

**IN THE SUPREME COURT  
OF OHIO**

ACCEL INC.,	)	CASE NO. 2015-1332
	)	
	)	On Appeal from the Ohio Board of Tax
	)	Appeals
v.	)	
	)	
JOSEPH W. TESTA, TAX	)	BTA Case No. 2012-2840
COMMISSIONER OF OHIO,	)	
	)	
	)	
Appellant.	)	

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**NOTICE OF CROSS-APPEAL OF ACCEL INC.**

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Christian M. Bates, Esq. (#0079761)  
Joseph G. Corsaro, Esq. (#0011474)  
Scott R. Poe, Esq. (#0082547)  
Corsaro & Associates Co., LPA  
28039 Clemens Road  
Westlake, OH 44145  
[Cbates@corsarolaw.com](mailto:Cbates@corsarolaw.com)

*Counsel for Appellee  
Accel Inc.*

MICHAEL DEWINE (#0009181)  
Ohio Attorney General  
DANIEL W. FAUSEY\* (#0079928)  
*\* Counsel of Record*  
Assistant Attorney General  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, Ohio 43215  
614-995-9032  
866-513-0356 fax  
[Daniel.fausey@ohioattorneygeneral.gov](mailto:Daniel.fausey@ohioattorneygeneral.gov)

*Counsel for Appellant  
Joseph W. Testa, Tax Commissioner of Ohio*

On or about August 13, 2015, Appellant, Joseph W. Testa, Tax Commissioner of Ohio, filed his Notice of Appeal as of right pursuant to R.C. 5717.04 from a Decision and Order of the Ohio Board of Tax Appeals, journalized and entered on or about July 15, 2015, that reversed in part and affirmed in part the Tax Commissioner's Final Determination regarding Appellee/Cross-Appellant Accel Inc. ("Accel") claims for exemption from Ohio use tax. Pursuant to R.C. 5717.04, S. Ct. Prac.

R. 10.01(A)(3) and S. Ct. Prac. R. 6.01(C)(1), Accel hereby gives notice of its cross-appeal relative to the July 15, 2015 Decision and Order of the Ohio Board of Tax Appeals, a copy of which is attached hereto as Exhibit A, and incorporated herein by reference.

Accel sets forth the following errors in the Board of Tax Appeals' ("BTA") decision:

1. The BTA erred in not abating the penalties assessed against Accel as R.C. 5741.14 does not permit the assessment of penalties under R.C. Chapter 5739 to use tax assessments.

2. The BTA erred to the extent it failed to give full weight to the expert testimony provided by Accel's expert Carol Ptak based on the Tax Commissioner's objections to the same.

3. The BTA erred in failing to consider the opinion of the Federal District Court for the Central District of California in *United States v. Dean* (C.D. Cal. 2013), 945 F. Supp.2d 1110 as at least persuasive authority on the issue of whether Accel's operations constitute manufacturing or assembly, as opposed to merely packaging. The *Dean* decision involved a Federal income tax deduction available to manufacturers pursuant to a statute that employed a substantially similar definition of "manufacturing" as that under Ohio law, involved a taxpayer engaged in the same activity as Accel, i.e. producing gift sets, and involved precisely the same issues as the instant case, i.e. whether the production of gift sets constitutes manufacturing or assembly, or merely packaging.

4. The BTA erred to the extent it concluded that "Accel does not engage in manufacturing as that term is traditionally understood in the sales and use tax context," when the only evidence in the record was that Accel changes the state or form of the products through its assembly process, consistent with Ohio's definition of "manufacturing" for use tax purposes.

5. The BTA erred as a matter of fact and law in failing to admit into the record Accel's Exhibit X and Exhibit Y (hereinafter, collectively the "Exhibits"). Exhibit X is captioned "First

Amendment to Agreement for Employee Leasing, dated October 6, 2006,” while Exhibit Y is a summary of Resource Staffing’s employees provided to Accel, including their respective tenures. The Exhibits were properly admissible as part of the record before the BTA for multiple reasons, including, but not limited to:

(a) The Exhibits were provided to Appellant/Tax Commissioner at least four days before the BTA evidentiary hearing;

(b) The Exhibits are not subject to evidentiary rules that would exclude them from the BTA’s consideration;

(c) Excluding the Exhibits unduly prejudices Appellee due to their highly probative value;

(d) The Exhibits are not inadmissible hearsay;

(e) Appellant/Tax Commissioner is not prejudiced by admitting the Exhibits;

(f) Appellant/Tax Commissioner violated the BTA’s discovery rules;

(g) The Exhibits were produced by third parties over which Accel had no control, pursuant to a subpoena for such documents issued by the Tax Commissioner (and the third party asserted it did not receive such subpoena); and

(h) Accel played no part in any alleged delay in the production of the Exhibits.

6. The BTA erred in denying Accel’s claims for exemption from use tax relative to labor leased from its vendor Manpower where the only evidence in the record was that the terms of the leased labor agreement with Manpower, and the parties’ performance under that agreement, were the same as with Resource Staffing, purchases from which were held to be exempt from use tax.

7. The BTA erred in failing to consider Accel's alternate position that if it was found to not be a manufacturer, it was nonetheless engaging in the resale of the items it purchased such that they were exempt from use tax pursuant to R.C. 5739.01(E).

8. The BTA erred in failing to consider whether Accel was making retail sales for purposes of R.C. 5739.02(B)(15).

9. The BTA erred in overruling Accel's objection and admitting testimony from the Tax Commissioner's expert Dr. Robert Clarke regarding the use of gift sets by consumers, where such opinion was not contained in his written report and the Tax Commissioner failed to establish that Dr. Clarke was qualified to offer expert opinion relative to consumer use of gift sets.

10. The BTA erred in qualifying the Tax Commissioner's expert Dr. Clarke as an expert witness and by overruling Accel's motion to strike his testimony, where, *inter alia*, Dr. Clarke:

- (a) failed to provide an opinion, in his written report or otherwise, on whether Accel's operations met the Ohio definition of "packaging";
- (b) relied exclusively, in both his written report and testimony, on industry definitions of packaging that were irrelevant to the issue of whether Accel was engaged in packaging under Ohio law;
- (c) did not observe Accel's assembly process in operation and had no knowledge of Accel's operations; and
- (d) had no experience in manufacturing or any other expertise in manufacturing which would qualify him as being able to render an opinion as to whether Accel was a manufacturer under Ohio law.

11. The BTA erred in sustaining an objection raised by the Tax Commissioner which prevented Dr. Clarke from having to answer questions at the hearing concerning whether he was aware of Ohio's definition of packaging for use tax purposes.

12. The BTA erred in sustaining the objection of the Tax Commissioner, precluding testimony of Audit Agent Dan Campbell regarding the similarities between Accel's operations and those of the taxpayer in *United States v. Dean, supra*.

13. The BTA erred in failing to find that the assessment was barred pursuant to R.C. 5703.58(B), which prohibits the assessment of tax, penalty and interest for use tax for any period prior to January 1, 2008. The assessment was not issued nor final, pursuant to R.C. 5739.13(B), until the Tax Commissioner issued his Final Determination on June 26, 2012, approximately nine (9) months after the effective date of R.C. 5703.58(B).

14. The Tax Commissioner's Final Determination is unconstitutional because it denies Accel Equal Protection under the Fifth and Fourteenth Amendments to the United States Constitution, as well as under the Ohio Constitution, by arbitrarily, unlawfully and unjustifiably treating Accel different than similarly situated taxpayers. Specifically, Accel was assessed use tax for purchases that would not have been taxed had they been made by Accel's customer and consumed by said customer in the same manner in which Accel consumed them.

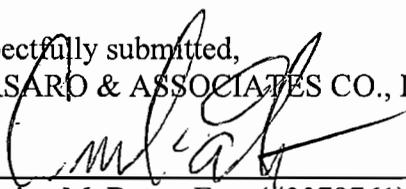
15. The Tax Commissioner's Final Determination is unconstitutional under the Supremacy Clause of the United States Constitution as Accel has been recognized by the United States Government as a manufacturer for the purposes of Federal income taxation pursuant to a definition of "manufacturing" which is substantially the same as the definition of said term under Ohio use tax law.

16. The BTA erred in failing to find that Accel was reselling the benefit of the service provided by its labor providers such that it is not subject to use tax under R.C. 5739.01(E).

17. The BTA erred in failing to find that Accel was consuming its leased labor as part of a manufacturing operation such that it is not subject to use tax under R.C. 5739.02(B)(42).

Respectfully submitted,  
CORSARO & ASSOCIATES CO., LPA

By: \_\_\_\_\_

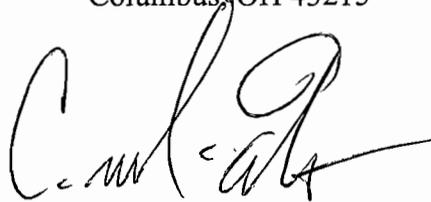
  
Christian M. Bates, Esq. (#0079761)  
Joseph G. Corsaro, Esq. (#0011474)  
Scott R. Poe, Esq. (#0082547)  
28039 Clemens Road  
Westlake, OH 44145  
Ph: (440) 871-4022  
Fax: (440) 871-9567  
Email: cbates@corsarolaw.com  
Attorneys for Appellee Accel Inc.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing *Notice of Cross-Appeal of Accel Inc.* was served on August 21, 2015: (1) via electronic filing with the Supreme Court of Ohio; (2) by overnight mail upon the Ohio Board of Tax Appeals, 30 E. Broad Street, 24<sup>th</sup> Floor, Columbus, Ohio 43215; and (3) by certified mail upon the following:

Michael DeWine, Esq.  
Daniel W. Fausey, Esq.  
30 East Broad Street, 25<sup>th</sup> Floor  
Columbus, OH 43215  
Counsel for Appellant Joseph W. Testa,  
Ohio Tax Commissioner

Joseph W. Testa  
Tax Commissioner of Ohio  
30 East Broad Street, 22<sup>nd</sup> Floor  
Columbus, OH 43215



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Christian M. Bates, Esq. (#0079761)  
Attorney for Appellee Accel Inc.

OHIO BOARD OF TAX APPEALS

ACCEL, INC., (et. al.),

CASE NO(S). 2012-2840

Appellant(s),

( USE TAX )

vs.

DECISION AND ORDER

JOSEPH TESTA, (et. al.),

Appellee(s).

APPEARANCES:

For the Appellant(s)

- ACCEL, INC.  
Represented by:  
CHRISTIAN BATES  
CORSARO & ASSOCIATES CO., LPA  
28039 CLEMENS ROAD  
WESTLAKE, OH 44145

For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO  
Represented by:  
DANIEL W. FAUSEY  
ASSISTANT ATTORNEY GENERAL  
OFFICE OF OHIO ATTORNEY GENERAL  
30 EAST BROAD STREET, 25TH FLOOR  
COLUMBUS, OH 43215-3428

Entered Wednesday, July 15, 2015

Mr. Williamson, Ms. Clements, and Mr. Harbarger concur.

Appellant appeals a final determination of the Tax Commissioner wherein he largely affirmed a use tax assessment issued as a result of an audit of appellant's purchases from January 1, 2003 through December 31, 2009. This matter is considered upon the notice of appeal, the statutory transcript ("S.T.") certified by the commissioner, the record of this board's hearing ("H.R."), and the parties' briefs. Upon consideration of the commissioner's motion to strike a portion of appellant's post-hearing brief, i.e., footnote 6, said motion is hereby denied.

Appellant ("Accel") described itself in its post-hearing brief as "a unique company that assembles gift sets, consisting primarily of health and beauty products (i.e., shampoos, lotions, shower gels, etc.), for major retailers such as Bath and Body Works and Victoria's Secret." Appellant's Post-Hearing Brief at 1. Following an audit of Accel's purchases, the Tax Commissioner assessed Accel use tax for "packaging materials" used in its operations and its purchased labor. Accel filed a petition for reassessment, which raised numerous objections, including, relevant to this matter: exemption as a manufacturer under R.C. 5739.02(B)(42)(a), double taxation, exemption as a packager under R.C. 5739.02(B)(15), exception for resale transactions under R.C. 57309.01(E), exemption of delivery charges under R.C. 5739.02(B)(11), exception for leased long-term labor under R.C. 5739.01(JJ)(3), statute of limitations, and constitutional objections. Accel also asked that the penalty and interest be abated. The commissioner, for the most part, rejected Accel's objections, and the present appeal ensued.

At this board's hearing, Accel's president and co-CEO, David Abraham, testified about Accel's operations. Although Mr. Abraham acknowledged that Accel markets itself as a "packager," he explained that it does so to distinguish itself from "pick and pack" companies who simply put finished products in shipping boxes. He explained that Accel, in contrast, designs gift sets, in consultation with its clients, and attaches end-user items into a non-disposable "package." H.R. at 28. Accel also presented the testimony of Joe Scott, its cost accounting manager, who explained the steps taken by Accel to create its gift sets, and Dan Harms, CFO, who testified about Accel's labor arrangements with Resource Staffing. Further, Accel called Moises Luevers, CFO of Resource Staffing to testify regarding Accel's arrangements to purchase labor from Resource Staffing during the period in question.

Both Accel and the commissioner presented expert testimony in support of their respective positions. Accel presented Carol Ptak, its offered expert witness in manufacturing, who testified about the definition of manufacturing used by the American Production and Inventory Control Society ("APICS"), and opined that Accel's operations would meet such definition as a manufacturer. The Tax Commissioner presented Dr. Robert Clarke, professor at the School of Packaging at Michigan State University, who opined that Accel merely packaged products, rather than transformed them into another product. After the hearing, the commissioner moved this board to reconsider the attorney examiner's ruling qualifying Ms. Ptak as an expert witness on the manufacturing process. The motion is hereby overruled; however, the objections are considered in our determination of the weight to be given Ms. Ptak's opinion in our ultimate determination.

In our review of this matter, we are mindful that the findings of the Tax Commissioner are presumptively valid. *Alcan Aluminum Corp. v. Limbach* (1989), 42 Ohio St.3d 121. Consequently, it is incumbent upon a taxpayer challenging a determination of the commissioner to rebut the presumption and to establish a clear right to the requested relief. *Belgrade Gardens v. Kosydar* (1974), 38 Ohio St.2d 135; *Midwest Transfer Co. v. Porterfield* (1968), 13 Ohio St.2d 138. In this regard, the taxpayer is assigned the burden of showing in what manner and to what extent the commissioner's determination is in error. *Federated Dept. Stores, Inc. v. Lindley* (1983), 5 Ohio St.3d 213.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property or the benefits realized in this state of services provided, with it being the obligation of the user to file a return and remit tax on the purchase of such items when tax was not paid to a seller. R.C. 5741.12. The legislature has also provided numerous exemptions and exceptions to the collection of sales tax, and, through R.C. 5741.02(C)(2), has mandated that if the acquisition of an item within the state would not be subject to tax, then the item's use within the state is correspondingly not subject to tax. However, "[s]tatutes relating to exemption or exception from taxation are to be strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto." *Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, paragraph two of the syllabus. See, also, *Ball Corp. v. Limbach* (1992), 62 Ohio St.3d 474; *Highlights for Children, Inc. v. Collins* (1977), 50 Ohio St.2d 186.

At the outset, we acknowledge Accel's claims that the assessment is unconstitutional under the Supremacy Clause of the U.S. Constitution and the Equal Protection Clauses of the U.S. and Ohio constitutions. The Ohio Supreme Court has authorized this board to accept evidence on constitutional points; however, it has also clearly stated that we have no jurisdiction to decide constitutional claims. *Cleveland Gear Co. v. Limbach* (1988), 35 Ohio St.3d 229; *MCI Telecommunications Corp. v. Limbach* (1994), 68 Ohio St.3d 195, 198. Therefore, we acknowledge Accel's constitutional claims, but make no findings in relation thereto.

We further note that Accel failed to make any further argument regarding its stated error regarding the taxation of delivery charges pursuant to R.C. 5739.02(B)(11). Accordingly, we find that Accel has failed to show the error in the commissioner's determination, and hereby affirm the commissioner's final determination as to this issue.

Turning to Accel's main argument, as a threshold matter, this board must determine whether Accel's activities constitute "manufacturing," "assembly," or "packaging." If Accel's operations qualify as manufacturing or assembly, it argues, the purchases at issue in the assessment qualify for exemption under R.C. 5739.02(B)(42)(a) and (g), which exempt from the sales tax, and corresponding use tax, "[s]ales where the purpose of the purchaser is to \*\*\* incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining" or "use the thing transferred \*\*\* primarily in a manufacturing operation to produce tangible personal property for sale." If not exempt under R.C. 5739.02(B)(42), Accel argues that it alternatively qualifies for exemption under R.C. 5739.02(B)(15) which exempts sales to those engaged in retail sales. The commissioner, on the other hand, argues that Accel's operations are merely "packaging," for which exemption is only permitted for those engaged in manufacturing and/or retail sales. Accordingly, we must initially determine whether Accel's operations constitute "packaging."

Packaging is defined in R.C. 5739.02(B)(15) as "placing in a package;" that section also defines "packages" to include "bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers." In *Custom Beverage Packers, Inc. v. Kosydar* (1973), 33 Ohio St.2d 68, 73, the Supreme Court added to these definitions by stating that packages "restrain movement of the packaged object in more than one plane of direction." Thereafter, in *Cole Natl. Corp. v. Collins* (1976), 46 Ohio St.2d 336, the court further found that "an item that prevented movement in more than one plane of direction, \*\*\*, was not a package if its predominant economic purpose was to facilitate the marketing of the taxpayer's products rather than to package the products." *Newfield Publications, Inc. v. Tracy* (1999), 87 Ohio St.3d 150. The *Newfield* court added that "the function of a package is to contain a product for shipping or handling." *Id.* at 153.

The evidence presented by Accel indicates that it does more than merely package products. Accel argues that its processes transform individual products, i.e., shampoos, lotions, shower gels, etc., into a distinct new product – a gift set consisting of such products specifically assembled in a re-usable container, e.g., a basket. Mr. Scott testified at this board's hearing that Accel goes through a three-stage process to complete a gift set, including a design phase where Accel works with its client to "brainstorm ideas on how to build that gift set, how that gift set is going to be presented in an aesthetic form so that it is sellable in a retail environment." H.R. at 57. Accel then implements the design through a fill and assembly specification to assemble the individual products into the gift set designed collaboratively by Accel and its customer. H.R. at 63-75. This process is similar to that discussed in *Pretty Products, Inc. v. Limbach*, 5th Dist. Coshocton No. 85-CA-10, 1985 Ohio App. LEXIS 9344 (Nov. 15, 1985), where the court found that the attachment of a cardboard header to car mats created a new, distinct product that constituted manufacturing. Such processes are in stark contrast to, for example, the mere "packaging" performed by the taxpayer in *Fichtel & Sachs Industries, Inc. v. Wilkins*, 108 Ohio St.3d 106, 2006-Ohio-246, where clutch kits were simply taken from inventory bins and put in a single box to fill a customer's order. See, also, *B.J. Alan Co. v. Zaino* (Jan. 26, 2001), BTA No. 1999-J-448, unreported. Compare, *Natl. PharmPak Services, Inc. v. Lawrence* (July 27, 2001), BTA No. 1999-M-1014, 1015, 1016, unreported. While we agree with the commissioner that the federal district court's decision in *United States v. Dean* (C.D. Cal. 2013), 945 F.Supp.2d 1110, is not persuasive on an issue of Ohio tax law, the court's decision and description of a similar gift set operation in the context of federal tax law highlights the unique nature of a gift set as a discrete consumer good. See, also, H.R., Ex. G at 1-2. We therefore find that Accel's activities do not constitute packaging.

Having found that Accel's operations do not meet the definition of "packaging," we turn to whether its operations are "manufacturing" or "assembly." We agree with the commissioner's contention that Accel does not engage in manufacturing as that term is traditionally understood in the sales and use tax context. See *Sauder Woodworking Co. v. Limbach* (1988), 38 Ohio St.3d 175, 176 ("An operation which merely enhances the value of the product without producing a change in state or form does not constitute processing."). However, we do find that Accel engages in assembly for purposes of R.C. 5739.02(B)(42)(a). "Assembly" is defined in R.C. 5739.01(R) as "attaching or fitting together parts to

form a product, but do[es] not include packaging.” In *Scholz Homes, Inc. v. Porterfield* (1971), 25 Ohio St.2d 67, 72, the Supreme Court explained that assembly “means more than the mere gathering together of fabricated materials;” rather, assembly is putting together various parts to make an operative whole.

In *Express Packaging, Inc. v. Limbach* (Sept. 18, 1992), BTA No. 1989-K-22, unreported, this board addressed the packaging exemption allowed to manufacturers in the context of a taxpayer that “custom packag[ed] goods which [were] previously manufactured by appellant’s customers into ‘units’” and which were received by the appellant “in large quantities or bulk form and \*\*\* subsequently combined by appellant in different quantities and assortments.” In that case, we found that simply placing prepared spices into bottles, and capping and labelling those bottles, did not constitute manufacturing. The Supreme Court similarly found that a “pick and pack” operation did not constitute manufacturing. *Fichtel & Sachs*, supra. Here, the record clearly demonstrates that Accel does more than simply put consumer goods into a carton, as was the case in *Express Packaging*. See, H.R. at 57-75. Indeed, Accel refers to its day-to-day operations as assembly, based on the Fill and Assembly specifications written during its collaborative design process with its customers. See H.R., Ex. S. Based upon the foregoing, we find that Accel engages in assembly for purposes of R.C. 5739.02(B)(42)(a), and, therefore, its purchases of “packaging material” are exempt from use tax.

Having so found, we will not further address Accel’s argument regarding the resale exception in R.C. 5739.01(E).

Accel also appealed the commissioner’s determination regarding its purchases of leased labor from Resource Staffing and Manpower. Initially, we note the commissioner’s objection to exhibits X and Y, an October 6, 2006 amendment to Resource Staffing’s contract with Accel and a summary of employees provided by Resource Staffing to Accel and their respective tenures, respectively. The commissioner represents that the documents were subpoenaed by him prior the hearing, but that such documents were not produced until the eve of hearing, and, despite being introduced by Accel at hearing, were not disclosed in accordance with this board’s rules. See Ohio Adm. Code 5717-1-15(I). The commissioner further argues that the documents are inadmissible hearsay. Upon review of the arguments and Accel’s responses thereto, the objections are well taken and exhibits X and Y are stricken from the record.

Purchases of “employment services,” are taxable under R.C. 5739.01(JJ); however, “[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 by the contract is assigned to the purchaser on a permanent basis” is exempt. R.C. 5739.01(JJ)(3). The parties do not dispute that the contract with Resource Staffing was for a period of at least one year. The Supreme Court explained in *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, ¶21, that assigning an employee on a permanent basis means assigning the employee with an indefinite end date, not as a substitute for a current employee who is on leave, and not to meet seasonal or short-term workload conditions. In his final determination, the commissioner found that the number of employees assigned to Accel under its contracts with Resource Staffing and Manpower, which was verbal only, fluctuated with the seasons, based on the dollar amount spent on such labor by Accel. S.T. at 9. The commissioner also noted that the names of specific employees assigned to Accel “changed quite often in a temporary manner.” S.T. at 10, quoting Auditor’s Remarks, pg. 13. The commissioner further rejected Accel’s arguments that its labor purchases were exempt under the resale and manufacturing exemptions.

Accel argues that employees were assigned on a permanent basis. It cites the testimony of Mr. Harms and Mr. Luevers, who indicated that the intent was to have permanent employees to avoid the need for constant training of new employees and to provide needed continuity. While Accel acknowledged that it occasionally became behind on its bills, resulting in less than its full staffing needs being met, Mr. Luevers testified that, in such instances, the hours of each employee were proportionately cut back, rather than entire employees being withheld. H.R. at 341-342. Moreover, Accel cites this board’s decision in *Excel Temporaries, Inc. v. Tracy* (Oct. 30, 1998), BTA No. 1997-T-257, unreported, where we found that even a

high degree of turnover of individual employees supplied under such a contract does not defeat a claim of exception under R.C. 5739.01(JJ)(3). Id. at 13. In response, the commissioner noted Mr. Scott's testimony that employee needs were determined on a project-by-project basis.

The testimony of Mr. Harms and Mr. Lluervers indicates that Resource Staffing assigned employees permanently to Accel; indeed, doing so was part of Resource Staffing's unique business model. H.R. at 288-290, 307-309. While we acknowledge the existence of some turnover of employees, we agree with Accel that such turnover does not obviate exception under R.C. 5739.01(JJ)(3). *Excel Temporaries*, supra. Further, we find the commissioner's arguments regarding the fluctuating hours required by Accel in conjunction with Accel's production levels to be unavailing. The concept of temporary or seasonal labor implies that employees are assigned for a short time period; the testimony presented at this board's hearing indicates that Accel adjusted its labor needs for each project by decreasing each employees' hours, rather than by accepting a smaller number of employees during less busy time periods. H.R. at 341-342. However, employees were not reassigned elsewhere and remained assigned to Accel for an indefinite period. H.R. at 330. We find nothing in the statute or related case law that requires that employees work a consistent number of hours. Rather, it is only required that the employees be assigned on a permanent basis. Based on the record before us, we find that Resource Staffing supplied personnel to Accel on such a basis during the time period in question.

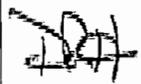
Moreover, Accel argues that the employees provided by Resource Staffing were not "under the supervision or control of another," as is required to meet the definition of "employment service" in R.C. 5739.01(JJ). The testimony of Mr. Lluervers indicated that Resource Staffing supplied supervisors, on its own payroll, not Accel's, to supervise and direct the employees provided for Accel's production activities. H.R. at 327-238.

While Accel argues that its relationship with Manpower was similar to its relationship with Resource Staffing, we find the only evidence of Manpower's provision of employment services was the affidavit of David Abraham, previously provided to the commissioner. Given the lack of specific evidence, as was presented with regard to Resource Staffing, we are unable to conclude that the commissioner erred in his determination regarding the employment services provided by Manpower.

Finally, Accel argues that the commissioner erred in failing to abate penalties and pre-assessment interest. It cites to R.C. 5703.58(B), which states that "the commissioner shall not make or issue an assessment against a consumer for any tax due under Chapter 5741 of the Revised Code, or for any penalty, interest, or additional charge on such tax, if the tax was due before January 1, 2008." That section, however, was not enacted and effective until September 29, 2011. As the commissioner correctly notes, the underlying assessment in this matter was made/issued on January 18, 2011. We therefore find that the prohibition in R.C. 5703.58(B) has no bearing in this matter. Although Accel made no further argument beyond its original notice of appeal relating to penalties and interest, specifically under R.C. 5741.99(C), R.C. 5739.133(A)(3), and R.C. 5741.14, we find that the commissioner made no error in his assessment of penalties and interest.

Based upon the foregoing, the final determination of the Tax Commissioner is hereby affirmed in part and reversed in part.

**BOARD OF TAX APPEALS**

RESULT OF VOTE	YES	NO
Mr. Williamson		
Ms. Clements		
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