Supreme Court of Ohio Clerk of Court - Filed October 26, 2015 - Case No. 2015-0551

In the
# Supreme Court of Ohio

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

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

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## INTRODUCTION

In Ohio, tax is imposed on purchases of employment services. R.C. 5739.01(B)(3)(k); R.C. 5739.01(JJ). An exclusion from the tax is available if the purchaser of employment services demonstrates that the purchases were made pursuant to: "(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." R.C. 5739.01(JJ)(3); *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. Eligibility for use of the exclusion requires that, as a threshold, the contract must contain these two elements. ST 1993-08, Employment Service, Revised February, 2007, Ohio Department of Taxation Information Release, Example C-4.

A.M. Castle & Co. ("AM Castle"), purchased employment services from DC Transportation pursuant to a contract, but this contract does not assign any driver to AM Castle on a permanent basis, or otherwise express the permanency of an assignment. Supp. at 4, 48. Rather, it provides that DC Transportation will provide to AM Castle a "sufficient number of drivers" on an "as required" basis. *Id.* AM Castle claims that it has no obligation to pay tax on these purchases. AM Castle contends that these purchases fit within the employment services exclusion at R.C. 5739.01(JJ)(3).

Accordingly, the contract fails to meet the express terms of the exclusion: namely, the contract fails to include the term that "each employee covered under the contract is assigned to [AM Castle] on a permanent basis." R.C. 5739.01(JJ)(3). Without a contract that addresses both statutorily required elements, the contract is statutorily defective and ineligible for the exclusion as a matter of law. *Bay Mechanical & Elec. Corp. v. Testa,* 133 Ohio St.3d 423, 2012-Ohio-

4312, ¶ 19; ST 1993-08, Employment Service, Revised February, 2007, Ohio Department of Taxation Information Release, Example C-4. Accordingly, on this basis alone, AM Castle cannot meet the statutory requirements for the employment services exclusion and the employment services purchases occurred in taxable transactions. R.C. 5739.01(B)(3)(k); R.C. 5739.01(JJ).

To bridge this gap between the actual language of the AM Castle and DC Transportation contract (which lacks the permanent assignment term) and the statute's requirements for use of the employment services exclusion (which requires a permanent assignment term in the contract), AM Castle says that "we didn't really mean what the contract said – we meant something else." *See, e.g.*, AM Castle Merit Brief, Proposition of Law. According to AM Castle, this "something else" is a term of permanency in the contract. AM Castle argues that the "facts and circumstances" of the assignment supplement this missing term in its contract, and therefore, qualifies AM Castle for the tax exclusion. *Id.*

AM Castle is wrong. The "facts and circumstances of the assignment" cannot be used to "cure" and ineligible employment services contract. This Court's holdings demonstrate that a "facts and circumstances" inquiry will be used only if the threshold statutory requirements are met, to ensure that the *actual practice* of the employee assignments *actually occurs* in accordance with the terms of the contract. *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. AM Castle's interpretation of when a facts and circumstances inquiry takes place is contrary to this precedent.

AM Castle's interpretation also disrupts foundational principles of statutory construction and contract application. If AM Castle is right, an exclusion of otherwise taxable employment services purchases is permitted, notwithstanding the express language of the statute (which

requires a permanent assignment term in the contract) and the actual language of the contract negotiated, agreed to, and executed by AM Castle and DC Transportation (which lacks the permanent assignment term). But such a result is contrary to two principles: (1) that clear and unambiguous words in a statute are applied as written, so that all parts of the statute are given meaning, and (2) that clear and unambiguous terms to a contract establish the terms of that agreement, without resort to a consideration of the parties' intent. *Boley v. Goodyear Tire & Rubber Co.*, 125 Ohio St.3d 510, 2010-Ohio-2550, ¶ 20, 21; *Aultman Hosp. Assn. v Community Mut. Ins. Co.*, 46 Ohio St.3d 51 (1989), syllabus.

Further, AM Castle's proposed use of the "facts and circumstances" inquiry means that any time a contracting party seeks to avoid taxation, that party need only claim that "we didn't mean what's written in the contract," and thereby qualify for exclusion of its taxable employment service purchases.

Still, even if the facts and circumstances of the AM Castle and DC Transportation contract are considered, the *actual practice* of the assignment as contained in the statutory transcript of this matter demonstrates that AM Castle purchased taxable employment services. The contract language, and other summary documents created by AM Castle, indicate that the drivers were temporarily assigned and the hearing testimony elicited differing accounts with respect to the permanency of the drivers. This is hardly the reliable and probative evidence the Board must have to reverse a Tax Commissioner final determination. *Olentangy Local Schools Bd. of Edn. v. Delaware Cty. Bd. of Revision*, 125 Ohio St.3d 103, 2010-Ohio-1040, ¶ 15; *Satullo v. Wilkins*, 111 Ohio St.3d 339, 2006-Ohio-5856, ¶ 14.

This Court should reverse the decision of the Board and conclude that AM Castle's purchases of employment services occurred in taxable transactions.

## LAW AND ARGUMENT

**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), i.e., 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).

**A. The employment services exclusion requires, as a threshold, a contract for employment services that meets the statutory elements set forth at R.C. 5739.01(JJ)(3). The AM Castle/DC Transportation contract fails to meet the threshold: it does not contain the statutory elements necessary to claim an exclusion from taxation, and accordingly, no facts and circumstances inquiry is prompted.**

The employment services exclusion statute sets forth two requirements that must be met to qualify for the use of tax exclusion. The "facts and circumstances of the assignment" inquiry, as derived from interpretative law, cannot be used to supersede the express requirements of the exclusion statute.

Here, the contract between AM Castle and DC Transportation never expressed that any driver would be permanently assigned to AM Castle. Accordingly, AM Castle cannot meet the elements set forth in the statute to qualify for a tax exclusion. And since AM Castle has not met the threshold requirements, there was no basis for the Board to conduct a facts and circumstances inquiry.

AM Castle argues that the language contained in its contract is immaterial so long as a facts and circumstances demonstrates a permanent assignment. But AM Castle's reading of R.C.

5739.01(JJ)(3) and the applicable interpretative law turns the language of the statute inside-out, so that the objective statutory requirements are relevant only if a subjective facts and circumstances analysis is satisfied first. AM Castle's interpretation of the "judicial check on the contract terms," i.e. the facts and circumstances inquiry, leap-frogs that inquiry to the front of the line, trumping the plain language of the statute.

AM Castle's reading of the employment services exclusion statute, and interpretation of the role of the facts and circumstances inquiry, is wrong. AM Castle's purchases of employment services are taxable as a matter of law.

***1. The facts and circumstances inquiry is triggered only after the statutory requirements for exclusion have been satisfied.***

R.C. 5739.01(JJ)(3) provides for an exclusion from taxation of employment service purchases. In this provision, two threshold requirements are necessary for the use of the exclusion. These are that the employment service purchases must have been made pursuant to a contract that expressly "*specifies:*"

(1) a term of at least one year, and

(2) a permanent assignment of each of employee covered under the contract.

R.C. 5739.01(JJ)(3); *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 18.

These statutory requirements are the bare minimums that parties must express in their contracts for employment services. *Id.* In essence, R.C. 5739.01(JJ)(3) contains a safe-harbor that allows an employment services transaction to be excluded from the general rule of taxation, when certain contractual preconditions exist.

An employment services contract that fails to meet either of the threshold requirements for use of the statute is defective for purposes of the exclusion. This means that the employment service purchases are ineligible for exclusion as a matter of law. R.C. 5739.01(JJ)(3); *see, e.g.*,

ST 1993-08, Employment Service, Revised February, 2007, Ohio Department of Taxation Information Release, Example C-4.

However, if the contract provides, or suggests, that employees are permanently assigned, it is then appropriate to conduct an inquiry into the actual facts and circumstances of the employment relationship. *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 21, 22. This inquiry is to ensure that the contract is consistent with the requirements of the exclusion statute. *Bay Mechanical,* 133 Ohio St.3d 423, 2012-Ohio-4312, at ¶ 19; *H.R. Options* at ¶ 18, 22. The inquiry determines whether the employees are truly permanently assigned, or whether the contract is merely reciting "magic words" and the actual practice is to use the employees as a non-permanent work-force. *Id.* The inquiry evaluates the assignment and ascertains "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." *Id.* Moreover, the determination of permanency must be made with respect to each person assigned. R.C. 5739.01(JJ)(3).

According to the very language of the statute, the satisfaction of the two elements set forth in R.C. 5739.01(JJ)(3) is necessary before a facts and circumstances inquiry is initiated. But when the clear and unambiguous language of the contract leaves no doubt that the statutory conditions have not been set forth expressly in the parties agreement, there is no need to look further and ascertain the facts and circumstances of the relationship.

***2. The AM Castle contract does not meet the statutory requirements for exclusion.***

The contract between AM Castle and DC Transportation does not meet both of the elements set forth in R.C. 5739.01(JJ)(3) to be eligible for the employment services exclusion. The actual language of the contract fails to permanently assign any driver to AM Castle. There

is no language in the contract that specifies that "each employee covered under the contract is assigned to [AM Castle] on a permanent basis." R.C. 5739.01(JJ)(3); Supp. at 48-50. Mr. Knopp, the AM Castle representative, clearly acknowledged in his hearing testimony that "the word permanent is not in that contract." Supp. at 48-50, 128. The contract also does not actually assign any individual driver to AM Castle. Supp. at 48-50. Nor does the contract state how many drivers will be provided, or provide any indication as to how many drivers will be assigned to AM Castle at any given time. *Id.*

Similarly, the contract does not *suggest* that any employees are permanently assigned to AM Castle. There is no contract term that states any driver is subject to indefinite assignment. Supp. at 48-50. There are no starting dates within the agreement for any driver. Supp. at 48-50. To the contrary, the only date mentioned in the document is its execution date. Supp. at 48-50.

Instead, the contract indicates temporary assignment. The contract provides that a "sufficient number of drivers" will be assigned on an "as required" basis. Supp. at 4, 48. Accordingly, AM Castle receives drivers from DC Transportation only as needed, and as according to AM Castle's business demands. Supp. at 4, 48. The contract also allows AM Castle to adjust the "sufficient number of drivers" assigned to it on the "as required" basis: 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. AM Castle may also to "remove [a] driver from service" upon written request, without providing any reason for the removal. Supp. at 49. In other words, the contract lacks any language that provides for any individual employee to be, or suggests that any individual employee is, permanently assigned to AM Castle. R.C. 5739.01(JJ)(3); *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 18.

AM Castle argues that there are no magic words required to create a permanent assignment for employment services. AM Castle's Merit Brief, Proposition of Law. But regardless, the statute sets forth the bare minimum requirements necessary for the use of the exclusion and that must be contained within an employment services contract. And as long as a contract meets the duration requirement and provides for a permanent assignment of an employee, the statutory requirements are met. *H.R. Options* at ¶ 21, 22.

The problem for AM Castle is that their contract failed to meet even the minimal statutory threshold. Thus, the language in the contract is not "consistent with the requirements set forth at (JJ)(3)." *Bay Mechanical,* 133 Ohio St.3d 423, 2012-Ohio-4312, at ¶ 19; *H.R. Options* at ¶ 22. The threshold elements for exclusion have not been met, and no further facts and circumstances inquiry is triggered. R.C. 5739.01(JJ)(3); *Bay Mechanical* at ¶ 19; *H.R. Options* at ¶ 22; ST 1993-08, Employment Service, Revised February, 2007, Ohio Department of Taxation Information Release, Example C-4. AM Castle's employment service purchases are statutorily subject to tax.

***3. AM Castle misconstrues the use of the facts and circumstances inquiry.***

In defense of its statutorily defective contract, AM Castle makes a "hindsight view" argument. AM Castle argues that a tax adjudicator should always perform a facts and circumstances analysis, ascertaining what the parties subjectively intended the terms of their contract to be, to determine whether an exclusion for purchases of employment services is available.

AM Castle proposes that the facts and circumstances analysis should be used to supplement a contract necessary to qualify a purchaser of employment services for the statutory exclusion. In this regard, AM Castle contends that it and DC Transportation intended and

"*consider[ed* the] drivers assigned to the AM Castle account to be permanently assigned." (Emphasis added.) AM Castle Merit Brief, p. 3. AM Castle further points to its self-serving hearing testimony, summary documents, and other limited evidence as the "facts and circumstances of the assignment" in its effort to supplement the contract's absent term of permanency, so that it can qualify for the tax exclusion.

But such a position is untenable.

*a. This Court's decisions demonstrate that a facts and circumstances inquiry occurs only after the statutorily required threshold provisions are met.*

This Court's decisions demonstrate that the facts and circumstances inquiry occurs after the statutorily required threshold provisions are met. AM Castle's suggested use of the facts and circumstances inquiry is contrary to this precedent.

As detailed in *HR Options* and *Bay Mechanical*, a contract that meets the statutory minimums is analyzed under a facts and circumstances inquiry. *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. This is to ensure that the actual performance of the contract is consistent with the statute's requirements. *Id.* In other words, a statutorily compliant underlying employment services contract must exist, with which to compare the subsequent actual performance. Without a statutorily compliant underlying contract, there is no basis upon which to make any comparisons.

Here, the AM Castle and DC Transportation contract does not provide, or even suggest, that employees are permanently assigned to AM Castle. Simply stated, the contract lacks any indicator of permanency and instead indicates impermanence. It is therefore, inappropriate to conduct an inquiry into the actual facts and circumstances of the employment relationship. *H.R. Options* at ¶ 21, 22.

*b. Principles of statutory application require that the statute's threshold requirements must be met before a facts and circumstances inquiry occurs.*

Foundational principles of statutory interpretation require this Court to reject AM Castle's proposal to conduct a facts and circumstances analysis to supplement an employment services contract that does not qualify for exclusion.

Ohio law is well-established that clear and unambiguous words in a statute are to be applied as written and not interpreted. *Boley,* 125 Ohio St.3d 510, 2010-Ohio-2550, at ¶ 20; *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.,* 74 Ohio St.3d 543, 545 (1996). "[T]o construe or interpret what is already plain is not interpretation but legislation, which is not the function of the courts." *Thompson Elec., Inc. v. Bank One, Akron, N.A.*, 37 Ohio St.3d 259, 264 (1988).

This Court has also observed that statutes are applied "as a whole and giv[en] such interpretation as will give effect to every word and clause in it. No part should be treated as superfluous unless that is manifestly required, and the court should avoid construction which renders a provision meaningless or inoperative." *Boley* at ¶ 21, *quoting State ex rel. Myers v. Spencer Twp. Rural School Dist. Bd. of Edn.*, 95 Ohio St. 367, 373 (1917).

The clear and unambiguous language of the statute that excludes from taxation purchases of employment services requires those purchases to have been made 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); *H.R. Options*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 18. AM Castle's argument ignores this express statutory language. AM Castle contents that the exclusion is available even though there is no contract "that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis."

Further, AM Castle's reading renders the express statutory requirements merely optional and voluntary, provided that the purchaser of the employment services can make an "after the fact" showing of permanency (which, for all practical purposes, occurs only if an audit is conducted). Thus, AM Castle's version of the statute is rendered meaningless, because not every word and clause in it is given effect and the permanent assignment provision is rendered inoperative. *Boley,* 125 Ohio St.3d 510, 2010-Ohio-2550, at ¶ 21. And the unintended consequence of such an application is that contracts for employment services will no longer need to contemplate and include any term of permanency for the assigned employees, so long as the judicial check on the contract – the facts and circumstances analysis – "demonstrates permanency."

This is not what R.C. 5739.01(JJ)(3) says. AM Castle's suggested reading of the statute that provides an exclusion for employment services purchases is a blatant disregard of the rules of statutory application and construction. *Boley* at ¶ 20, 21. AM Castle is requesting that this Court to venture into "legislation, which is not the function of the courts." *Thompson Elec., Inc.*, 37 Ohio St.3d at 264.

*c. Principles of contract application are violated if a facts and circumstances inquiry occurs to contradict the express terms of a written agreement.*

AM Castle's view of when a fact and circumstances analysis is conducted also disrupts and unsettles long-established principles of contract application.

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. When contract terms express the agreement of the parties, a court will not conduct any further inquiry because "courts presume that the intent of the parties to a contract resides in language they chose to employ in the agreement." *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. See also *Aultman Hosp. Assn.* 46 Ohio St.3d at syllabus ("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."). Furthermore, when "the terms in a contract are unambiguous, courts will not in effect create a new contract by finding an intent not expressed in the clear language employed by the parties." *Shifrin* at 638; *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246 (1978).

In this case, AM Castle and DC Transportation negotiated, agreed to, and executed a contract for purchases of employment services. The actual language of this contract indicates temporary assignment for each individual employee. The actual language of this contract expresses the intent of AM Castle and DC Transportation: that 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.

In other words, this contract clearly and unambiguously evidences the intent of AM Castle and DC Transportation to have purposefully declined to include a term of permanent assignment for each employee. AM Castle had the opportunity to include a term of permanent assignment within its contract with DC Transportation. AM Castle cannot now revisit those terms through the auspices of a facts and circumstances analysis and attempt to rewrite the contract so that it obtains a tax benefit to which, as a result of its own actions, it is not entitled.

This Court will "not give the contract a construction other than that which the plain language of the contract provides," and effectively "create a new contract by finding an intent not expressed in the clear language employed by the parties." *Aultman Hosp. Assn.*, 46 Ohio

St.3d at syllabus; *Shifrin,* 64 Ohio St.3d at 638; *Alexander* at 246. Yet this is precisely what AM Castle requests. Moreover, AM Castle's suggested use of the facts and circumstances analysis means that any time a contracting party is unhappy with terms it negotiated, the party need only to claim that "we didn't mean what's written in the contract" to avoid a tax.

When a term is not included in a contract, that term 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. This agreement does not become subject to interpretation and modification simply because AM Castle is disappointed that it failed to include an express provision, or even a suggestion, of permanent assignment for each employee and, consequently, failed to qualify for the R.C. 5739.01(JJ)(3) exclusion from taxation. *Id.* at 55.

The contract between AM Castle and DC Transportation contract is statutorily defective and non-compliant with the elements of the R.C. 5739.01(JJ)(3) exclusion. AM Castle is ineligible for an exclusion from taxation as a matter of law and the facts and circumstances of the assignment cannot be used to rescue AM Castle from this conclusion.

**B. Even if an analysis of the facts and circumstances is proper, the actual practice of the assignments was that no driver was assigned to AM Castle on a permanent basis.**

Even if this Court sets aside the plain language of R.C. 5739.01(JJ)(3) (which requires a term of permanent assignment in a contract) and the clear language of the employment services contract (which lacks the necessary permanent assignment term), AM Castle's purchases of employment services are taxable for two additional reasons.

### *1. A facts and circumstances inquiry that addresses any issue other than the "actual practice" of the assignment – such as the parties' intentions with respect to the assignment – is inconsistent with applicable precedent, the plain language of the exclusion statute, and with principles of statutory and contract application.*

The Board erroneously concluded that the analysis under R.C. 5739.01(JJ)(3) should include an inquiry into the amorphous concept of parties' *intent.*

But it is not appropriate to add a consideration of the parties' intent to the express requirements of R.C. 5739.01(JJ)(3). The statute is clear, definite, and unambiguous: an exclusion is available 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 within R.C. 5739.01(JJ)(3). And the words of the statute are to be applied as written and not interpreted or construed to include words not present. *State ex rel. Savarese*, 74 Ohio St.3d at 545; *Sears v. Weimer*, 143 Ohio St. 312 (1944), paragraph five of the syllabus.

The statute's focus is on whether the parties' contracted for permanent placement and the actual practice of the parties is only admissible to contract a contract that claims to "permanently" assign employees. *See Bay Mechanical* at ¶ 19; *H.R. Options, Inc.* at ¶ 21. Injecting the concept of "intent" is in contravention to the plain language of the statute and is inconsistent with bedrock principles of statutory application.

Moreover, even if the BTA was correct to look at the "facts and circumstances" in order to *prove* permanence (when the contract says otherwise), it was still improper to consider the parties' "intent" as a part of that undertaking. The focus of a facts and circumstances inquiry is whether the "*actual practice* of the assignment of particular employees was 'indefinite' in character," and if employees were "truly [provided] in an exempt manner." *Bay Mechanical,*

133 Ohio St.3d 423, 2012-Ohio-4312, at ¶ 19, 23 (emphasis added). *See also H.R. Options, Inc.*, 100 Ohio St.3d 373, 2004-Ohio-1, at ¶ 21. In those cases, the contracts actually specified permanence, and the Court only looked at facts and circumstances of employment to determine whether the employees were actually permanently supplied. *See, HR Options* at ¶ 23 (the Court reviewed executed contracts between HR Options and its clients, and HR Options and its actual employees.); *Bay Mechanical* at ¶ 30 (invoices of the employment services purchased were sought to be reviewed). In other words, the facts and circumstances reviewed in those cases included documentation to verify the permanence of an assignment. By reviewing these forms of documentation, the actual practice of the assignment could be objectively determined.

But intent, on the other hand, is not an indicator of any actual practice of the parties to the employment services contract. Intent does not address the past practices and procedures of an assignment. By definition, intent is "to have in mind something to be done or brought about; plan . . . to have a purpose or design." Webster's Unabridged Dictionary, 991 (2001). 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. Thus, given the directive in *HR Options* to review the actual practice of the parties, "intent" is an incongruous concept, is inconsistent with the applicable precedent, and has no place in a facts and circumstances analysis. *Bay Mechanical* at ¶ 19. *See also H.R. Options, Inc.* at ¶ 21.

**2. *As established by the evidence in the record, no AM Castle drivers were "permanent" within the meaning of R.C. 5739.01(JJ)(3).***

In the proceedings before the Tax Commissioner, it was determined that none of the AM Castle drivers assigned pursuant to the contract were "permanent" within the meaning of R.C. 5739.01(JJ)(3). The Tax Commissioner reached this determination because the AM Castle

contract stated that it would accept a "sufficient number of drivers" on an "as required" basis. Supp. at 48. The contract simply failed to permanently assign any drivers.

The evidence supporting the Tax Commissioner's determination, namely the AM Castle and DC Transportation contract and other summary documents about the drivers, was provided by AM Castle. It was only at the Board hearing that AM Castle sought to distance itself from this evidence, in an apparent attempt to create confusion and ambiguity when there was none otherwise.

Exclusion statutes are strictly construed against non-taxability and the taxpayer has the burden to prove entitlement to exclusion. *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, ¶ 7; *H.R. Options, Inc.*, 102 Ohio St.3d 1214, 2004-Ohio-2085, at ¶ 2; *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 123 (1989); *National Tube Co. v. Glander*, 157 Ohio St. 407 (1952), paragraph two of the syllabus. Thus, it was AM Castle's burden to demonstrate error in the Tax Commissioner's presumptively valid determination and to show that it was entitled to exclusion.

AM Castle failed to overcome this burden before the Board and the Board reached its conclusion in error. The whole of the statutory transcript, and the contract contained within that statutory transcript, supports the Tax Commissioner's final determination. As further detailed in the Tax Commissioner's Merit Brief at pages 26-30, the testimonial evidence AM Castle provided at the hearing was self-serving and contradictory. The witnesses provided differing accounts with respect to the permanency of the drivers. *See, e.g.*, Supp. at 143, 165. The witnesses' testimony also contrasted with the documentary evidence contained within the statutory transcript, Supp. 16, 114, 143, 154, and with documents created for the purpose of this litigation, Supp. 16, 127, 138, 158, 160-162, 183-185. This is hardly sufficient evidence to

support the conclusion that the Tax Commissioner's final determination was anything other than reasonable and lawful. *A. Schulman, Inc.*, 116 Ohio St.3d 105, 2007-Ohio-5585, at ¶ 7; *Alcan Aluminum Corp.*, 42 Ohio St.3d at 123.

Moreover, AM Castle's defense of the Board's decision is doomed to fail. Because AM Castle failed to present reliable and probative evidence to support the Board's decision, the Board's decision is a demonstration of its 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; *Satullo*, 111 Ohio St.3d 339, 2006-Ohio-5856, at ¶ 14.

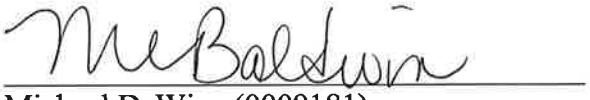
As a consequence, any review of the facts and circumstances surrounding the assignment of the DC Transportation drivers to AM Castle leads to the conclusion that the AM Castle purchased taxable employment services.

## CONCLUSION

Based on the foregoing, the Tax Commissioner respectfully requests this Court to reverse the decision of the Board, that reversed the Tax Commissioner's denial of an exclusion for AM Castle's purchases of employment services.

Respectfully Submitted,

Michael DeWine
Ohio Attorney General



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## CERTIFICATE OF SERVICE

I certify that a copy of the foregoing has been sent by email and regular U.S. mail this 26th day of October, 2015, to upon the following:

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