment service.

Example B2: A dentist hires an employment agency to provide a dental hygienist to fill in for a regular employee who is on vacation.

This is a medical and health care service worker who is involved with patient care. This is not an employment service.

Example B3: A medical clinic hires an employment agency specializing in providing medical personnel to provide a trained nurse to help on a temporary basis to perform non-patient care service such as the submission of medical claims.

This transaction does not fit within the exclusion because, although medically trained, the individual is not providing care to the clinic's patients. This is an employment service.

C: R.C. 5739.01(JJ)(3)

"Employment service" does not include "[s]upplying 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." Some employee leasing situations will fall within this category. Various examples are discussed below. Typically, the service provider, in exchange for reimbursement of employee wages, salaries and benefits plus a commission, agrees to employ personnel who conduct the business of the client. The direction of the daily work activities of the employees are at the discretion of the client, while payment of the employees' wages is made by the service provider.

For purposes of the Ohio sales and use tax, such service is not an employment service subject to tax if the contract between the service provider and the purchaser is for a duration of at least one year and if the contract specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis. Permanent basis means that employees are intended to be assigned for an indefinite or for an unlimited period of time. Further, the parties' performance under the contract is subject to review. In *H.R. Options, Inc. v. Zaino* 100 Ohio St.3d 373, 2004-Ohio-1, the Ohio Supreme Court stated the following:

When the Tax Commissioner's agents examine an employment service contract, they must be able to determine at the time whether an employee has been assigned on a permanent basis. The contract, along with the facts and circumstances of the assignment, should permit the Tax Commissioner's agent to determine permanency.

Situations where the performance of the parties do not conform to the terms of the contract may be subject to tax. Also, if at least one employee covered under an employment service contract is not assigned on a permanent basis, then the entire contract may be considered taxable.

Contracts that do not provide for a term of at least one year and/or that each employee is assigned permanently are considered contracts for taxable employment service. The following are examples: Example C1: Company A is a small manufacturing company that has outsourced its human resource functions by entering into a written contract with an employment agency. The terms of the contract

include that all provided employees are indefinitely assigned to Company A and that the duration of the contract will be two years. Company A and the professional employee organization both operate under the contract as the terms require.

Because the contract meets the third exception to the definition of an employment service and the parties are operating under the contract in conformance with the terms of the contract, this is not an employment service.

Example C2: Using the same facts as in Example C1 except that the contract is not in writing but instead is an oral contract. In *Excel Temporaries, Inc. v. Tracy* (Oct. 30, 1998), BTA No. 97-T-257, the Ohio Board of Tax Appeals determined that an oral contract may be considered valid for purposes of R.C. 5739.01(JJ)(3). The Board stated that:

. . . this does not mean that parol evidence may in itself be sufficient in all cases to prove that the taxpayer's assignment of personnel is excluded from the definition of an employment service. Corroborating evidence may be necessary to establish that such contract exists and that performance under the contract meets the requirements contained within R.C. 5739.01(JJ)(3).

Accordingly, for the purpose of this example, if Company A can provide corroborating evidence that the contract was indeed for a period of two years and that each employee covered by the contract is assigned to Company A on a permanent basis, the transaction will not be an employment service. It is strongly advised that employment service contracts be in writing. While the Ohio Board of Tax Appeals has determined that a contract may be oral, it has yet to examine a factual situation where the taxpayer has been able to prove that such contract meets the exclusion found in R.C. 5739.01(JJ)(3).

Example C3: Using the same facts as in Example C1 except that upon audit, the tax auditor finds from review of company records that the parties are not operating according to the terms of the contract. The employment agency has not permanently assigned any employees to Company A, but instead only furnishes employees to Company A based upon the company's needs, which fluctuate substantially from week-to-week.

Since the exclusion found in R.C. 5739.01(JJ)(3) is subject to the performance of the parties, the transactions between Company A and the service provider in this example would be an employment service.

Example C4: Company B is a small manufacturing company with fluctuating sales. It enters into a written contract with an employment agency. The terms of the contract provide that the contract is for a duration of one year and that the employment agency will be the exclusive provider of all employees to Company B as needed.

This situation does not meet the third exclusion because the employees are not permanently assigned to Company B. Accordingly, this is an employment service.

Example C5: Company AB enters into a contract with an employment agency. The terms of the contract indicate that the employees will be permanently assigned and the contract is for the length of one year. Upon audit, the company records indicate that the service provides six full time workers under the contract that are indeed permanently assigned as well as additional workers as needed.

In this example the contract would not fit within the third exclusion because each worker covered by the contract is not assigned on a permanent basis to Company AB. This is an employment service.

D: R.C. 5739.01(JJ)(4)

"Employment service" does not include "[t]ransactions between members of an affiliated group, as defined in division (B)(3)(e) of this section." To qualify as a member of an affiliated group, one person or business must own or control the business operations 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 percent of the other corporation's common stock with voting rights. See R.C. 5739.01(B)(3)(e). In determining the relationships of the parties the federal attribution rules do not apply. The following are examples:

Example D1: Company G's entire workforce are employees of Company H. Company G and Company H are wholly owned subsidiaries of the same parent corporation.

In this example the companies qualify as members of an affiliated group and, therefore, the transactions are specifically excluded from being an employment service.

Example D2: The Smith family is the owner of several companies including Smith Trucking and Smith ES. Smith Trucking is equally owned by the father and his three sons. Smith Trucking needs qualified drivers. Seeing this need, the three sons organize and start an employment service company, Smith ES, which provides the drivers to Smith Trucking and other companies on a temporary as needed basis. Smith ES does not have a contract with Smith Trucking that would qualify for the exclusion found in R.C. 5739.01(JJ)(3). The question is whether transactions between Smith Trucking and Smith ES are excluded from the definition of a taxable employment service as the transactions are between members of an affiliated group?

In this example, the transactions are not excluded from the definition of employment service because no one person or business owns or controls the business operations of another member of the group. Accordingly, the transactions between Smith Trucking and Smith ES are subject to tax.
E. R.C. 5739.01(JJ)(5)

Effective January 1, 2007, "Employment service" does not include "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." This exception to the definition was added by H.B. 293 in response to the Ohio Supreme Court's decision in *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356, 2005-Ohio-2167. The Court had stated in *Crew 4 You* that "[a] seller of 'employment service' as that term is used in Ohio pays the 'wages, salary, or other compensation' of the personnel." This decision left no room for a claim for resale under R.C. 5739.01(E). The amendment enacted by Sub. H.B. 293 now defines that "employment service" does not include situations where the service is sold from one employment service agency to another employment service agency that uses the employees to fulfill its contractual obligations to a third-party customer.

Further, the amended language makes clear that the transaction between the employment agency purchasing the employment service from another and the third party is a taxable employment service.

Example E1: Employment agency A is an out-of-state company that has no employees located in Ohio. It desires to provide employees to a client in Ohio. To do this it contracts with employment agency B that is located in Ohio to provide employees to employment agency A's client. Agency B bills agency A for the employees. Agency A bills its Ohio clients.

Prior to January 1, 2007, the transaction between employment agency A and employment agency B may be a taxable employment service. This is pursuant to the decision of the Ohio Supreme Court in *Crew 4 You, Inc. v. Wilkins*, 105 Ohio St.3d 356, 2005-Ohio-2167, Agency B is required to charge and collect tax from agency A on its employment service provided to agency A. The reason for this is because agency B is paying the compensation to the personnel provided. The Ohio Supreme Court stated in *Crew 4 You, Inc.* that "[a] seller of 'employment service' as that term is used in Ohio pays the 'wages, salary, or other compensation' of the personnel."

With the enactment of the amendment effective January 1, 2007, this is no longer the case. The transaction between employment agency A and employment agency B is specifically excluded from the definition of a taxable employment service. Absent a claim of exemption, i.e. sale to a nonprofit charitable purpose organization or the proper application of one of the other exceptions to the definition of an employment service, the transaction between employment agency A and its third party client is a taxable employment service. Employment agency A must be a licensed vendor and it must collect the tax due from its customer.

Additional Examples

F: Additional examples related to employment service are provided below.

Example F1: Company H hires an individual to shovel snow, as needed during the winter months, from its sidewalk for a given hourly rate.

This transaction is not an employment service. The individual performing the work is not working for an employer who in turn provides him to a client. The individual is being paid directly by the purchaser of the service.(Footnote 1)

Example F2: Company I obtains temporary clerical, accounting, data entry and similar personnel as needed to fill in for vacationing employees who work under varying degrees of supervision by a client.

This is the prime example of an employment service.

Example F3: In order to mount an air conditioning unit on a roof, an HVAC contractor requires a crane. The crane rental company furnishes the equipment along with an operator necessary to complete the task. The billing from the crane company breaks down the total cost between the crane and the operator's time.

This is a nontaxable service. Despite the probability of considerable direction of the crane operator by the contractor and a breakdown of the crane operator's time, the crane rental company is not providing an employment service. It is providing a crane service. The service it provides is the moving, lifting and positioning of objects with its own equipment. (Footnote 2)

Example F4: A real estate broker headquartered in Cincinnati engages an employment agency located in Cincinnati to furnish a person to answer the telephone and provide other clerical duties in its Covington, Kentucky branch office.

This transaction is not taxable. Although this is an employment service, it is not subject to Ohio tax since the job site (post-of-duty) of the temporary worker is not in Ohio. A company in this situation is advised to keep records that accurately identify where this type of service is rendered to prevent future problems in the event of an audit.

Example F5: An Ohio employment agency moves its headquarters from Cincinnati to Covington Kentucky. The agency then provides a temporary employee to a client in Cincinnati. The employee's post-of-duty is in Cincinnati, Ohio.

This is a taxable employment service. As in the previous example, the location of the employment agency is irrelevant to the taxability of the service being rendered. The agency clearly has "substantial nexus" with the State of Ohio. Since an employee of the agency is providing the company's service in Ohio, substantial nexus exists with Ohio. The Kentucky agency must register as a seller with Ohio and it must collect and remit the tax on all taxable sales located in Ohio.

Example F6: Company J has several small offices throughout the country and outsources all of its personnel from an employment agency. Company J does not have a contract with the employment service agency that qualifies for the exclusion found in R.C. 5739.01(JJ)(3). The temporary employees are located in various states throughout the country.

Although the entire transaction is an employment service, only those employees with an Ohio post-of-duty would be subject to tax in Ohio.

Example F7: Company K is a trucking operation. It contracts with Company L to provide drivers as needed. Company K schedules each driver's vehicle, load, and return trip assignments and pays Company L for the supplying of the drivers. Company L pays the drivers' wages.

In this situation Company L is providing an employment service. It should also be noted that the exemption Company K may have for "highway transportation for hire," R.C. 5739.02(B)(32), applies to transportation equipment and its repair, not to employment service.

Using the same facts, but adding the fact that Company L is providing drivers pursuant to a contract of at least one year that specifies that each employee under the contract is assigned on a permanent basis; subject to actual performance, this transaction is not an employment service.

Example F8: A nonprofit charitable purpose organization needs additional clerical personnel to help with a fundraising event. It contracts with an employment agency to provide the needed personnel. Although this is an employment service, the nonprofit charitable organization may claim exemption from the tax under R.C. 5739.02(B)(12). The employment agency must obtain a certificate of exemption as provided for in R.C. 5739.03(B)(1).

Example F9: Company M is a manufacturer that desires to outsource all of its human resource needs. It contracts with an employment agency that places Company M's current personnel on its roll of

employees. The employees are then assigned back to Company M. Because Company M is unsure of how this arrangement will workout, the contract runs from month-to-month. The exclusion found in R.C. 5739.01(JJ)(3) does not apply because the contract is not for at least one year.

This is an employment service. The fact that the employment agency did not find and hire the personnel but instead received personnel referred to it from its client does not change the fact that the transaction is an employment service.

Example F10: Company N is a manufacturer purchasing employment service from employment agency C. Agency C will provide personnel to Company N as needed. The personnel work on Company N's assembly line putting together the items that Company N manufactures for sale. The transactions are taxable employment service. Company N may not claim the resale exception. In this situation, the actual benefit that Company N receives is the benefit of the employment service; that is, the employees' contribution of a temporary and flexible work force. Company N is using the employment service in the making of its finished product along with the materials and everything else that goes into making the product.

Neither can Company N claim the manufacturing exemption. The exemption in R.C. 5739.02(B)(42)(g) applies to the "thing" transferred. A "thing" for purposes of R.C. 5739.02(B)(42) includes only those enumerated services listed in R.C. 5739.01(B)(3)(a), (b) and (e). The section defining employment service as taxable is R.C. 5739.01(B)(3)(k). Accordingly, employment service is not included within the definition of a "thing" and cannot qualify for the manufacturing exemption. This answer is consistent with the holding of the Ohio Supreme Court in *Bellemar Parts Industries, Inc. v. Tracy*, 88 Ohio St.3d 351, 2000-Ohio-343.

Example F11: Company O routinely hires new employees as needed to fill positions in its company. Company O however does not want to make a commitment on the hiring of any new employee until such time as it is convinced of the suitability of the individual. Company O contracts with employment agency D to provide employees as needed on a temporary basis to fill these positions. If after a three month trial period, Company O likes the individual, it will hire the individual as a regular employee. If Company O does not feel the individual is suitable, it will have the employment agency D provide another temporary to try to fill the position. During the trial period, the temporary is paid by employment agency D, who in turn charges Company O for supplying the employee.

This is an employment service and the service provider should charge tax to Company O on the transactions during the trial period. Further, if Company O pays the service provider an additional fee when it hires an individual as a regular employee, such charge is a taxable employment placement fee under R.C. 5739.01(B)(3)(l).

Note that given the facts in this example, it is irrelevant as to whether the terms of the contract between Company O and the employment agency meet the exclusion to the definition of employment service found in R.C. 5739.01(JJ)(3). This is because the Ohio Supreme Court has held that "permanent" in the context of R.C. 5739.01(JJ)(3) means assigning an employee to a position for an indefinite period. See *H. R. Options*, supra. In the situation found in the current example, the employee will be assigned only for the trial period. After the trial period the employee will either be hired by Company O or will be removed from the position and subject to reassignment by the employment agency. In these facts there is no "permanent" or indefinite assignment and the transaction cannot qualify for the exclusion to the definition of employment service found in R.C. 5739.01(JJ)(3).

Example F12: Company P is an employment agency. It contracts with its clients to provide them with employees. All transactions are subject to Ohio's taxing jurisdiction. The employees assigned will receive their daily direction from the clients. The results of an audit find that Company P's contracts with its clients fall into three distinct categories:

- (1) Written contracts with clients that qualify on their face for the exclusion found in R.C. 5739.01(JJ)(3), but Company P's records indicate that the employees are not permanently assigned to the clients but instead are routinely shuffled from client to client as Company P dictates;
- (2) Written contracts with clients that qualify for the exclusion found in R.C. 5739.01(JJ)(3) both on their face and under a test for performance; and
- (3) Oral contracts where clients will call in to Company P to obtain temporary employees as needed to fill in for regular employees who are on vacation, have called in sick that day, who are on some other short term leave or are needed due to an increased demand in the client's business.

To fill many of these positions, Company P pulls from its own employee pool. However, it also has a contract with Company Q, an employment placement service company, who will find and provide Company P with specific types of employees. Company P pays a placement fee to Company Q for each employee found and Company P adds each employee to its own employee pool. The question is which of the three types of contracts are subject to tax and whether Company P's transactions with Company Q are subject to tax.

The written contracts described under category (1) are subject to tax. Even though a contract may on its face meet the requirements for the exclusion found in R.C. 5739.01(JJ)(3), the terms of the contract are still subject to review for actual performance. See *H.R. Options, Inc. v. Zaino*, supra, and the explanation regarding the third exclusion on pages 4 and 5 above. Since in this example an audit found that the parties were not performing according to the written terms of the contract, i.e. the employees were not permanently assigned, these contracts do not qualify for the exclusion found in R.C. 5739.01(JJ)(3) and the transactions are subject to tax.

The written contracts described under category (2) qualify for the exclusion found in R.C. 5739.01(JJ)(3) as the specific terms meet what is required by the statutory exclusion and a review of performance finds that the parties are operating under the terms of the contract as they are written, i.e. each employee covered under the contract is assigned to the client on a permanent basis. The situation described under category (3) is the typical employment service situation and each transaction is subject to tax; excluding some other exemption, e.g. the purchaser is a nonprofit charitable purposes organization exempt from tax under R.C. 5739.02(B)(12).

Finally, the transactions between Company P and Company Q are taxable employment placement services, R.C. 5739.01(B)(3)(I) and R.C. 5739.01(KK). (Footnote 3) Company P must pay tax on the placement fees it pays to Company Q. Company P may not claim the sale for resale exception found in R.C. 5739.01(E) as it is not reselling the employment placement service it received. Instead, Company P is the consumer of the service as it received the benefit of the employment placement service. Its benefit is the receipt of personnel that it can add to its employee pool and use to fulfill its contractual obligations of providing employment service to its clients.

If you have any questions regarding this matter, you should direct your questions to one of our taxpayer service centers or call 1-888-405-4039.

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Footnotes:

1. Effective August 1, 2003 certain snow removal services became subject to tax. See Information Release ST 2003-02 - Landscaping, Lawn Care Services, and Snow Removal - January, 2004.
2. See also R.C. 5739.01(UU)(1)(c) which provides that "Lease" or "rental" do not include "[p]roviding 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."
3. See information release ST 1993-01 - Employment Placement Service - April, 1993 for more information regarding taxable employment placement services