

In the
Supreme Court of Ohio

ACCEL, INC.,	:	
	:	Case No. 2015-1332
Appellee/Cross-Appellant,	:	
	:	Appeal from Ohio Board of Tax Appeals
v.	:	
	:	BTA Case No. 2012-2840
JOSEPH W. TESTA,	:	
TAX COMMISSIONER OF OHIO,	:	
	:	
Appellant/Cross-Appellee.	:	

**MERIT BRIEF OF APPELLANT/CROSS-APPELLEE JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO**

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INTRODUCTION

Accel, Inc. (“Accel”) is a self-described “packaging company”¹ that uses temporary labor to supplement its workforce as needed to meet the seasonal demands of its retail customers. Accel’s packaging business involves preparing the finished goods of retailers for shipping and retail display. For instance, Accel gathers pre-manufactured products such as shampoos, lotions, and candles, and glues, tapes, and secures them into baskets with packaging materials, in order to protect those products for shipping and shelf-display. During the ramp-up period to the big retail shopping season—July to December—Accel’s labor needs balloon, and it spends more than double on its staffing during this period than it does for the other six months of the year combined.

Sales of materials used in packaging ordinarily are taxable in Ohio, as are temporary labor services. However, Accel sought to avoid paying sales and use tax on its purchases. So, it packaged a couple selective depictions of its operations with a couple of loose interpretations of Ohio law, in the hopes of avoiding taxation. In order to convince this Court that its purchases should not be taxed, Accel tests both the elasticity of the sales tax statutes and the willingness of this Court to ignore the reality of Accel’s business operations.

First, Accel claims it is a manufacturer—for sales tax exemption purposes only—and therefore entitled to exemption for its purchases of packaging materials under R.C. 5739.02(B)(42)(a) and (g) for “manufacturing operations” and for materials incorporated in finished goods through “manufacturing, assembling, processing, or refining.”²

¹ Ex. F. For the sake of convenience, the Tax Commissioner’s BTA hearing exhibits are designated herein as “Ex.,” the Statutory Transcript prepared by the Tax Commissioner by “ST,” the parties’ Joint Stipulations as “Joint Stips.,” and the transcript of the BTA hearing as “HT.”

² These statutes provide exemptions for materials incorporated into finished goods through “manufacturing, assembling, processing, or refining” (R.C. 5739.02(B)(42)(a)); and for materials

But neither exemption is available to Accel under the plain language of those statutes. The definitions of the terms “Manufacturing Operation” and “Assembly” as used in the exemption statutes both expressly *exclude* packaging from their scope. “‘Manufacturing operation’ **does not include packaging.**” R.C. 5739.01(S) (emphasis added). “‘Assembly’ and ‘assembling’ mean attaching or fitting together parts to form a product, but **do not include packaging a product.**” R.C. 5739.02(B)(42)(R) (emphasis added).

The Board correctly determined that Accel was not “manufacturing” as that term is understood in this Court’s precedent, because Accel did not “‘produc[e] a change in state or form’” to the finished product. Opinion and Order at 3 (quoting *Sauder Woodworking Co. v. Limbach*, 38 Ohio St.3d 175, 176 (1988)). But despite ruling that Accel was not “manufacturing,” the Board nevertheless held that Accel was “assembling” items sufficient for *the same* tax exemption under R.C. 5739.02(B)(42)(a).

In order to reach such a conclusion, the Board first had to determine that Accel was *not* engaged in “packaging,” because under R.C. 5739.02(B)(42)(R), “assembling” expressly “*do[es] not include packaging a product.*”

The Board was wrong; Accel is a packaging company under any metric: fact, industry and academic definitions, and law. Accel is a packaging business by design. Accel brands itself a contract packager on its own website, is called a contract packaging company by its founder and co-CEO, markets its business as “an end-to-end innovating packaging solution” and uses the term packaging in *its own mission and vision statements*, and to describe *the very purpose for its existence*. See, Ex. C-K. In addition to these very public-facing proclamations about the nature of its business, Accel also lists its business activity as “packaging” on its own corporate income

used “primarily in a manufacturing operation” to produced finished goods for resale (R.C. 5739.02(B)(42)(g)).

tax returns and internal financial statements—documents with no marketing purposes. HT 291-98, Joint Stips.¶ 4-5; Ex. K-O.

Accel is right to hold itself out as a packager. Under the commonly-accepted academic and industry standards, Accel is in the business of “contract packaging.” Ex. B, Expert Report of Prof. Robert Clarke, at 5; HT 485-86, 465-66.

Accel is a packager as a matter of law too. The taxable items purchased by Accel meet the statutory definitions of “packaging” in the sales tax chapter, like “containers, boxes, sacks, bags, and bottles, and packaging materials, including wrapping, labels, [and] tags,” (R.C. 5739.012(A)(1)) and “bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers” (R.C. 5739.02(B)(15)). These definitions exactly match the items for which Accel was assessed consumer’s use tax, i.e., wrapping, labels, packing materials, and the like. HT 67-75. Accel’s witness admitted that the taxed sales are “materials that are used in our packaging.” HT at 90.

Buttressing these statutes, this Court has explained that a package “restrain[s] movement of the packaged object in more than one plane of direction.” *Custom Beverage Packers, Inc. v. Kosydar*, 33 Ohio St.2d 68, 73 (1973). “The function of a package,” according to this Court “is to contain a product for shipping or handling.” *Newfield Publications, Inc. v. Tracy*, 87 Ohio St.3d 150, 153 (1999).

The purpose of Accel’s packaging is to restrain the movement of the goods for shipping and handling. As explained by Accel’s own witnesses, the packaging done by Accel prevents damage to the product and restrains the product for shipping and display. HT 65-75; 90-93; 101-110. Accel further explained that the materials “protect [the product] from moisture and dirt,” “secure a product * * * during the transportation phase,” “protect during the shipping process,”

and “used to hold product together.” HT at 90-92. The reason Accel used these materials was “so when [the product] ships from our facility to our customer’s facility that it does not lose its shape or form.” HT 90-92.

As Accel’s CEO explained “we are responsible to ensure [the products] can withstand the rigors of shipping; our goal is to have the gift set look the same on the store shelf as it did coming off our line.” Ex. G. Similarly, the Tax Commissioner’s expert witness explained that the packaging done by Accel protected the product, made it shelf-ready, and secured the product for shipping. HT 475-479; 490-492. Thus, under any measure, Accel is engaged in “packaging,” and its purchases are therefore specifically ineligible for the sales tax exemptions for manufacturing in R.C. 5739.02(B)(42)(a).

But even if the text of the statute did not specifically exclude packaging from the definition of “assembling,” Accel still does not qualify for exemption based on “assembling.”

Assembling means “attaching or fitting together parts to form a product.” R.C. 5739.01(S). As this Court has explained, “assembling” “means more than the mere gathering together of fabricated materials.” *Scholz Homes, Inc. v. Porterfield*, 25 Ohio St.2d 67, 72 (1971); see, also *Fichtel & Sachs Industries, Inc. v. Wilkins*, 2006-Ohio-246 ¶ 36. The required act is the fitting together of “various parts * * * so as to make into an operative whole.” *Id.*

To constitute “assembly,” this Court looks to whether there is a change in state or form of the product. *Sauder Woodworking*, 38 Ohio St.3d at 177. In *Sauder Woodworking*, this Court agreed with the BTA’s holding that packaging resulted in no change in state or form—the package was not an “inherent part of the product, as the [product] was equally functional and usable prior to its packaging.” *Id.*

The operative whole—the gift basket and its contents—arrive to Accel already manufactured and complete. HT 110-116. As the evidence confirmed no change in state or form of the finished goods occurs. Ex. B at 6; HT 491-493. Instead, Accel receives prefabricated finished goods from the customer, and packages those goods for shipping, storage, and shelf placement. HT 38-42.

Accel’s process is the mere “gathering together” of prefabricated materials for packaging. Even if the packaging “enhances the value of the product,” the packaging does not constitute assembling unless it produces a change in state or form. *Sauder Woodworking Co.*, 38 Ohio St.3d at 177.

The process is no different than placing a pre-manufactured salt and pepper shaker into a package with wrapping, glue, and a label, to make a shaker “set.” And, the same result obtained in similar packaging cases. See, *National Pharmpak Services, Inc., v. Lawrence, Tax Commissioner*, BTA Nos. 1999-M-1014, 1015, 1016, 2001 WL 855750, at *5 (July 27, 2001); *Fichtel & Sachs*, 2006-Ohio-246 ¶ 12; *Sauder Woodworking*, 38 Ohio St.3d at 176. In each case, there is no change in state or form of the finished product, with or without packaging. The salt and pepper set is still a set without packaging, and the gift basket is still a gift basket.

Moreover, even if Accel’s process *did* result in a change in state or form to the finished goods, it would *still* be excluded under the plain terms of the statutes, which exclude packaging from their terms. In other words, even if Accel’s process technically amounted to “assembling,” under a broad reading of the term, it would still be excluded, because it is fundamentally still packaging, which is excluded. Accordingly, this Court should have no difficulty in overruling the Board’s decision that Accel is entitled to an exemption under R.C. 5739.02(B)(42)(a).

Second, Accel argues that the employees that it procured from a staffing service were “permanent,” so the purchase was entitled to the exclusion from tax contained in R.C. 5739.01(JJ)(3). Under Ohio law, the provision of short-term or long-term temporary workers is taxable. R.C. 5739.01(B)(3)(k); R.C. 5739.01(JJ). In this case, Accel obtained temporary laborers from Resource Staffing and should have paid sales tax on that transaction. As with the “manufacturing” claim, Accel’s “permanent labor” claims defy fact and law.

Under well-settled precedent, such purchases are taxable, unless the purchaser proves that its employment services contract “specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” *H.R. Options, Inc. v. Zaino*, 2004-Ohio-1, ¶ 18. This tracks the clear and unambiguous language of R.C. 5739.01(JJ)(3), which requires 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) (emphasis added).

The contract between Accel and Resource Staffing failed to meet this threshold statutory requirement for exclusion. The contract did **not** specify that each employee would be assigned to Accel on a permanent basis—indeed, it contained no term for the provision of employees at all. R.C. 5739.01(JJ)(3).

It was error for the Board to use witness testimony to fill in this contractual gap. The Board should have ended its analysis on the face of the contract and concluded that Accel’s employment service purchases were taxable. The agreement did not meet the necessary statutory requirements for statutory exclusion and the analysis should have ended there.

However, even if the Board was permitted to fill in the missing contractual terms through extrinsic evidence, it made two additional mistakes.

First, the Board erroneously injected the “intent” of the parties into this Court’s statutory analysis with regard to whether individual laborers were assigned on a permanent basis. Decision at 4. Intent is not an element of the analysis under the statute or this Court’s precedent applying it. In fact, this Court has rejected such a prior attempt by the Board. *H.R. Options*, 2004-Ohio-1 at ¶ 20.

Second, when the actual conduct of the parties is examined, the evidence demonstrates that the employees were temporary, including:

- Labor invoices that established that employees changed frequently and were employed often for short periods. ST at 251.
- Labor invoices reflected that the amount spent on labor fluctuates with the seasons. Accel spent up to seven times more on leased labor during the busy retail holiday season than it did during other times of the year. ST at 256.
- Accel’s own witness testified that its use of temporary labor is seasonal, rather than permanent and that labor need varies from project to project, and from month to month. HT 76, 94-96.
- Expert witness testimony confirmed that contract packagers who serve the retail industry must meet seasonal demands, especially the busy Christmas season. HT 472-73.
- Resource Staffing provided only “General Laborers.” ST at 192.
- No term of employment was provided in the contract for any employees.

Thus, Accel’s use of labor bears all the hallmarks of temporary labor: (1) high turnover; (2) seasonal employment; (3) unskilled labor; and (4) an industry (contract packaging) wherein temporary labor is the norm. Accel’s own documentary evidence, including its contract and invoices, the testimony of Accel’s own employees, the testimony of the Tax Commissioner’s auditing agent, and the testimony of the Tax Commissioner’s expert witness all established that laborers were assigned to Accel were non-permanent.

In conducting its own analysis, the Board grossly misweighed the evidence of the parties’ performance, relying *solely* on the self-serving testimony of the owner of the labor company that

provided Accel with the leased labor—a company who, by its own admission had “skin in the game.” To be clear: the *only* evidence relied upon by the Board came from this person—Mr. Lluberer, who admitted that his company would have to indemnify Accel, should Accel’s leased labor be found taxable. In light of this admission, it was error for the Board to give Mr. Lluberer’s testimony any weight. Moreover Mr. Lluberer’s self-serving testimony was overwhelmingly contradicted by reliable and probative evidence. It was error for the BTA to rely solely on Mr. Lluberer’s testimony to the contrary.

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 Accel purchased taxable employment services. The Board’s decision is based on incorrect legal conclusions and is unreasonable and unlawful. *Satullo v. Wilkins*, 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*, 2010-Ohio-1040, ¶ 15.

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

STATEMENT OF THE CASE AND FACTS

Accel is a “contract packager.” Ex. K. Accel contracts with businesses for a variety of packaging services, including the packaging of “gift sets,” which was the primary example of its operations that Accel provided before the Tax Commissioner and BTA. See HT at 25. These gift sets package a combination of lotions, perfumes, soaps, and similar items in one container, such as a basket. See *id.* at 35-36. Accel’s packaging process has several steps: pre-manufactured items comprising the basket and its contents are shipped to Accel from

manufacturers in bulk; the items are uncased by Accel employees; the items are then placed into the basket by hand—sometimes held by a plastic form, sometimes glued or taped to a flat sheet of plastic in the bottom of the basket; the basket is filled with shred; the basket and all its contents are covered with bubble wrap; and the basket is enclosed in plastic wrap or bags and placed in a cardboard box for shipping. See HT at 35-36, 90-91, 74, 104-106.

At all times, the pre-manufactured items comprising the gift basket and content belong to the retail client of Accel, not Accel. HT 39-42. As noted, these materials—the tapes, glues, platforms, bags, shred, bubble wrap, and wrapping—make up the packages Accel creates. Though the placement of the products is very specifically designed and executed, Accel is placing items into packages nonetheless.

The purpose of Accel’s packaging is to restrain the movement of the goods for shipping and handling. As explained by Accel’s own witnesses, the packaging done by Accel prevents damage to the product and restrains the product for shipping and display. HT 65-75; 90-93; 101-110. Accel further explained that the materials “protect [the product] from moisture and dirt,” “secure a product * * * during the transportation phase,” “protect during the shipping process,” and “used to hold product together.” HT at 90-92. The reason Accel used these materials was “so when [the product] ships from our facility to our customer’s facility that it does not lose its shape or form.” HT 90-92.

Accel was audited by the Department of Taxation. Tax Commissioner’s Final Determination (“FD”) at 1. The auditor determined that Accel had erroneously failed to pay use tax on a large number of purchases of packaging materials such as bubble wrap, corrugate, glue, and tape (the “Taxed Items”), as well as sales tax on purchases of temporary labor services. *Id.*

The unpaid tax liability combined with interest and penalty resulted in an assessment in the amount of \$3,479,194.19. *Id.*

Accel filed a petition for reassessment, claiming that it qualified as a manufacturer, shielding its purchases of the Taxed Items from use tax liability. *Id.* To that end, Accel cited several statutory exemptions and exceptions which it contends apply to eliminate the use tax liability. *See generally id.* In addition, Accel put forth several constitutional, public policy, and jurisdictional bases in support of its position. *Id.* Accel further argued that its use of temporary labor was outside the definition of employment services and therefore not subject to sales tax. *Id.* Accel also challenged the Tax Commissioner's characterization of its leased labor as "temporary." *Id.*

The Tax Commissioner's auditing agent visited Accel's facility, met with its CFO, and reviewed Accel's records. ST 227-228. After reviewing Accel's operations and records, the Tax Commissioner sent Accel his preliminary audit findings. ST 231-33. Following more communication with Accel, the Tax Commissioner issued his Final Determination, finding that Accel did not meet the statutory requirements for the exemptions or exceptions cited. *Id.* In addition, the Commissioner found that the non-statutory arguments advanced by Accel were inapplicable and unpersuasive. *Id.* In response to the Commissioner's final determination, Accel appealed to the Board.

At the Board, the parties introduced joint stipulations of fact, and multiple documentary exhibits, including the complete record of the Tax Commissioner's audit process and administrative review. Contained in this record (the Statutory Transcript or "ST") are the assessment, Accel's Petition for Reassessment with attachments describing the taxed items, the

Auditing Agent’s report and remarks, various business records of Accel—including labor invoices and contracts—and various communications between Accel and the Tax Commissioner.

At the Board’s hearing Accel provided the following witnesses:

- David Abrams, the president and co-CEO of Accel.
- Joseph Scott, Accel’s “Cost Engineer.”
- Daniel Harms, Accel’s CFO.
- Moises Lluervers, owner of Resource Staffing, who testified as to the relationship between Accel and one of its providers of temporary labor. Mr. Lluervers over the objection of the Tax Commissioner, because the witness had not been timely disclosed and the documents brought by the witness were not produced in accordance with the applicable rules of Civil Procedure or the Board’s rules and constituted unfair surprise. HT at 310, 316-20. The documents also contained evidentiary defects such as hearsay, summary evidence without the backup support, were created for litigation purposes, and Mr. Lluervers was not the records custodian. *Id.* Moreover, Mr Lluervers appeared with his own counsel (Mr. Steven Dimengo), who refused to enter an appearance on the record, but repeatedly passed notes to counsel for Accel to ask Mr. Lluervers during questioning until instructed to stop by the Board. HT 299-300; 340-341. Mr. Lluervers admitted that he had “skin in the game” because his company had agreed to indemnify Accel, should its labor purchases be found taxable. HT 333.
- Carol Ptak, who was offered by Accel as an “expert witness” and was allowed to testify regarding “manufacturing” over the Tax Commissioner’s objections. HT 143. Mrs. Ptak fudged her credentials and lacked the requisite education and experience to testify regarding “manufacturing” as discussed further herein.

The Tax Commissioner provided the following witnesses:

- Daniel Campbell, the Tax Commissioner’s auditing agent.
- Professor Robert Clarke, Ph.D., the Tax Commissioner’s expert witness. Dr. Clarke is a Professor with a Phd. in Package Engineering, who teaches at Michigan State’s School of Packaging. He opined that under the commonly-accepted academic and industry standards, Accel is in the business of “contract packaging.” Ex. B, Expert Report of Robert Clarke, at 5; HT 485-86, 465-66.

After the evidentiary hearing, the parties submitted post-hearing briefs along with several written evidentiary motions. On July 15, 2015, the Board issued its Decision and Order. The Board held that Accel was not engaged in manufacturing, but was doing “more than” packaging,

and was therefore qualified for sales tax exemption for “assembling.” Decision and Order at 3. The Board also held that Accel had failed to carry its burden to demonstrate that its purchases of leased labor from Manpower were excluded as “permanently placed” labor, but found that Accel had met its burden with regard to labor leased from Resource Staffing. *Id.* at 4-5. The Board excluded certain documentary evidence of Accel on the Tax Commissioner’s motion, but allowed the testimony of Mr. Lluveres and Mrs. Ptak. *Id.*

The Tax Commissioner appealed the Board’s decision to this Court on August 13, 2015. Accel cross-appealed on August 21, 2015.

LAW AND ARGUMENT

Proposition of Law No. 1:

Tax exemption statutes are strictly construed against the party claiming exemption and the taxpayer bears the burden to show it is entitled to exemption.

When the Board reversed the Tax Commissioner’s determination, it disregarded this Court’s well-settled expectations for review of Tax Commissioner rulings on tax exemption claims. The Board ignored the established rule of construction that statutes containing tax exemptions are to be “strictly construed” and when there is a close-call, doubt is to be resolved *against* the exemption. *A. Schulman, Inc. v. Levin*, 2007-Ohio-5585, ¶ 7. In place of this long-established rule, the Board did the opposite; it construed the tax exemption statutes broadly and liberally in favor of exemption.

This Court has made clear that statutes providing for “tax exemptions ‘must be construed *strictly against* the taxpayer.’” (emphasis sic) *H.R. Options*, 2004-Ohio-2085 at ¶ 2. This is so, because tax exemptions are a matter of legislative grace and are therefore the exception to the rule. *Anheuser-Busch, Inc. v. Tracy*, 85 Ohio St.3d 514, 515 (1999).

When a taxpayer like Accel seeks exemption from taxation, it bears the burden to “affirmatively establish” its right to the exemption. *Campus Bus Serv. v. Zaino*, 2003-Ohio-1915, ¶ 8. “In all doubtful cases exemption is denied.” *A. Schulman, Inc. v. Levin*, 2007-Ohio-5585 ¶ 7, quoting *Youngstown Metro. Hous. Auth. v. Evatt*, 143 Ohio St. 268, 273 (1944).

In this case, the BTA did not strictly construe the relevant exemption statutes (R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ)(3)) against exemption, but instead construed them liberally in favor of exemption.

Proposition of Law No. 2:

The BTA must affirm the Tax Commissioner’s findings unless Appellant proves they are unreasonable and unlawful.

The Board also contravened this Court’s instructions to affirm the Tax Commissioner’s findings unless “clearly unreasonable and unlawful” and, instead, the Board merely substituted its own fact finding for that of the Tax Commissioner.

“Absent a demonstration that the commissioner’s findings are clearly unreasonable or unlawful, they are presumptively valid.” *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 123 (1989); see, also, *Am. Fiber Sys. v. Levin*, 2010-Ohio-1468, ¶ 42 (citing *Hatchadorian v. Lindley*, 21 Ohio St.3d 66 (1986), paragraph one of the syllabus); *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 215 (1983). To that end, an appellant bears the burden to show “in what manner and to what extent” the Commissioner’s final determination was erroneous. *Am. Fiber Sys.* at ¶ 48, quoting *Federated Dept. Stores* at 215.

To reverse the Commissioner’s final determination, Appellant must show clear entitlement to the exemption, both factually and legally, and demonstrate the Commissioner’s denial of the exemption to be clearly unreasonable and unlawful. If there is any doubt as to the

interpretation of applicable law or the weight of Appellant's supporting facts, its claim must fail. *Anderson/Maltbie P'ship v. Levin*, 2010-Ohio-4904, ¶ 16.

The BTA failed to apply the appropriate standard of review. Instead, the BTA reviewed the findings of the Tax Commissioner *de novo* and, without holding that the Tax Commissioner's findings were "unreasonable or unlawful," merely substituted its own judgment for that of the Commissioner. It was error for the BTA to substitute its own application of the facts for the Tax Commissioner's. Instead, the BTA should have limited its review to whether the Commissioner's application of his factual findings to the law was "reasonable" and "lawful" and, if so, affirmed.

Proposition of Law No. 3:

Packaging is expressly excluded from the sales tax exemptions available to manufacturers under R.C. 5739.02(B)(42)(a) and (g).

The assessed sales to Accel were for items used and consumed in its "packaging" operation as that term is used in Ohio sales and use tax law. The BTA should have affirmed the Tax Commissioner's Final Determination which found that the sales to Accel were used and consumed in "packaging" for Ohio sales and use tax purposes.

A. "Packaging" is expressly excluded from the sales tax exemptions available to manufacturers under R.C. 5739.02(B)(42)(a) and (g).

Ohio law includes both sales and use tax. R.C. 5741.02 imposes use tax liability and R.C. 5739.02 creates the sales tax liability. The exemptions and exceptions found in the sales tax also apply under the use tax. R.C. 5741.02(C)(2).

In this case, Accel claimed entitlement to two exemptions primarily intended for manufacturers³: R.C. 5739.02(B)(42)(a) exempts sales in which the purchased items are incorporated by manufacturing, assembling, processing, or refining; and R.C. 5739.02(B)(42)(g) exempts sales in which the purchased items are used primarily in a manufacturing operation.

The Board of Tax Appeals held that Accel was not engaged in “manufacturing,” and was therefore not entitled to exemption on that basis. BTA Decision and Order at 3. However, the Board determined that Accel was “assembling” finished goods and was therefore entitled to the exemption under R.C. 5739.02(B)(42)(a). *Id.*

The BTA erred, because “packaging” is expressly excluded from the definition of “assembling” provided by R.C. 5739.01(S) and “manufacturing operation” in R.C. 5739.01(R).

In holding that Accel was “assembling,” the BTA ignored the plain language of R.C. 5739.01(R), which provides that “‘Assembly’ and ‘assembling’ mean attaching or fitting together parts to form a *product, but do not include packaging a product.*” (Emphasis added). Thus, as a matter of law, the process of packaging is *expressly excluded* from the definition of “assembling,” and therefore can never be included.

Similarly, R.C. 5739.01(S) provides that “‘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

³ R.C. 5739.02(B)(42) exempts “Sales where the purpose of the purchaser is to do any of the following:

“(a) To incorporate the thing transferred as a material or a part into tangible personal property to be produced for sale by manufacturing, assembling, processing, or refining; * * * .

* * *

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

materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. ‘Manufacturing operation’ *does not include packaging.*” (Emphasis added). Thus, as a matter of law, the process of packaging is *expressly excluded* from the definition of “manufacturing operation,” and therefore can never be included.

The BTA erred by ignoring the plain language of the applicable definitions and should be reversed on that basis alone. The BTA’s failure to apply the plain language of a statute is an error of law that will be reversed by this Court. See, e.g., *Cincinnati Cmty. Kollel v. Testa*, 2013-Ohio-396, ¶ 25 (“the first rule of statutory construction requires courts to look at the statute’s language to determine its meaning. If the statute conveys a clear, unequivocal, and definite meaning, interpretation comes to an end, and the statute must be applied according to its terms.”)

Further, even if packaging was not excluded, the BTA erred by giving the term “assembling” a broad, more expansive definition than provided by statute and this Court’s precedent, which requires that assembly result in a change in state or form of the finished goods. Statutes granting tax exemptions are narrowly construed against exemption and, in all close cases, exemption is denied. *National Tube Co. v. Glander*, 157 Ohio St. 407 (1952). Accel’s process does not change the state or form of the finished goods. For those reasons, this Court should reverse the BTA’s determination that Accel was entitled to exemption for its packaging materials under R.C. 5739.02(B)(42)(a).

B. Accel is a packaging company as a matter of fact, law, and industry and academic standards.

1. Accel is a packager as a matter of fact.

According to Accel Inc.’s (“Accel”) website, the company and its leadership have been “leaders in the *contract packaging industry*” since 1995. Ex. J (Emphasis added). Accel was created “to fulfill a need for a *contract packager* to be committed to superior quality.” Ex. K

(Emphasis added). Accel’s mission is to “provide world-class *contract packaging solutions* to the nation’s leading corporations and be an essential partner in our client’s success *by packaging products* flawlessly, profitably and to maximum consumer satisfaction.” Ex. K (Emphasis added). Accel’s vision statement reads: “To reinvent the way that American companies *package and deliver goods* to market[.]” *Id.* (Emphasis added). Accel strives to provide quality service “at every step of the *packaging process* from intake to consumer’s hands.” *Id.* (Emphasis added).

Accel’s co-founder, majority owner, and co-CEO Tara Abraham believes “Accel Inc [sic] is essentially a *contract packaging company*[.]” Ex. F (Emphasis added). Accel’s customers and media outlets agree that Accel is a contract packaging firm. *See* Ex. D (“Accel Inc., the *contract packaging leader* . . .”) (Emphasis added); Ex. F (“We use them for *packaging* many of our brands . . .”) (Emphasis added); Ex. G (“Accel offers a wide variety of *packaging specialties* . . .”) (Emphasis added). Accel’s other co-CEO David Abraham even described an Accel product as *packaging on the stand*: “a whole new extraordinary form of packaging.” HT 32.

Indeed, in every customer-facing document, Accel has identified itself as a packager, in the packaging industry. But the company doesn’t stop there. It also listed its business activity as “packaging” on its own corporate income tax returns and internal financial statements—documents with no marketing purposes. HT 291-98, Joint Stips.¶ 4-5; Ex. K-O.

Thus, there should be no dispute that, by its own admissions, Accel is a packager engaged in packaging operations.

2. *Accel is a packager as a matter of law.*

No direct definition of “package” appears in the definitional section of the sales tax law, R.C. 5739.01. But R.C. 5739.02(A)(15) expressly exempts sales of packaging to the *retailer, reseller or manufacturer* (not applicable to Accel) of the product “including material, labels, and

parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale * * * .” As a matter of law, the General Assembly has already provided that sales of packaging to certain *retailers, resellers, and manufacturers* are exempt sales, but have not so provided for the packager. Because, as a matter of fact and law, Accel is a packager and not a reseller, retailer, or manufacturer, the BTA erred by not applying the General Assembly’s intent to tax its purchases and sales.

The statute further defines “packages” thusly: “‘Packages’ includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers ‘Packaging’ means placing in a package.” All of the transactions for which Accel was assessed (other than the leased labor) meet this definition of “packaging,” as a matter of fact and law. Moreover, Accel’s business is “placing [finished goods] in a package,” as a matter of fact and law. Therefore, the BTA erred as a matter of fact and law by finding that Accel was not engaged in packaging.

The operations at Accel meet the elemental statutory definition of packaging. This includes placing items in a package: “Accel is enclosing products primary packages, unto a secondary unit.” HT at 545-548. And Accel’s packaging materials included “wrapping” and “containers” such as shrink wrap, bubble wrap, baskets, and shipping cases. HT at 452, 475-77, 491-92, 545-48; see Ex. B at 13-15. The gift baskets arrive at Accel whole, albeit in various shipping containers, and Accel merely wraps them for shipping and shelf display – all packaging functions. *Id.*

This Court defines packaging as material that “restrain[s] movement of the packaged object in more than one plane of direction.” *Custom Beverage Packers*, 33 Ohio St.2d at 73. Such materials, “may not necessarily fully enclose, but they do restrain movement of the

packaged object in more than one plane of direction.” *Id.* That multi-directional restraint is the hallmark of packaging. See, Ex. B at 6-8.

“The function of a package,” according to this Court “is to contain a product for shipping or handling.” *Newfield Publications*, 87 Ohio St.3d at 153. Additionally, this Court has explained that packaging (as opposed to assembling) involves the “gathering together of fabricated materials.” *Scholz Homes*, 25 Ohio St.2d at 72; see, also *Fichtel & Sachs*, 2006-Ohio-246.

Accel admitted that the materials it uses serve to prevent movement in more than one direction. For instance, many items are glued in place within the gift set “so when it ships from [Accel’s] facility to [Accel’s] customer’s facility [] it does not lose its shape or form.” *Id.* at 92. In fact, Mr. Scott himself—the employee charged with implementing the customer’s design and production plan—testified that the materials provided by Accel are the only things keeping the items in the gift set from moving around inside the basket. *Id.* at 115-16.

This is exactly the kind of packaging service this Court recognized in *Custom Beverage*: material that restrains movement of the packaged objects. See HT at 103-04 (“Poly bags used to hold client products within the package according to the client specifications” are used “to protect it from moisture and dirt.”), *id.* at 104 (“Bubble wrap used to wrap packages” is “[u]sed to protect in strategic places things from bumping or being jostled or removed in transit.”), *id.* at 106 (PVC “shrinks the product, the PVC down to the size that holds all of the product into place.”).

And Accel’s packaging operation parallels other precedent from this Court that holds that packaging produces no change in state or form. Accel’s packaging of the gift basket makes it visually appealing and transportable, so that the various shampoos and lotions sit tight in their

assigned spots. This is no different than packaging pre-manufactured drugs into smaller containers with labels, cotton, and lids. See, *National Pharmpak Services, Inc., v. Lawrence, Tax Commissioner*, BTA Nos. 1999-M-1014, 1015, 1016, 2001 WL 855750, at *5 (July 27, 2001). Or placing pre-manufactured clutch disks, pressure plates, and clutch releases, grease, and throw-away parts into car-specific “clutch kits.” *Fichtel & Sachs*, 2006-Ohio-246 ¶ 12. Or placing “flat-pack” furniture parts, hardware, instructions, and protective material in cartons. *Sauder Woodworking*, 38 Ohio St.3d at 176. In each case, there is no change in state or form of the finished product, with or without packaging. A salt and pepper set is still a set without packaging, the clutch kit is still a clutch kit, and the gift basket is still a gift basket.

Moreover, Accel admitted that function of the materials it uses is to protect the product during shipping and handling. As Accel’s CEO explained “we are responsible to ensure [the products] can withstand the rigors of shipping; our goal is to have the gift set look the same on the store shelf as it did coming off our line.” Ex. G. And when asked to describe the items that the Tax Commissioner assessed sales tax upon, Mr. Scott explained that those items were: “various components or materials that are used in our packaging.” HT at 90 (the list was provided by Accel and appears as Exhibit B to Accel’s Petition for Reassessment, ST at 81). When asked to describe the function of items on the list, he explained that they served to protect the item during shipping, handling, and retail display:

Some of the items that are indicated in here are RSCs, or a shipper that products are shipped in. They are also poly bags listed in here, an item that's used to place over a gift set to protect it from moisture and dirt. Shrink bands are also included in here to secure a product or the gift set and all of the products inside it during the transportation phase.

We also have EPS in here. EPS is the Styrofoam that can be placed inside the basket or a retentive. We also have also some internal corrugate, as I call it, partitions and pads again to protect during the shipping process.

We also have swift tags in here; we also have labels; glue; wafer seals, wafer seals are a clear adhesive label **used to hold product together**.

* * *

Reason why **these materials are used** in the construction of the gift set. Again, it is determined the design phase when we determine how a product is going to be built and how it's going to be held together **so when it ships from our facility to our customer's facility that it does not lose its shape or form**. HT 90-92.

Thus, as Accel admitted, its packaging process includes “packaging materials” that constrain the movement of the product in one or more planes of direction and protect the product for shipping and shelf storage. Accordingly, Accel is “packaging” as a matter of law.

3. *Accel is a packager under the industry and academic understanding of the field.*

The Tax Commissioner’s expert witness—a tenured associate professor in Michigan State University’s School of Packaging who holds a Ph.D. in Engineering Management, a Master’s in Business Administration, and a Bachelor’s degree in Packaging, and who has decades of manufacturing and packaging industry experience—easily concluded that Accel is a packager, not a manufacturer. *See Ex. B; see also id.* at App. A.

The industry and academic definitions of packaging comport with this Court’s understanding of packaging. Packaging and manufacturing expert Professor Clarke testified as to the meaning, place, and functions of packaging in both the packaging and manufacturing industries. *See generally* HT at 358. Dr. Clarke explained that packaging can serve multiple purposes: “containment, protection, communication, and utility or convenience.” *Id.* at 472. At the same time, a single purchasable unit may employ multiple levels of packaging simultaneously: primary, secondary, tertiary, or more. *Id.* at 368.

The pre-manufactured individual products that comprise gift sets provide examples of primary packaging. “Primary packaging is the package that physically holds the product, typically considered a shelf package[.]” HT at 367. In a gift set, the bottles of soap, the jar holding the candle, and the tubes of lotion are the primary packaging. *Id.* at 479.

Of course, Accel does not manufacture the primary packages. *Id.* at 108-09. Nor does it put the soap, lotions, or candles into their respective primary packages. *Id.*, *see also id.* at 36. Instead, those bottles, jars, and tubes are manufactured and filled by a third party, which ships them in bulk to Accel. HT at 108-09. Like the packager in *Express Packaging*, those items “are received by [Accel] in large quantities or bulk form and are subsequently combined by [Accel] in different quantities and assortments.” *Express Packaging*, 1992 WL 236077 at *1. Accel’s packaging service takes those finished primary packages and places them into *secondary packages*.

“A secondary package is multiple primary packages, closed or bundled together to facilitate movement or sales[.]” HT at 367. Dr. Clarke identified the basket as the secondary packaging in the gift sets, in which the bottles, tubes, and jars are placed along with other packaging materials. *Id.* at 479. Accel’s other packaging material similarly meets academic and industry definitions of packaging, as an item that “contains, protects, preserves, transports, informs, and sells,” and “[a] form that is intended to contain, protect/preserve, aid in safe and efficient transport and distribution, and finally act to inform and motivate a purchase.” Ex. B, 494-95, *see also* Ex. B at 496. Thus, under the industry and academic definitions, Accel is “packaging.”

The gift sets Accel creates meet the industry, academic, statutory, and jurisprudential definitions of package. As such, the materials it purchases for use in packaging are subject to tax.

Proposition of Law No. 4:

In order to constitute “assembling,” as that term is used in R.C. 5739.02(B)(42)(a), the taxpayer must change the state or form of the finished good, as is required by the other terms used in that tax exemption statute, including “manufacturing,” “processing,” and “refining.”

A. “Assembling,” as that term is used in R.C. 5739.02(B)(42)(a), connotes a change the state or form of the finished goods.

It is immaterial whether Accel’s packaging operation produces a change in state or form of the finished goods, because the General Assembly has provided, through the applicable statutory definitions, that packaging is *never* available to a company like Accel. Still, even if “packaging” was not expressly excluded from “assembling,” Accel would still not qualify as “assembling,” because Accel’s process does not change the state or form of the finished goods.

When a person claims exemption for “assembling,” this Court analyzes whether or not the person’s process affects a “change in state or form” to the finished product. In *Sauder Woodworking*, this Court considered a claim of “manufacturing or assembling” together and rejected both, because there was no change in state or form of the product during the packaging. *Sauder Woodworking*, 38 Ohio St.3d at 177; *see, also, Fichtel & Sachs*, 2006-Ohio-246, ¶ 36, (manufacturing requires “as transformation or conversion of materials or things into a different state or form from that in which they originally existed.”)(quoting *Natl. Tube*, 157 Ohio St. 407 \). The Court in *Sauder Woodworking* agreed with the BTA that the packaging was not an “inherent part of the product, as the [product] was equally functional and usable prior to its packaging.” *Id.*

Consistent with the holding of *Sauder Woodworking*, this Court had previously clarified that the word “assembling” in the context of sales and use tax “means more than the mere gathering together of fabricated materials.” *Scholz Homes*, 25 Ohio St.2d at 72. The required act, according to the Court, is the fitting together of “various parts * * * so as to make into an operative whole.” *Id.*

The word “assembling” in R.C. 5739.02(B)(42)(a) must connote a change in state or form, as this Court has said is required for each of the surrounding terms, “manufacturing” and “processing.”⁴ *National Tube*, 157 Ohio St. 407 at paragraph four of the syllabus (“The terms, ‘manufacturing’ and ‘processing’ * * * imply essentially a transformation or conversion of materials or things into a different state or form from that in which they originally existed—the actual operation incident to changing them into marketable products.”)

This Court has explained that, “where two or more words of analogous meaning are employed together in a statute, they are to be read in their cognate sense to express the same meaning.” *State, ex rel. Rear Door Bookstore v. Tenth Dist. Ct. of Appeals*, 63 Ohio St.3d 354, 361, (1992) (explaining the doctrine of *noscitur a sociis*).

It would make no sense to give “assembling” a broader meaning than the surrounding statutory verbs of “manufacturing” and “processing,” particularly because the terms of statutes granting tax exemptions are construed narrowly against exemption. *National Tube*, 157 Ohio St. 407.

In its decision, the BTA improperly distinguished and failed to follow this Court’s controlling precedent, including *Fichtel & Sachs*, 2006-Ohio-246; *Sauder Woodworking*, 38

⁴ Similarly, the other term, “refining” requires a change in state or form by definition: R.C. 5739.01 (Q) provides: “‘Refining’ means removing or separating a desirable product from raw or contaminated materials by distillation or physical, mechanical, or chemical processes.”

Ohio St.3d at 177; *National Tube*, 157 Ohio St. 407; and *Custom Beverage Packers*, 33 Ohio St.2d 68.

Instead, the BTA relied on outdated, non-controlling, and inapposite cases such as: (1) *Pretty Products, Inc. v. Limbach*, 5th Dist. Coshocton No. 85-CA-10, 1985 Ohio App. LEXIS 9344 (Nov. 15, 1985) a decision with no analysis that **predates** this Court's controlling decision in *Fichtel* by 11 years; (2) and *United States v. Dean*, 945 F.Supp.2d 1110 (C.D. Cal. 2013) a **federal** decision from California, regarding IRS and Treasury regulations, with a lower standard for what qualifies as "manufacturing" than Ohio tax law, and having no bearing whatsoever on the applicable Ohio standard.

Therefore, the BTA erred as a matter of law when it applied a different meaning for the term "assembling" under R.C. 5739.02(B)(42)(a). Having found that Accel affected no "change in state or form" of the finished goods, the BTA should also have held that Accel was not "assembling."

B. Accel is not engaged in "assembling" as that term is understood in R.C. 5739.02(B)(42)(a).

As the facts demonstrated, Accel affects no change in state or form to the finished product. Therefore the BTA should have held that Accel was not "assembling."

Indeed, the BTA found that there was no "change in state or form" of this finished goods. See, Decision and Order at 3 (quoting *Sauder Woodworking*, 38 Ohio St.3d at 176 ("An operation which merely enhances the value of the product without producing a change in state or form does not constitute processing.") Having so held, the BTA should have held that Accel was not "assembling."

Nor does Accel’s process involve “putting together various parts to make an operative whole.” *Scholz Homes*, 25 Ohio St.2d at 72. Instead, it is “the mere gathering together of fabricated materials.” *Id.*

As this Court has explained, packaging is not assembling, but a secondary process that occurs after the completion of manufacturing. *Sauder Woodworking*, 38 Ohio St. 3d at 177 (“the ‘transformation’ or ‘conversion’ process inherent in the ‘manufacturing’ or ‘processing’ * * * was complete prior to the [product] being placed in the cartons on the packaging line.”) “The product has been changed into its final state or form prior to packaging. Therefore, packaging occurs after the end of manufacturing.” *Gen. Mills, Inc. v. Limbach*, 35 Ohio St.3d 256, 258 (1988).

Mirroring this Court’s explanation, Accel’s majority-owner and co-CEO Tara Abraham admitted that Accel’s packaging occurs after manufacturing is complete:

“manufacturing really implies primary components of the product * * * while packaging is a secondary process that comes after manufacturing. * * * Contract manufacturers manufacture the bottles and the various lotions and also fill the bottles with the lotion. Accel Inc. takes the filled bottles and puts together the gift sets. Once the gift sets themselves are complete, we are responsible to ensure they can withstand the rigors of shipping; our goal is to have the gift set look the same on the store shelf as it did coming off our line.” Ex. G. *Id.*

Thus, Accel—by its own admission—does not manufacture the product, but simply packages it.

Accel gathers together prefabricated materials, and packages them in an aesthetically-pleasing manner for shipping and self-display. The items do not create an operative whole—they operate independently. A bottle of shampoo can be removed and used without removing or using the included candle, and vice versa.

Fact testimony and evidence from Accel’s own witnesses established that the products

received by Accel are finished products that do not change in state or form during Accel's packaging. Instead, Accel receives the gift baskets whole, and merely wraps them for shipping and shelf display – all packaging functions. HT at 452, 475-77, 491-92, 545-48; see TC's Ex. B at 13-15.

Like the packaging process in *Fichtel & Sachs*, Accel merely places pre-manufactured items in a single container. As was the case in *Fichtel & Sachs*, the items leave Accel's facility in the same form that they were received. See HT at 109-10. Placing an item in the basket does not physically change it. *Id.* at 113. Nor does placing an item in the basket physically change any of the other items in the basket. *Id.* at 113-14. The items in the gift basket look, feel, and work the exact same way when they leave Accel's facility as when they arrived. The only addition Accel provides is the packaging material—the shred, the glue, the tape.

Moreover, the Tax Commissioner's expert witness, Dr. Robert Clarke, testified that no change in state or form of the finished goods occurs as a result of Accel's packaging operations. HT 495, 465-66; Ex. B Expert Report of Robert Clarke at 5. Dr. Clarke has a PhD in Engineering. HT 379-80, Ex. B, Expert Report of Dr. Clarke at 3. Dr. Clarke gave exhaustive testimony on his first-hand experience with finished-goods production, from design to prototype to testing production. HT 380-81, 397-98, 408-11, 412-13, 414-16, 418-19; see, also, Ex. B at 4. Accordingly, Dr. Clarke was well-qualified to testify as to whether Accel's process produced a change in state or form of the raw materials. In his opinion, no change in state or form occurred. Ex. B at 16-20.

The BTA's erred by relying on *de minimus* evidence that was not reliable or probative to determine that Accel was "assembling" a "finished product," including *only*:

- "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.” BTA Decision and Order at 3, citing 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.” BTA Decision at 3, citing H.R. at 63-75.

These facts, even if taken as true do not amount to a “change in state or form” to constitute manufacturing and, as the testimony and exhibits established, are typical of packaging operations.

Proposition of Law No. 5:

Purchases of employment services are taxable unless the employment services contract expressly “specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” R.C. 5739.01(JJ)(3). When an employment services contract fails to provide an express term for “permanent” employees, the Board cannot supply the missing terms by inquiring into facts and circumstances of the employment relationship to exclude the transaction from tax.

Purchases of “employment services” are considered sales under R.C. 5739.01(B)(3)(k), but the definition for employment services specifically excludes provision of “permanent” personnel. Under R.C. 5739.01(JJ)(3), excluded sales include “[s]upplying personnel to a purchaser pursuant to a contract of at least one year * * * that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.”

To avoid sales tax liability on the temporary labor it purchased, Accel must prove that its staffing purchases meet the exclusion for temporary labor in R.C. 5739.01(JJ)(3). Accel cannot meet this standard, because its contract fails to meet the express statutory requirement of specifying that the laborers are “permanent.” But, even if it could satisfy this requirement, Accel’s actual practices demonstrate that the labor was temporary, with high-turnover, designed to meet seasonal and project-based requirements.

- 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), including “permanent” assignment. The Accel/Resource Staffing contract does not contain the statutory elements necessary to claim an exclusion from taxation.**

The employment services exclusion statute sets forth two requirements that must be met to qualify for the use of tax exclusion. There must be: (1) a contract of at least one year, which (2) specifies that employees are assigned permanently. R.C. 5739.01(JJ).

Here, the contract between Accel and Resource Staffing never expressed that any employee would be permanently assigned to Accel. Accordingly, Accel cannot meet the elements set forth in the statute to qualify for tax exclusion. And since Accel has not met the threshold requirements, there was no basis for the Board to delve into the facts of the employment relationship.

The BTA regarded the language contained in Accel’s contract immaterial, and filled in the missing element through testimony regarding the parties’ intent. But the Board’s application 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.

1. *An employment services contract must expressly provide of permanence of employees.*

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*, 2004-Ohio-1 at ¶ 18. These statutory requirements are the bare minimum that parties must express in their contracts for employment services. *Id.*

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*, 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 & Elec. Corp. v. Testa*, 2012-Ohio-4312, ¶ 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.* Moreover, the determination of permanency must be made with respect to each person assigned. R.C. 5739.01(JJ)(3).

The Court’s test is therefore designed to prevent taxpayers from claiming exclusion from tax by creative tax planning, and to test whether parties are truly entitled to tax exemption. The BTA’s test flips this standard on its head, and suggests that a contract need not even specify permanence to support a claim of tax exclusion.

Instead of ending its analysis at the statutorily defective contract, the BTA undertook a “hindsight view” review. The BTA determined that it could fill in the missing contractual

language through understanding the “intent” of the parties. BTA Decision and Order at 4. But such a position is untenable.

This Court’s decisions demonstrate that inquiry into the facts and circumstances of an employment relationship occurs *only after* the statutorily required threshold provisions are met. The Board’s 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*, 2012-Ohio-4312 at ¶ 19; *H.R. Options*, 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.

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

The contract between Accel and Resource Staffing 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 employee to Accel. There is no language in the contract that specifies that “each employee covered under the contract is assigned to [Accel] on a permanent basis.” R.C. 5739.01(JJ)(3); ST at 185-192. The contract also does not actually assign any individual employee to Accel. ST at 185-192. Nor does the contract state how many laborers will be provided, or provide any indication as to how many laborers will be assigned to Accel at any given time. *Id.*

Similarly, the contract does not *suggest* that any employees are permanently assigned to Accel. There is no contract term that states any employee is subject to indefinite assignment. ST

at 185-192. There are no starting dates within the agreement for any employee. ST at 185-192. To the contrary, the only date mentioned in the document is its execution date. ST at 185-192.

Instead, the contract indicates temporary assignment. The contract provides that a Resource Staffing will “lease employees * * * to fill work assignments and positions as requested by [Accel]”. ST at 185. Accordingly, Accel receives laborers from Resource Staffing only as requested, and as according to Accel’s business demands. 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 Accel. R.C. 5739.01(JJ)(3); *H.R. Options*, 2004-Ohio-1 at ¶ 18.

Thus, the language in the contract is not “consistent with the requirements set forth at (JJ)(3).” *Bay Mechanical*, 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; Employment Service, Revised February, 2007, Ohio Department of Taxation Information Release, Example C-4. Accel’s employment service purchases are statutorily subject to tax.

3. *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 the Board’s decision 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 v. Goodyear Tire & Rubber Co.*, 2010-Ohio-2550, ¶ 20; *State ex rel. Savarese v. Buckeye Local School Dist. Bd. of Edn.*, 74 Ohio St.3d 543, 545

(1996). 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*, 2004-Ohio-1 at ¶ 18. The Board ignored this express statutory language.

Further, the Board’s reading renders the express statutory requirements merely optional, 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, under the Board’s analysis, the statute is rendered meaningless. *Boley*, 2010-Ohio-2550 at ¶ 21. The consequence of such an application is that contracts for employment services will no longer need to include any term of permanency for the assigned employees, so long as the parties can “demonstrates permanency” through oral evidence at the BTA.

This is not what R.C. 5739.01(JJ)(3) says. Accel’s suggested reading of the statute disregards the rules of statutory application and construction. *Boley* at ¶ 20, 21.

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

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

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. v. Community Mut. Ins. Co.*, 46 Ohio St.3d 51 (1989) at syllabus; *Shifrin v. Forest City Ents., Inc.*, 64 Ohio St.3d 635, 638 (1992); *Alexander v. Buckeye Pipe Line Co.*, 53 Ohio St.2d 241, 246 (1978). Yet this is precisely what Accel requests. Moreover, Accel’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*, 46 Ohio St.3d at 53-54. This agreement does not become subject to interpretation and modification simply because Accel 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 Accel and Resource Staffing contract is statutorily defective and non-compliant with the elements of the R.C. 5739.01(JJ)(3) exclusion. Accel 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 Accel from this conclusion.

B. Even if an analysis of the facts and circumstances is proper, the actual practice of the assignments was that no employee was assigned to Accel 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), Accel'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*. BTA Decision and Order at 4.

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.

Intent is not an element of the analysis under the statute or this Court's precedent applying it. In fact, this Court has rejected such a prior attempt by the Board. *H.R. Options*, 2004-Ohio-1 at ¶ 20.

Moreover, even if the BTA was correct to look at the "facts and circumstances" in order to *prove* permanence, 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*, 2012-Ohio-4312 at ¶ 19, 23

(emphasis added). *See also H.R. Options, Inc.*, 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. An intention is subjective and seldom able to be proven by direct evidence. *Hawkins v. Hawkins*, 1986 WL 5570 (10th Dist., May 13, 1986); *State v. Johnson*, 1980 WL 353301 (10th Dist., Feb. 28, 1980). 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, Accel’s laborers were temporary and not “permanent” within the meaning of R.C. 5739.01(JJ)(3).*

“Permanent,” according the Ohio Supreme Court, “means that an employee is ‘assigned 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.” *Bay*

Mechanical, 2012-Ohio-4312 at ¶ 18. If the contract specify a term of permanent employment, then arbiters must look at both the language and the facts and circumstances in order to determine whether an employee's placement is seasonal, substitutional, or designed to meet short-term workload needs. *Id.*

In his Final Determination, the Tax Commissioner determined that Accel's labor was not permanent because Accel's records demonstrated that the labor was highly seasonal and temporary. ST 12-13. As the Tax Commissioner found, during a month in the "busy" season, Accel had 128 laborers on payroll, but, in the slow season, that number decreased to 56. ST at 12-13. And, only 52% of the employees who appeared on Accel's payroll in June appeared on the payroll four months later (29 of 56). ST at 13.

The documentary evidence and testimony at hearing further demonstrated that the labor was temporary:

- Accel's own labor invoices that established that employees changed frequently and were employed often for short periods. ST at 251.
- Accel's own records reflecting that the amount spent on labor fluctuates with the seasons. ST at 251. Roughly 72% of the money spent on labor by Accel was during the five months from July to November. *Id.* Accel spent up to seven times more on leased labor during the busy retail holiday season than it did during other times of the year. ST at 256.
- Accel's own witness testified that its use of temporary labor is seasonal, rather than permanent. HT 76, 94-96. Accel's own Cost Accounting Manager Joe Scott explained that labor need varies from project to project, and from month to month. *Id.* at 94-95. Mr. Scott calculates how many temporary employees are required to meet the workload needs of each specific project and will then he obtain the requisite temporary labor to supplement Accel's core group of employees. *Id.* at 94-96.
- The Tax Commissioner's expert witness confirmed that meeting seasonal demand is a typical function of contract packagers who serve the retail industry. HT 472-73.
- Expert witness testimony established that Accel's busy season would be the retail Christmas season, which is an inherently seasonal business, wherein it would require the most temporary labor.

- The contract between Accel and Resource Staffing expressly provided that the only positions would be “General Laborers.” ST at 192.
- No term of employment was provided in the contract for any employees.
- The Auditing Agent’s report and testimony that explained that Accel’s labor force fluctuates with the seasons depending on the demands of the contract packaging job at hand and on the season. HT 253-57.

As further detailed below, the testimonial evidence Accel provided at the hearing was self-serving and contradictory and the Board erred in relying on it.

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

Accel failed to overcome this burden before the Board and the Board reached its conclusion in error. In finding that the employees provided by Resource Staffing were “permanent” within the meaning of R.C. 5739.01(JJ)(3), the BTA relied on evidence that was not reliable or probative, relying *solely* on the testimony of biased, self-interested, and non-credible witnesses, that contradicted documents in the record and was not supported by any documents.

As the Board previously held, and this Court has affirmed, reliance solely on witness testimony in the face of contradictory testimony, documentation, and findings of the Tax Commissioner is improper. *Bay Mech. & Elec. Corp., v. Levin*, BTA No. 2008-K-1687, 2011 WL 2446198 at *3 (June 14, 2011), affirmed by *Bay Mechanical*, 2012-Ohio-4312 at ¶ 14 (“The BTA found that the controller's testimony and exhibits, presenting as they did information ‘gleaned from records not before us,’ did not rise to the level of proof required by *H.R. Options.*”)

Indeed, the Board relied *solely* on self-serving testimony that was not credible, in particular, testimony from the owner of Resource staffing, Mr. Lluevers. BTA Decision and Order at 4-5. Mr. Lluevers' testimony was biased, not credible, and should have been completely disregarded by the BTA. Any reliance on his testimony is reversible error.

Mr. Lluevers admitted at hearing that he has "skin in the game," because his company had agreed to indemnify Accel if the employees were found to be taxable. HT at 333. And, Mr. Lluevers admitted that his company had its own assessments pending with the Tax Commissioner against it for exactly the same arrangements as it had with Accel for different employers. HT 336-337. Thus, it was directly in his own self-interest to preclude his company from liability on this and other assessments and his testimony should have been afforded no weight under Evid.R. 611. *State v. Ferguson*, 5 Ohio St.3d 160, 165 (1983) ("It is beyond question that a witness' bias and prejudice by virtue of pecuniary interest in the outcome of the proceeding is a matter affecting credibility under Evid. R. 611(B)"). Moreover, Mr Lluevers appeared at the BTA hearing with his own counsel (Mr. Steven Dimengo), who refused to enter an appearance on the record, but repeatedly passed notes to counsel for Accel to ask Mr. Lluveres during questioning until instructed to stop by the Board. HT 299-300; 340-341. Clearly, Mr. Lluevers's testimony was entirely self-serving, concerned only with protecting himself from liability, and was worthy of no weight whatsoever.

The Board also relied on self-serving testimony from Accel's CFO that it was "in their interest" to have permanent employees, and to rehire those who had been laid off seasonally. BTA Decision and Order at 4-5.

Even accepting the testimony of Lluevers as competent and credible, such testimony did not establish that Accel had permanent leased laborers. Instead, it established at best, that it was

in the company's interest to have the same seasonal, temporary laborers return as needed by the company to meet short-term, seasonal, and fluctuating needs. The testimony failed to establish that Accel contracted for "permanent" leased labor from Resource Staffing.

Similarly, the BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were "under the supervision or control of another" within the meaning of R.C. 5739.01(JJ)(3) and therefore did not meet the definition of taxable employment services. BTA Decision and Order at 5. In so finding, the BTA ignored reliable, probative information, including:

- the contract between Accel and Resource Staffing that expressly provided that "employees will be under Client Company's [Accel's] direction and control during their assignment to Client Company, and that Client Company can direct and control the employees to fulfill its business needs and to comply with any legal requirements." ST at 185.
- The voluminous testimony and documentation that Accel has various lines running at all times, where packaging is performed according to varying job requests and instructions. This is Accel's business and there was no testimony establishing that any so-called "supervisors" from Resource Staffing had any hand in the training, placement, responsibilities, or any other day-to-day control or supervision of the employees on the various lines.

And, in so finding, the BTA relied on evidence that was not reliable or probative, relying *solely* on the testimony of one biased, self-interested, and non-credible witness, Mr. Llleuver, that contradicted documents in the record and was not supported by any documents. In this regard, it was error to rely on any Testimony from Mr. Llleuers, for the reasons explained above. Further, the BTA's finding in this regard was based solely on a few lines of testimony from Mr. Llleuers that did not explain how Resource Staffing "supervised" the employees at all. BTA Decision and Order at 5. Moreover, his testimony was only that Resource Staffing wished to have supervisor on hand to "control of the *quality* of the employees' work." HT at 288 (emphasis added). Such testimony fails to establish that the employees were not also, and more

directly, under the supervision and control of Accel.

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.*, 2007-Ohio-5585 at ¶ 7; *Alcan Aluminum Corp.*, 42 Ohio St.3d at 123. Because Accel 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.*, 2010-Ohio-1040 at ¶ 15; *Satullo*, 2006-Ohio-5856 at ¶ 14.

As a consequence, any review of the facts and circumstances surrounding the assignment of the Resource Staffing laborers to Accel leads to the conclusion that the Accel purchased taxable employment services.

Proposition of Law No. 6:

The BTA should not allow a witness to testify as an expert when they have fudged their qualifications on their resume and lack the requisite skill, experience, and training to testify.

The Board has "wide discretion in determining the weight to be given to evidence and the credibility of witnesses which come before the board * * * and courts will not disturb such determination unless a patent abuse of discretion is shown. *Cardinal Fed. Sav. & Loan Ass'n v. Cuyahoga Cnty. Bd. of Revision*, 44 Ohio St.2d 13, 19-20, (1975) (citing *American Steel & Wire Co. of New Jersey v. Bd. of Revision*, 139 Ohio St. 388, 392, (1942); *Shaker Square Co. v. Bd. of Revision*, 170 Ohio St. 369 (1960); *Benedict v. Bd. of Revision*, 170 Ohio St. 62 (1959)) (internal citations omitted). This Court should hold that the BTA abused its discretion in allowing Accel's proffered expert, Mrs. Ptak to testify as an expert witness, because she lacks the requisite credibility of an expert witness and she lacks the requisite skill, experience, and training.

While it is true that the Board said that it “considered [the Tax Commissioner’s objections to Mrs. Ptak’s testimony] in [its] determination of the weight to be given Ms. Ptak’s opinion in our ultimate determination,” (BTA Decision and Order at 2) this was an incomplete remedy, as Accel will no doubt rely on Mrs. Ptak’s testimony in its brief to this Court. The appropriate remedy would have been to strike her testimony and report entirely.

A. Accel’s proffered expert witness completely lacked credibility and should have been excluded on that basis.

At hearing and in her report, Accel’s proffered expert Mrs. Ptak provided a short list of bullet points containing her “credentials.” Appellant’s Exhibit G, App. A; HT at 143. As testimony revealed at hearing, these “credentials” were, at best, puffery and, at worst, outright untrue.

To be clear, Mrs. Ptak fudged her credentials *in her own expert report*.

First, Mrs. Ptak gave herself a degree that she doesn’t have. In her report, Mrs. Ptak lists herself as holding a Master’s Degree in Manufacturing and Materials Management from Rochester Institute of Technology (“RIT”). Accel’s Exhibit G. But, in reality, Mrs. Ptak holds a Masters in Business Administration. HT 142. Her “credentials” list does not contain the words “MBA” or “Masters in Business Administration.” Nor did her university offer a degree or certificate program in “Manufacturing and Materials Management.” HT 142-43; Ex. B at 997. In fact, on cross-examination, Mrs. Ptak admitted that “RIT does not offer a master’s degree in manufacturing and materials management.” *Id.* at 143.

Thus, Mrs. Ptak materially misrepresented her qualifications to the Board. If, as Mrs. Ptak insists, she did a “custom concentration” at RIT, during the MBA program, in “manufacturing and materials management,” then she should have said so. It is misleading and

deceptive to omit the term “MBA” and instead represent that she has a Master’s degree in a field that she does not and that is not even offered by the school she attended.

Second, Mrs. Ptak bestowed a Professorship on herself that she does not have. Mrs. Ptak lists herself as a “Professor in Operations Management” at the undergraduate and graduate level at Pacific Luther University.” Accel’s Exhibit G. But she was not a “Professor.” In reality, as Mrs. Ptak herself said on the stand, she “was not hired as professor. [She] was hired as an invited distinguished executive in residence.” HT 139-40.

The use of the term “Professor” has serious implications and is not a term used lightly in the academic world. As the Tax Commissioner’s expert—a tenured Associate Professor at Michigan State University—testified, the process of attaining the title “Professor” can take the better part of a decade. *See* HT 359. “Professorship is the academic arm of teaching research within a university. Professorships come in three levels. * * * “within a university setting, there is a very strict definition and requirement for proper titling whether you are an Assistant Professor, an Associate Professor, or full professor.” *Id.* at 359-61. Indeed, referring to yourself as a Professor when you haven’t earned the title could cost lead to being “charged with academic fraud and dismissed from the university.” *Id.*

Third, Mrs. Ptak represents to this Board that she is the “author” of books for which she was a “co-author” or merely wrote the foreword. In her report, Mrs. Ptak lists herself as the “[a]uthor of 7 manufacturing books and a chapter in the TOC Handbook.” Accel’s Exhibit G. In reality, Mrs. Ptak is only a co-author of most of the books she lists, and in one work she wrote only the forward. It is extremely misleading to present oneself as an “author” of a book for which one wrote only a four-page foreword. Similarly, it is inappropriate in the academic world to attribute “authorship” (as in lead authorship) of a book to oneself, when one is not the lead

author or is simply a co-author. Authorship attribution is extremely important in academic works. HT 405. As Dr, Clarke explained “[t]he person that has the majority of the work done and completed is the first author and typically they are defined by the relative contribution.” *Id.* Authorship has career and tenure consequences. HT 405-06.

In each instance Mrs. Ptak makes an untrue statement regarding her credentials and qualifications. This inaccuracy—in Mrs. Ptak’s own work product, no less—indicates a lack of credibility and illustrates the error in qualifying her as an expert. The exaggerations and misstatements in Mrs. Ptak’s summary of qualifications make her report and testimony absolutely unreliable—lacking any credibility. This is particularly inappropriate with the type of expert opinion required in this case.

This appeal turns on the definition of a few key terms, such as “manufacturer.” When an expert witness is willing to bend and stretch the meaning of terms, as Mrs. Ptak did in her summary of qualifications, it indicates a total lack of reliability when it comes to her actual expert opinions and testimony.

This Court cannot rely on the use of a contested term like “manufacturing” by a witness that has shown a willingness to play fast and loose with the meaning of other terms. This is especially true when the witness is a purported expert, and the terms at issue go to the witness’ own qualifications. This Court should find that Mrs. Ptak’s testimony and report are so lacking in credibility that they should have been stricken from the record.

Further, Mrs. Ptak barely put any effort into arriving at the conclusions in her report. According to her own testimony and her expert report, her examination was limited to: a memo provided by legal counsel, an excerpt of the final determination in this case, a single definition from a supply-side organization (APICS’s) dictionary, a cryptic and explained reference to the

“Supply Chain Council (SCOR) Model,” and a supervised tour of the plant. HT at 191-93, Ex. G a 5. Her actual written report is a mere four pages of text. *Id.* This is hardly a searching, rigorous, and academic inquiry as to whether a change in state or form of a finished good is taking place at Accel. Such a summary review is more of a “drive by” than actual expert research and further undermines the credibility of the conclusions contained therein. As Dr. Clarke testified, he would not feel “comfortable as an academic” producing a report based upon such little information. HT at 559.

Moreover, there is no evidence in the record that any of the seven books listed by Mrs. Ptak are peer-reviewed publications. Peer review is especially important for a work to be considered a serious academic piece and not just published “rhetoric.” HT 404.

Thus, this Board should hold that Mrs. Ptak’s report and testimony lacks credibility and should strike it from the record.

B. Accel’s expert witness is unqualified to provide expert testimony.

Accel offered the testimony and report of Carol A. Ptak, a consultant. Although the Board qualified her as an expert in manufacturing, Mrs. Ptak’s experience and work does not qualify her to provide expert testimony on the issue of whether Accel’s process results in a change in state or form of the finished goods. Ohio Rule of Evidence 702 limits expert testimony to those witnesses who are qualified.

A witness may testify as an expert if all of the following apply:

(A) The witness’ testimony either relates to matters beyond the knowledge or experience possessed by lay persons or dispels a misconception common among lay persons;

(B) The witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony;

(C) The witness' testimony is based on reliable scientific, technical, or other specialized information. To the extent that the testimony reports the result of a procedure, test, or experiment, the testimony is reliable only if all of the following apply:

- (1) The theory upon which the procedure, test, or experiment is based is objectively verifiable or is validly derived from widely accepted knowledge, facts, or principles;
- (2) The design of the procedure, test, or experiment reliably implements the theory;
- (3) The particular procedure, test, or experiment was conducted in a way that will yield an accurate result.

Evid.R. 702.

Mrs. Ptak did not demonstrate, through testimony or her expert report, that she contains specialized knowledge, skill, experience, training, or education regarding the physical transformation in state or form of raw materials. *See* R.C. 5739.01(S). Nearly all of Mrs. Ptak's experience is in supply chain logistics—the pursuit of efficiency in the sourcing, purchase, transportation, storage, and use of component parts.

On the stand, Mrs. Ptak discussed the jobs held since she graduated with a degree in biology. After school Mrs. Ptak worked in a lab that produced biological materials for the academic market and then a medical device maker. HT 145. The products the companies fabricate are wholly dissimilar from the products produced by Accel. Mrs. Ptak next worked as distribution manager, managing logistics for a research department—again handling the supply chain. *Id.* at 146-49.

After that, Mrs. Ptak began her consulting company, where she began advising businesses and got a Master's Degree in Business Administration. *Id.* Soon, Mrs. Ptak was managing inventory and production control for an aerospace company. *Id.* From there, Mrs. Ptak entered the supply chain industry group world, working with APICS and SIG. *Id.* Mrs.

Ptak's career has also included stops at PeopleSoft and Pacific Lutheran University. *Id.* In all of these organizations, Mrs. Ptak focused on supply chain and logistics issues rather than the actual hands-on transformation of raw materials into finished goods, as is at issue here. Interestingly, at Pacific Lutheran, Mrs. Ptak did not teach any manufacturing courses—according to the evidence at hearing, all her classes were “business” classes. HT 440

Of the seven “manufacturing books” listed by Mrs. Ptak on her expert report, exactly *none* of them are focused on producing a change in state or form of finished goods. Instead, these books relate to supply-chain concepts and theories. And there is no evidence that any of these “manufacturing books” were peer-reviewed. As Dr. Clarke (who *has* published multiple peer-reviewed works) explained, peer review is important for an academic work to be viewed as credible:

In academia, publication is not enough because you can self publish and you can spout any rhetoric you want and publish it and call it a publication.

In academia, you have to have a Peer Review. This means that you have experts within the field review your paper in a blind study. You don't know the reviewers. They don't know you. They have to assign relevant value to your publication in order for it to go into an actual publication.

Now, in a Peer Review process you might have a tier one publication. Harvard Business Review might be an example of that. Those are extremely hard to get into and it's very competitive. It may take up to two years to either find out you're being published or you're being turned down. Other journals are less intense. So you have tier two publications, et cetera. Those are often more industry-based journals, but the review process is the same.

HT at 404.

The publications she lists in her report speak specifically to Materials Requirements Planning, a technique for making the production planning and inventory control processes more efficient—again largely prior to any transformative manufacturing. To be sure, supply chain principals, MRP, and Mrs. Ptak's consulting all have applications in the manufacturing industry,

just as human resources, payroll services, and the practice of law do. That Mrs. Ptak *works with* manufacturers is insufficient to establish that she is an expert in manufacturing.

Mrs. Ptak does not have a degree in Engineering and she did not testify to her participation in the processes that transform the state or form of raw materials into finished goods through design, testing, prototyping, and production—the exact processes at issue in this case. Mrs. Ptak’s consulting firm, Demand Driven Institute, provides supply chain solutions for ordering and storage of inventory—processes that largely occur prior to or alongside the transformative manufacturing or processing. See DEMAND DRIVEN INSTITUTE, <http://DemandDrivenInstitute.com> (last visited May 30, 2014).

True, she may know what a manufacturing plant looks like from the perspective of the movement of inventory, and she may know the typical supply chain operations of a manufacturing plant, but this does not mean that Accel is “manufacturing.” The same processes exist in the packaging world as well. Indeed, manufacturing processes may be, and often are employed in the packaging industry. HT at 483-87. A “packaging line” looks like any other production line. *Id.* Similarly, the supply-chain concepts that Mrs. Ptak specializes in—like “lean operations,” “just in time,” “ERT,” and “MRP,” are used in the packaging industry as well. *Id.* But Mrs. Ptak wouldn’t know this, because, as she testified when asked about whether packagers might use the same concepts, “I’m not familiar with packaging. My whole career has been manufacturing, so I can’t speak to what a packager would do. * * * I’m not a packager, so I don’t know. I’ve never worked in that industry. I’ve only ever worked in manufacturing.” HT at 179-80. Thus, from her perspective, while she could say what manufacturing “looks like,” she couldn’t even say whether a packaging operation might look the same.

The crux of this case is not whether Accel *resembles* a manufacturer, or employs manufacturing techniques. If that were the case, Mrs. Ptak might be qualified to testify. Instead, the crux of this case is whether there is a change in state or form of the finished goods in this case. Mrs. Ptak is simply unqualified to provide that testimony.

On the other hand, the Tax Commissioner's expert witness *does* have a PhD in Engineering. HT 379-80, Ex. B, Expert Report of Dr. Clarke at 3. And Dr. Clarke *is* a Professor at Michigan State, a well-known and respected university, which is home to the largest, and original degree-bearing packaging school in the world. HT 359-61.

Unlike Mrs. Ptak, Dr. Clarke actually has a degree in, and teaches in the field of his expertise. HT 371-78. Dr. Clarke has worked for and with not only packaging companies, but also manufacturing companies in the industry, as a consultant, and as an academic and researcher. HT at 371, 397-98, 408-11, 412-13, 414-16, 418-19. Dr. Clarke taught classes about manufacturing and wrote peer-reviewed articles about packaging. HT 414-15.

Dr. Clarke gave exhaustive testimony on his first-hand experience with finished-goods production, from design to prototype to testing production. HT 380-81, 397-98, 408-11, 412-13, 414-16, 418-19; *see, also*, Ex. B at 4. For instance, Dr. Clarke testified about developing and producing a "no-drip neck ring" for Wesson Oil bottles. HT 380-81. Another example was redesigning the glass bottles for Hunt's ketchup to get the proper flow from the bottle and appropriate tolerances for the cap. *Id.* at 383-85, 408-11. He even bought competitors' products and cut them apart to re-engineer their production processes. *Id.*

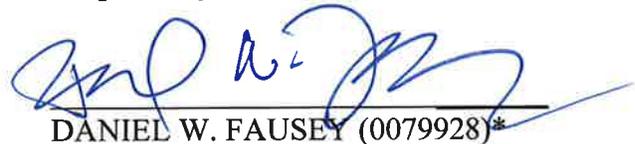
Any reliance by the BTA on any testimony or report from Ptak is in error, because, for the reasons explained above, the testimony and report of Ptak are neither reliable nor probative, under this Court's precedent. *See, Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d

570, 571 (1992) (“‘Reliable’ evidence is dependable; that is, it can be confidently trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.* * * ‘Probative’ evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.”)

CONCLUSION

For the foregoing reasons, this Court should reverse the Board’s grant of exemption to Accel under R.C. 5739.02(B)(42)(a) for “assembling,” should reverse the Board’s finding of exclusion from taxation under R.C. 5739.01(JJ) for Accel’s lease of temporary labor services from Resource Staffing, and should reverse this Board’s ruling that Accel’s expert witness was competent and credible to provide expert testimony.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Merit Brief of Appellant/Cross-Appellee Joseph W. Testa, Tax Commissioner of Ohio* was served upon the following by email and regular U. S. Mail on this 30 day of November, 2015:

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In the
Supreme Court of Ohio

ACCEL, INC.,

Appellee/Cross-Appellant,

v.

JOSEPH W. TESTA,
TAX COMMISSIONER OF OHIO,

Appellant/Cross-Appellee.

: Case No. 2015-1332

: Appeal from Ohio Board of Tax Appeals

: BTA Case No. 2012-2840

**APPENDIX TO THE MERIT BRIEF OF APPELLANT/CROSS-APPELLEE
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Tax Commissioner of Ohio,

Appellant.

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15-1332
Case No. _____
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BTA Case No. 2012-2840

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

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Appellant, Joseph W. Testa, Tax Commissioner of Ohio, gives his notice of his appeal as of right, under R.C. 5717.04, to the Supreme Court of Ohio, from a Decision and Order of the Ohio Board of Tax Appeals, journalized and entered on July 15, 2015, that reversed in part and affirmed in part the Tax Commissioner's Final Determination regarding Appellee Accel's claim for exemption from Ohio sales and use tax. That Decision and Order is attached as Exhibit A.

The Tax Commissioner sets forth the following errors in the Board's decision:

1. The Decision and Order of the Board of Tax Appeals is unreasonable and unlawful.

2. The BTA failed to apply the appropriate standard of review, that “[a]bsent a demonstration that the commissioner’s findings are clearly unreasonable or unlawful, they are presumptively valid.” *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 123, 537 N.E.2d 1302 (1989); *Am. Fiber Sys. v. Levin*, 125 Ohio St.3d 374, ¶ 42, quoting *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 215 (1983). Instead, the BTA reviewed the findings of the Tax Commissioner *de novo* and, without holding that the Tax Commissioner’s findings were “unreasonable or unlawful,” merely substituted its own judgment for that of the Commissioner. The BTA’s decision rested on factual determinations, and did not take issue with the Tax Commissioner’s understanding of the law. Therefore, it was error for the BTA to substitute its own view of the facts for the Tax Commissioner’s. Instead, the BTA should have limited its review to whether the Commissioner’s factual findings were “reasonable” and, if so, affirmed.

3. The BTA failed to apply the correct standard of statutory construction when a person seeks exemption from taxation. This Court has repeatedly explained “tax exemptions ‘must be construed *strictly against* the taxpayer.’” *H.R. Options, Inc. v. Wilkins*, 102 Ohio St.3d 1214, 2004-Ohio-2085, 807 N.E.2d 363, ¶ 2 (emphasis sic). “In all doubtful cases exemption is denied.” *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, 876 N.E.2d 928, ¶ 7, quoting *Youngstown Metro. Hous. Auth. v. Evatt*, 143 Ohio St. 268, 273, 55 N.E.2d 122 (1944). In this case, the BTA did not strictly construe the statutes (R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ)(3)) against exemption, but instead construed them liberally in favor of exemption.

4. The BTA erred as a matter of fact and law in finding that the sales to Accel were

not used and consumed for purposes of “packaging” as that term is used in Ohio sales and use tax law. Instead, the BTA should have affirmed the Tax Commissioner’s final determination which found that the sales to Accel were used and consumed in “packaging” for Ohio sales and use tax purposes.

5. The BTA erred as a matter of fact and law in ignoring, misinterpreting, and misapplying the plain language of R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ).

6. The BTA erred as a matter of fact and law in ignoring, misinterpreting, and misapplying the precedent that interprets and applies R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ).

7. The BTA erred in misapplying the facts to the law under R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ) and the cases interpreting those provisions.

8. The BTA erred as a matter of fact and law in ignoring reliable and probative evidence that Accel was engaged in a packaging operation, including, but not limited to:

- a. Dozens of admissions by the company’s founders and its own marketing materials, that Accel is a packaging company. For instance, Accel labeled itself a contract packager on its own website, has been called a contract packaging company by its founder and co-CEO, tells clients and the media that it offers “an end-to-end innovating packaging solution” and uses the term packaging in *its own mission and vision statements*, and to describe *the purpose for its very existence*. See, TC Ex. C-K.
- b. Accel’s own tax returns and internal financial statements, wherein it self-identified its business activity as “packaging.” HT 291-98, Joint Stips.¶ 4-5;

Apt. Ex. K-O.

- c. Expert testimony by a Professor with a Phd. in Package Engineering, who teaches at Michigan State's School of Packaging, that under the commonly-accepted academic and industry standards, Accel is in the business of "contract packaging." Ex. B, Expert Report of Robert Clarke, P.5; HT 485-86, 465-66.
- d. Fact testimony and evidence that the operations at Accel meet the definition of packaging. This include placing items in a package ("Accel is enclosing products primary packages, unto a secondary unit") and that Accel's packaging materials included "wrapping" and "containers" such as shrink wrap, bubble wrap, baskets, and shipping cases. HT at 545-548. The gift baskets arrive at Accel whole, albeit in various shipping containers, and Accel merely wraps them for shipping and shelf display – all packaging functions. HT at 452, 475-77, 491-92, 545-48; see TC'x Ex. B at 13-15.

9. The BTA's erred by ignoring or misconstruing reliable and probative evidence that Accel was *not* engaged in manufacturing, including, but not limited to:

- a. Accel's majority-owner and co-CEO Tara Abraham, stated in an interview that "We [Accel] believe that manufacturing really implies primary components of the product . . . while packaging is a secondary process that comes after manufacturing. . . . Contract manufacturers manufacture the bottles and the various lotions and also fill the bottles with the lotion. Accel Inc. takes the filled bottles and puts together the gift sets." TC Ex. G.
- b. Fact testimony and evidence from Accel's own witnesses that the products

received by Accel are finished products that do not change in state or form during Accel's packaging. Instead, Accel receives the gift baskets whole, and merely wraps them for shipping and shelf display – all packaging functions. HT at 452, 475-77, 491-92, 545-48; see TC'x Ex. B at 13-15.

- c. Expert testimony by the Tax Commissioner's expert witness, Dr. Robert Clarke, testified that no change in state or form of the finished goods occurs as a result of Accel's packaging operations. HT 495, 465-66; Ex. B Expert Report of Robert Clarke at 5.

10. The BTA's erred by relying on de minimus evidence that was not reliable or probative to determine that Accel was "assembling" a "finished product," including *only*:

- a. "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." BTA Decision at 3, citing H.R. at 57.
- b. "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." BTA Decision at 3, citing H.R. at 63-75.

These facts, even if taken as true do not amount to a "change in state or form" to constitute manufacturing and, as the testimony and exhibits established, are typical of packaging operations.

11. The BTA erred as a matter of fact and law by finding that Accel's "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.” BTA Decision at 3. Instead, the “gift set” arrives as a finished product, containing finished products (including the re-usable container) that are merely packaged for shipping, shelf life, and display. No transformation of raw materials into finished goods occurs during Accel’s process. Instead, the finished good arrives to Accel already in its final state and is merely packaged by Accel.

12. The BTA erred as a matter of law by improperly distinguishing and failing to follow this Court’s precedent, including the holding of *Fichtel and Sachs*, that “there must be some change in the state or form of a product” before it can be considered manufacturing and “[p]utting several parts in a single box does not in any way change the state or form of any of the parts.” *Fichtel & Sachs Indus., Inc. v. Wilkins*, 2006-Ohio-246, 108 Ohio St.3d 106, ¶¶ 37-38. See, also, *Sauder Woodworking Co. v. Limbach*, 38 Ohio St.3d 175, 177, 527 N.E.2d. 296, citing *Custom Beverage Packers v. Kosydar*, 33 Ohio St.2d 68, 294 N.E.2d 672 (1973) (“ the ‘transformation’ or ‘conversion’ process inherent in the ‘manufacturing’ or ‘processing’ * * * was complete prior to the furniture pieces and hardware being placed in the cartons on the packaging line.”) *Sauder Woodworking Co. v. Limbach*, 38 Ohio St.3d 175, 177 (1988).

13. The BTA erred by relying on outdated, non-controlling, and inapposite cases such as: (1) *Pretty Products, Inc. v. Limbach*, 5th Dist. Coshocton No. 85-CA-10, 1985 Ohio App. LEXIS 9344 (Nov. 15, 1985) a decision with no analysis that **predates** this Court’s controlling decision in *Fichtel* by 11 years; (2) and *United States v. Dean*, 945 F.Supp.2d 1110 (C.D. Cal. 2013) a **federal** decision from California, regarding IRS and Treasury regulations, with a lower standard for what qualifies as “manufacturing” than Ohio tax law, and having no bearing whatsoever on the applicable Ohio standard.

14. The BTA erred as a matter of fact and law by failing to apply, misapplying, misinterpreting, or ignoring the plain language of several statutes, including:

- a. R.C. 5739.01(R), which provides that “‘Assembly’ and ‘assembling’ mean attaching or fitting together parts to form a *product*, *but do not include packaging a product.*” (Emphasis added). The BTA held that Accel was “assembling” under this definition, which is incorrect as a matter of fact and law. As a matter of law, the process of packaging is expressly excluded from the definition of “assembling,” and therefore can never be included. As a matter of fact, Accel is engaged in packaging as explained above. Also, a matter of fact and law, Accel is not engaged in the process of “attaching or fitting together parts to form a product.” Instead, Accel receives a finished product and merely places it in packaging materials to make it shelf-ready.
- b. R.C. 5739.01(S), which provides that “‘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.*” (Emphasis added). As a matter of law, the process of packaging is expressly excluded from the definition of “manufacturing operation,” and therefore can never be included. As a matter of fact and law, Accel does not change the “state or form” of any items. Instead, Accel receives a finished product and merely places it in packaging materials to make it shelf-ready.

- c. R.C. 5739.012(A)(1), which provides that “(a) ‘Distinct and identifiable products’ does not include any of the following: (i) Packaging, including containers, boxes, sacks, bags, and bottles, and packaging materials, including wrapping, labels, tags, and instruction guides that accompany the retail sale of the products and are incidental or immaterial to the retail sale thereof.” All of the transactions for which Accel was assessed (other than the leased labor) meet this definition of “packaging.” Therefore, the BTA erred as a matter of fact and law by finding that Accel was not engaged in packaging.
- d. 5739.02(B)(15) which:
- i. expressly exempts sales of packaging to the *retailer, reseller* or *manufacturer* of the product “including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale, including any machinery, equipment, and supplies used to make labels or packages, to prepare packages or products for labeling, or to label packages or products, by or on the order of the person doing the packaging, or sold at retail.” As a matter of law, the General Assembly has already provided that sales of packaging to *retailer, reseller, and manufacturers* are exempt sales, but have not so provided for the packager. Because, as a matter of fact and law, Accel is a packager and not a reseller, retailer, or manufacturer, the BTA erred by not applying the General Assembly’s intent to tax its purchases and sales.

ii. The statute further defines “packages” thusly: “‘Packages’ includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers ‘Packaging’ means placing in a package.” All of the transactions for which Accel was assessed (other than the leased labor) meet this definition of “packaging,” as a matter of fact and law. Moreover, Accel’s business is “placing [finished goods] in a package,” as a matter of fact and law. Therefore, the BTA erred as a matter of fact and law by finding that Accel was not engaged in packaging.

15. The Board of Tax Appeals erred as a matter of law by permitting Accel to offer the testimony and report of an expert witness, Carol Ptak, on the subject of manufacturing. Accordingly, it was error for the BTA to admit her testimony or report. In this regard:

a. Ptak should not have been allowed to testify, as she lacked credibility. Ptak misstated her own credentials in her own expert report, as demonstrated during the hearing in this matter. This alone should have been the basis for excluding her testimony. Ptak’s misstatements included:

i. Ptak gave herself a degree that she doesn’t have. In her report, Mrs. Ptak lists herself as holding a Master’s Degree in Manufacturing and Materials Management from Rochester Institute of Technology (“RIT”). Appellant’s Exhibit G, App. A. But, in reality, Mrs. Ptak holds a Masters in Business Administration. HT 142. Nor does RIT offer a degree or certificate program in “Manufacturing and Materials Management.” HT 142-43; TC Ex. B at 997.

- ii. Ptak bestowed a Professorship on herself that she does not have. Mrs. Ptak lists herself as a “Professor in Operations Management” at the undergraduate and graduate level at Pacific Lutheran University.” Appellant’s Exhibit G, App. A. But she was not a “Professor.” In reality, as Mrs. Ptak herself said on the stand, she “was not hired as professor. [She] was hired as an invited distinguished executive in residence.” H.T. 139-40.
 - iii. Ptak represented that she is the “author” of books for which she was a “co-author” or merely wrote the foreword.
- b. Ptak was not qualified to testify because she lacked the requisite specialized knowledge, skill, experience, training, or education regarding both packaging and manufacturing (the physical transformation in state or form of raw materials). By her own admission, Ptak had no experience or education whatsoever with packaging processes—the exact processes at issue in this case. Moreover, Ptak’s work history and experience are all on the business side and the “supply side” of manufacturing, involving purchasing and processes that occur prior to manufacturing. She had no experience or education in processes that transform the state or form of raw materials into finished goods through design, testing, prototyping, and production.

16. Any reliance by the BTA on any testimony or report from Ptak is in error, because, for the reasons explained above, the testimony and report of Ptak are neither reliable nor probative, under this Court’s precedent. See, *Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992) (“‘Reliable’ evidence is dependable; that is, it can be confidently

trusted. In order to be reliable, there must be a reasonable probability that the evidence is true.* *

* ‘Probative’ evidence is evidence that tends to prove the issue in question; it must be relevant in determining the issue.”)

17. The Board of Tax Appeals erred as a matter of fact and law by determining that Accel purchased nontaxable employment services from Resource Staffing pursuant to R.C. 5739.01(JJ)(3).

18. The BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were “permanent” within the meaning of R.C. 5739.01(JJ)(3). In so finding, the BTA ignored reliable and probative evidence that the employees were only temporary or seasonal, including:

- a. The contract between Accel and Resource Staffing expressly provided that the only positions would be “General Laborers.” ST at 192.
- b. No term of employment was provided in the contract for any employees.
- c. The Auditor explained that the labor force fluctuates with the seasons in his report.
- d. Accel’s own labor records established that the names of employees listed on the invoices changed quite often and in a temporary manner. ST at 251.
- e. Accel’s own invoices for temporary labor reflecting that the amount spent on labor fluctuates with the seasons. ST at 251. Roughly 72% of the money spent on labor by Accel was during the five months from July to November.
- Id. Accel spent up to seven times more on leased labor during the busy retail holiday season than it did during other times of the year. ST at 256.
- f. Accel’s own witness testified that its use of temporary labor is seasonal, rather

than permanent, and therefore does not comport with the exclusion. HT 76, 94-46. Accel's own Cost Accounting Manager Joe Scott explained that temporary labor physically produces the gift sets. HT at 76. The labor need varies from project to project, and from month to month. Id. at 94-95. Because of that seasonal fluctuation, each project requires Mr. Scott to calculate how many temporary employees are required to meet the workload needs of that specific project. Id. at 94-95. After Mr. Scott determines the number of short-term employees necessary to complete the project, he obtains the requisite temporary labor to supplement Accel's core group of employees. Id. at 95-96. According to Mr. Scott, Accel's business—being closely tied to the retail industry—increases between August and November and drops off the rest of the year. Id. at 94-95. Through the course of the audit, the State determined that in the months mentioned by Mr. Scott, Accel spends approximately twice as much as it spends the other seven months combined. See TC Ex. A at 259.

- g. The Auditing Agent testified that Accel increased its workload depending on the demands of the contract packaging job at hand and on the season. HT 253-57. And the Tax Commissioner's expert witness confirmed that meeting seasonal demand is a typical function of contract packagers who serve the retail industry. HT 472-73.
- h. Expert witness testimony established that Accel's busy season would be the retail Christmas season, which is an inherently seasonal business, wherein it would require the most temporary labor.

19. The BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were “permanent” within the meaning of R.C. 5739.01(JJ)(3). In so finding, the BTA relied on evidence that was not reliable or probative, relying *solely* on the testimony of biased, self-interested, and non-credible witnesses, that contradicted documents in the record and was not supported by any documents, including:

- a. Testimony from the owner of Resource staffing, Mr. Luevers. Mr. Luevers’ testimony was biased, not credible, and should have been completely disregarded by the BTA. Any reliance on his testimony is reversible error. Mr. Luevers admitted at hearing that he has “skin in the game,” because his company had agreed to indemnify Accel if the employees were found to be taxable. HT at 333. And, Mr. Luevers admitted that his company had its own assessments pending with the Tax Commissioner against it for exactly the same arrangements as it had with Accel for different employers. Thus, it was directly in his own self-interest to preclude his company from liability on this and other assessments and his testimony should have been afforded no weight.
- b. Self-serving testimony from Accel’s CFO that it was “in their interest” to have permanent employees, and to rehire those who had been laid off seasonally.
- c. Even accepting the testimony of Luevers and Harms as competent and credible, such testimony did not establish that Accel had permanent leased laborers. Instead, it established at best, that it was in the company’s interest to have the same seasonal, temporary laborers return as needed by the company to meet short-term, seasonal, and fluctuating needs. The testimony failed to

establish that Accel contracted for “permanent” leased labor from Resource Staffing.

- d. Reliance solely on witness testimony in the face of contradictory testimony, documentation, and findings of the Tax Commissioner is in error as expressly in contradiction with the holding of *Bay Mech. & Elec. Corp., v. Levin*, BTA No. 2008-K-1687, 2011 WL 2446198 at *3 (June 14, 2011), affirmed by *Bay Mech. & Elec. Corp. v. Testa*, 2012-Ohio-4312, 133 Ohio St.3d 423, ¶ 14 (“The BTA found that the controller's testimony and exhibits, presenting as they did information ‘gleaned from records not before us,’ did not rise to the level of proof required by H.R. Options.”)

20. The BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were “under the supervision or control of another” within the meaning of R.C. 5739.01(JJ)(3). In so finding, the BTA ignored reliable, probative information, including:

- a. the contract between Accel and Resource Staffing expressly provided that “employees will be under Client Company’s [Accel’s] direction and control during their assignment to Client Company, and that Client Company can direct and control the employees to fulfill its business needs and to comply with any legal requirements.” ST at 185.
- b. Voluminous testimony and documentation that Accel has various lines running at all times, where packaging is performed according to varying job requests and instructions. This is Accel’s business and there was no testimony establishing that any so-called “supervisors” from Resource Staffing had any

hand in the training, placement, responsibilities, or any other day-to-day control or supervision of the employees on the various lines.

21. The BTA erred as a matter of fact and law by determining that the employees provided by Resource Staffing were “under the supervision or control of another” within the meaning of R.C. 5739.01(JJ)(3). In so finding, the BTA relied on evidence that was not reliable or probative, relying *solely* on the testimony of one biased, self-interested, and non-credible witnesses, that contradicted documents in the record and was not supported by any documents, including:

- a. It was error to rely on any Testimony from Mr. Luevers, for the reasons explained above.
- b. The BTA’s finding in this regard was based solely on a few lines of testimony from Mr. Luevers that did not explain how Resource Staffing “supervised” the employees at all. Moreover, his testimony was only that Resource Staffing wished to have supervisor on hand to “control of the *quality* of the employees’ work.” HT at 288 (emphasis added). Such testimony fails to establish that the employees were not also, and more directly, under the supervision and control of Accel.

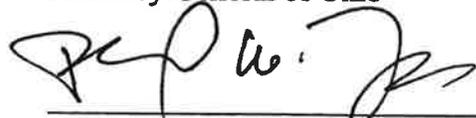
22. The Board of Tax Appeals erred by ignoring, misinterpreting, or failing to apply the express language of R.C. 5739.01(JJ), which requires that the contract between Accel and Resource Staffing provide personnel “pursuant to a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” The contract between Accel and Resource Staffing did not specify that each employee assigned under the contract was to be assigned on a

permanent basis and therefore, the contract fails to meet the express statutory requirements for exclusion from sales tax for this transaction.

23. The Board of Tax Appeals erred as a matter of law by construing R.C. 5739.01(JJ)(3) to require inquiry into the particular facts and circumstances of the employment arrangement, when the express language of the statute does not so provide.

Respectfully submitted,

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Joseph W. Testa, Tax Commissioner of
Ohio

CERTIFICATE OF SERVICE

I certify that, on this 13 day of August, 2015, a true copy of the foregoing "Notice of Appeal" and "Praecipe" was served: (1) by hand delivery upon the Ohio Supreme Court, 65 S. Front Street, Columbus, Ohio 43215, and the Ohio Board of Tax Appeals, 30 E. Broad Street, 24th Floor, Columbus, Ohio 43215; and (2) by certified mail upon the following:

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Accel, Inc.*



Daniel W. Fausey

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
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WESTLAKE, OH 44145

For the Appellee(s)

- JOSEPH W. TESTA, TAX COMMISSIONER OF OHIO
Represented by:
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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. Luevers 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. Luevers 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



0000000133
**FINAL
DETERMINATION**

Date: JUN 26 2012

Accel Inc.
c/o Daniel C. Harms, CFO
9000 Smith's Mill Road
New Albany, Ohio 43031

Re: Assessment No. 8110400164
Consumer's Use Tax
Account No. 97-179673

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5739.13, and R.C. 5741.14 concerning the following use tax assessment:

	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Consumer's Use Tax	\$2,449,347.73	\$367,402.20	\$2,816,749.93
Preassessment Interest	\$662,444.26	\$0.00	\$662,444.26
Total			\$3,479,194.19

This assessment is the result of an audit of the petitioner's purchases for the period of January 1, 2003 through December 31, 2009. A hearing was held on this matter. The petitioner's objections are addressed below.

Accel Inc offers contract packaging services, including package engineering and design, shrink wrapping and distribution services to personal care product firms. For example, Accel offers its services to the Limited Brands related companies, such as Bath and Body Works. Accel also offers its services to pre-wrap gift set packages for the holiday season. See <http://www.accel-inc.com/top/packing.asp>

At issue is packaging material that the petitioner purchased to package products on its packaging lines, such as bubble wrap, corrugate, tape, and other materials.

Manufacturing

The petitioner maintains that it is a "hybrid manufacturer and packager." (Schedule A, Pg. 2). The petitioner maintains that its purchases are exempt because it is primarily engaged in a manufacturing operation to produce tangible personal property for sale.

In accordance with R.C. 5739.02(B)(42)(a), a sale is exempt where the purpose of the purchaser is to incorporate the thing transferred as material or a part into tangible personal property to be produced for sale by manufacturing, assembling, etc.

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APP25

JUN 26 2012

Pursuant to R.C. 5739.01(S), a 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.

The petitioner states that during a typical project, it takes several items it received from its customer and creatively assembles these items into a single product. For example, the petitioner maintains that one item it produces is a bath gift set. The petitioner states, "[t]he bath gift set is comprised of various bottles of bath products, which are creatively arranged, affixed together, and placed in a basket in a manner that makes the bath gift set presentable for sale." (Letter dated Aug. 9, 2011, pg. 2). The petitioner further describes its role in the manufacturing process. "Taxpayer's role in the process is to design and produce the ultimate product. For example, several bottles of shampoos and body washes may be combined with a basket, wrapping and other items to create a bath gift set." *Id.*

Typically, in a claim to a manufacturing exemption, the ordinary inquiry is whether the specific item in question is used or consumed during the manufacturing process, such inquiry requires a determination of when the manufacturing process begins and ends, and whether the property is used or consumed during the manufacturing process. However, to claim an entitlement to the manufacturing exemption, one has to engage in manufacturing. Therefore, we have to determine whether the petitioner's activities fall within the definition of manufacturing at all.

The petitioner contends that manufacturing occurs when it takes the single items (shampoo, lotion, etc) and assembles them together in a gift set comprised of a variety of bath products. In essence the petitioner is arguing that it produces a change in state or form when it takes single bottles of shampoo or body wash and combines the items into a gift set. The petitioner contends that items such as "bags, baskets, shrink wrap and bubble wrap hold together and assist in marketing the completed product." (Schedule A, Pg. 6).¹

The terms manufacturing and processing imply essentially a transformation or conversion of materials or things into a different state or form from that in which they originally existed—the actual operation incident to changing them into marketable products. *Scholz Homes, Inc. v. Porterfield* (1971), 25 Ohio St.2d 67, 266 N.E.2d 834, quoting *National Tube Co. v. Glander* (1952), 157 Ohio St. 407, 105 N.E.2d 648. Glaringly absent from the petitioner's assertion is a detailed explanation of the purported manufacturing process and how each item in contention is used in that process. Indeed, the petitioner has not described any activities that fall within the

¹ The petitioner states that other items, such as a conveyor system is also exempt under the manufacturing exemption because the conveyor takes items through an assembly line during which products are arranged, assembled together using glue, ribbon, tape, bags, baskets, etc, wrapped using bubble or shrink wrap, and ultimately labeled for sale. (Schedule A., Pg. 6). The petitioner maintains that it also manufactures corrugate that is cut by the petitioner's machines to fit into the gift basket. Additionally, the petitioner maintains that it designed the glue that affixes the bottles to the cut corrugate, in a way that makes them the most attractive for sale, but also easily detachable by the end-user.

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JUN 26 2012

definition of manufacturing. The evidence indicates that the petitioner receives previously manufactured products which it then packages. The products received by the petitioner, lotions and shampoos, etc. are already manufactured products. The petitioner is not changing or transforming the products into a different state or form by arranging them into a basket in a creative manner using ribbons and glue. See *Express Packaging, Inc., v. Limbach* (Sept. 18, 1992), BTA Case No. 89-K-22, unreported, where, much like the case herein, the taxpayer received previously manufactured products which the taxpayer then packaged and shipped to designated locations. Similar to the case at hand, the taxpayer in *Express Packaging* argued that its operations were entitled to the manufacturing exemption. The Board of Tax Appeals determined that the taxpayer's activities were not entitled to the manufacturing exemption where the taxpayer received prepared spices from its customers, placed those spices in a bottle, placed a cap on the bottle and labeled the bottle. Likewise, the Board found that the glue/adhesives were not exempt where, "appellant acquires previously manufactured packaging materials (i.e. boxes, cartons), places previously manufactured goods in these packaging materials, and seals them with glue in preparation for shipping."² Indeed, an operation which merely enhances the value of the product without producing a change in state or form does not constitute processing. *Sauder Woodworking Co. v. Limbach* (Nov. 10, 1986), BTA Case No. 83-G-401, citing *Gressel v. Kosydar* (1973), 34 Ohio St.2d 206. The petitioner's argument is not persuasive.

Nevertheless, the petitioner contends that its activities fit neatly within the definition of manufacturing. Specifically, the petitioner contends that it "takes several related parts given to it by its customer, assembles the parts together to form a completed, marketable product. These related parts change state and form by being assembled together - for example, the petitioner takes individual bottles of bath products and groups and arranges them together in a creative manner by using items such as glue, ribbons, and labels to crate a single product such as a bath set." (Schedule A, pg. 6). Pursuant to R.C. 5739.01(S), a manufacturing operation includes assembling parts. Apparently, the petitioner contends that it is assembling parts and therefore engaged in manufacturing.

However, pursuant to R.C. 5739.01 (R), the definition of "assembly" means attaching or fitting together parts to form a product, but do not include packaging a product. "Attaching" means "to fasten or affix; join" <http://dictionary.reference.com>. The petitioner is arranging the items together in a basket. The petitioner is not attaching or fitting together parts as contemplated by R.C. 5739.01(R). Furthermore, in *Scholz Homes, supra*, the Supreme Court stated that "assembling" means more than gathering together materials.³ Therefore, the petitioner's actions do not constitute "assembly". Moreover, the evidence indicates that the

² It is acknowledged that the Board of Tax Appeals determined that certain of the taxpayer's activities fell within the manufacturing exemption. It is also noted that the petitioner in the present matter asserts that it produces and assembles the packaging using molds, dies, and heat treatment. Nevertheless, the petitioner merely makes an unsupported assertion with no explanation or description of that specific process. Nonetheless, to the extent that any items could be viewed as part of a manufacturing operation, it is noted that these items have already been removed from the audit, prior to the appeal. Specifically, the audit remarks state that molds and thermoform related equipment have been removed from the audit. However, as to the items raised by the petitioner in the appeal, the petitioner has not described any activity that meets the definition of manufacturing.

³ During the audit period in question in *Scholz Homes*, "assembling" was not defined in the Ohio Revised Code.

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petitioner is indeed, packaging the product, and therefore the petitioner's activities are explicitly excluded from the definition of "assembly" as well as the definition of manufacturing.⁴

In further support of its contention that it is a manufacturer, the petitioner states that it amended its federal return to avail itself of a deduction that is available to manufacturers under Section 199 of the Internal Revenue Code. (Letter Dated Aug. 9, 2011, pg. 4) Thus, the petitioner maintains that from a federal perspective, it is considered to be a manufacturer. However, the petitioner has not described any activity that meets the definition of a manufacturing operation under Ohio law.⁵

Double Taxation

The petitioner maintains that subjecting its purchases to use tax violates a general prohibition against double taxation. The petitioner rationalizes that the cost of the items that it uses in its processes is included in the final cost of the product upon which sales tax is charged when sold. Thus, the petitioner maintains that if the items are taxed now and taxed again upon final sale, that results in double taxation. In support of its position, the petitioner cites *Bailey v. Evatt* (1944), 142 Ohio St. 616, 53 N.E.2d 812. The Ohio Supreme Court in *Bailey* recognized that the primary purpose of the manufacturing exemption was to avoid double taxation and encourage the production of more valuable tangible personal property. However, it has already been decided that the petitioner is not engaged in a manufacturing operation, therefore, this rationale doesn't apply to the petitioner. The petitioner further contends that taxing its purchases now and taxing the ultimate finished product, ultimately increases the price of the product and thereby results in decreased revenue for the Department of Taxation. The petitioner maintains that this is so, because at a higher price, the number of purchases would be reduced. The petitioner's contentions are not well taken. The sales/use tax is a transactional tax and it is presumed that *all* sales are subject to tax, unless an exemption applies.⁶ *Timken v. Lindley* (1985), 29 Ohio App.3d 181, 504 N.E.2d 455; *CompuServe, Inc v. Limbach* (1994), 93 Ohio App.3d 777, 639 N.E.2d 1227. The petitioner describes two separate transactions and/or two separate sales. Sales tax is due on each sale unless an exemption applies.

⁴ The auditor completed a tour of the facility. During the tour, the auditor noted that multiple lines of packaging were running. Workers were packaging items by hand across the assembly lines. The lines included conveyors moving product along to be packaged. Glue guns were used to apply glue for packaging on the packaging lines. The packaging line workers would fold, wrap, tie or place the items into packaging materials manually.

⁵ The petitioner further argues that labeling it as a "packager" creates an inconsistency with the federal tax consideration which suggests that Ohio law should trump the Internal Revenue Code. The petitioner states that is in violation of the Supremacy Clause of the Constitution. Additionally, the petitioner states that the fact that the petitioner was entitled to make the IRS deduction establishes that the auditor mis-classified the petitioner as providing packaging services, rather than a manufacturer. However, the petitioner's contentions are not well taken. First, as decided above, the petitioner is not engaged in a manufacturing operation. Moreover, even the petitioner classifies itself as a packager. (See Schedule A, pg. 2). Finally, the Department of Taxation is an administrative agency without authority to decide constitutional issues. However, the petitioner's status under the IRS Code, is not determinative of whether it is engaged in a manufacturing operation in accordance with Ohio law.

⁶ This is a purchase audit, therefore use tax would apply. Pursuant to R.C. 5741.02(G), purchases are presumed taxable, until the contrary is established. The procedures and application of the use tax is similar to sales tax.

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Packaging

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The petitioner next contends that it is entitled to the packaging exemption. However, the packaging exemption is limited to the persons specified in R.C. 5739.02(B)(15). The petitioner acknowledges this and contends that it qualifies for the exemption as a person engaged in a manufacturing operation to produce tangible personal property for sale or as a person engaged in making retail sales.

As decided above the petitioner is not engaged in a manufacturing operation. Therefore, the petitioner also maintains that it is engaged in making retail sales.

Pursuant to R.C. 5739.01(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. The petitioner maintains that there can be no dispute that its transactions with its customers involve its customers paying a price to the petitioner and the petitioner transferring title or possession of the item it produces for its customer. Therefore, the petitioner argues that it is making retail sales. The petitioner's contention is not well taken. In this situation, the petitioner is not making retail sales. Indeed, the petitioner acknowledges that it does not have its own product line. (Letter dated Aug. 9, 2011, Pg. 1). The petitioner, presumably, contends that when it performs its packaging service for its customer it is making a retail sale. However, the petitioner is providing a service and only the enumerated services are considered a retail sale for sales tax purposes. Moreover, the petitioner acknowledges this while making an alternative argument; indeed, the petitioner states, that a "sale" includes only specific types of services, none of which are applicable here." (Schedule A, pg. 7). Therefore, the petitioner's statement indicates that the petitioner acknowledges that it is not making retail sales, which is in direct contradiction to the petitioner's contention that it qualifies for the packaging exemption because it is making retail sales.

Next, the petitioner maintains that if the Department finds that it is not making retail sales, then, the petitioner questions how its transactions can be subjected to use tax. The petitioner cites *J.C. Penney Co. v. Limbach* (1986), 25 Ohio St.3d 46 for the proposition that sales tax only applies to "sales". The petitioner maintains that if the Department disagrees that the petitioner is engaging in a sale, and yet imposes sales tax, it is creating an illogical and asymmetrical tax scheme whereby services and property are sold in Ohio that are not subject to sales tax, but nonetheless, would be subject to use tax. The petitioner's contention is without merit.

J.C. Penney basically states that a transaction that would not ordinarily be subject to sales tax is not subject to use tax. See also, R.C. 5741.02 (C)(2). As stated earlier, the petitioner provides a rather intertwined and contradictory argument. Indeed, the petitioner appears to be confusing the transactions at issue. At issue is the petitioner's purchases of materials it used in providing its packaging services, i.e, glue, shrink wrap, bags, baskets, etc., such items are clearly taxable sales, unless an exemption applies, which the petitioner has failed to establish. Therefore, while the petitioner is not engaged in making retail sales when it provides its

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packaging service, it is the consumer of the retail products it purchases when providing the service. The objection is denied.

Arbitrary

The petitioner maintains that the assessment is not subject to sales or use tax under Ohio law which makes the assessment arbitrary. The petitioner bases its argument on statements by the auditor during the audit that if the petitioner's customers, i.e. Bath and Body Works, had undertaken the same activity, rather than outsource it to the petitioner, then, the items would not be subject to sales or use tax. However, the petitioner's contention is not well taken. The packaging exemption is available to qualified persons. When a manufacturer or retailer purchases packaging materials to package its products for sale the purchases are exempt from taxation. However, this has no bearing on the assessment against Accel and it doesn't make the assessment against Accel arbitrary. It is well established that under R.C. 5739.02 sales are presumed taxable unless proved otherwise, and that the taxpayer has the burden of proof.⁷ See, *Timken, supra*; *CompuServe, supra*. This places upon the petitioner an affirmative duty to show that its transactions are not subject to tax. It has been determined that Accel is not a person qualified for the packaging exemption. Therefore, the petitioner has not demonstrated that the assessment is arbitrary.

Equal Protection

The petitioner maintains that its customers and it are jointly engaged in a single transaction that begins when the customers produce the component parts and ends with the completed product. Essentially, the petitioner is, again, arguing that it is part of the manufacturing operation. As decided above, the petitioner's contention is without merit.

The petitioner further argues that the Department's tax treatment of two similarly situated Ohio taxpayers, the petitioner and its customers, violates the Equal Protection Clauses of Ohio and the United States Constitutions.

The Department of Taxation is an administrative agency without jurisdiction to consider constitutional issues. However, if one were to decide the issue, the claimant's contention would not be well taken. Only the specified persons provided R.C. 5739.02(B)(15) are entitled to the packaging exemption. It has been determined that the petitioner is neither engaged in a manufacturing operation or making retail sales in relation to the items at issue. Therefore, while manufacturers and persons engaged in retail sales may be entitled to the packaging exemption. The petitioner is not. Moreover, the Equal Protection Clause "does not require things which are different in fact *** to be treated in law as though they were the same." *GTE North, Inc. v. Zaino* (2002), 96 Ohio St. 3d 9, 2002-Ohio-2984, quoting *Tigner v. Texas* (1940), 310 U.S. 141, 147, 60 S.Ct. 879, 84 L.ED. 1124. In other words, Equal Protection requires similar treatment for the similarly situated. There is no requirement of equal treatment of differently situated persons. See *Home Depot USA, Inc. v. Levin* (2009), 121 Ohio St.3d 482, 905 N.E.2d 630, 2009-

⁷ This is a purchase audit, therefore use tax would apply. Pursuant to R.C. 5741.02(G), purchases are presumed taxable, until the contrary is established. The procedures and application of the use tax is similar to sales tax.

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Ohio-1431. The petitioner is not similarly situated to a manufacturer or to a person engaged in making retail sales.

Resale

The petitioner maintains that it is entitled to the resale exemption. The petitioner argues that if the Department states that the petitioner has not changed the state or form of the products that it produces then it is reselling the products in the same form. The petitioner's contention is without merit. The exemption claimed is found in R.C. 5739.01(E) which provides that a sale is not subject to tax if the purpose of the consumer is to resale the thing in the same form.

While the petitioner is not changing the state or form of the products that are already manufactured, for purposes of the manufacturing exemption, the petitioner is also not reselling the products that it purchased in the same form. Again, the items at issue are such things as glue, bags, shrink wrap etc, the petitioner is not giving Bath and Body works a bottle of glue or a roll of shrink wrap. The petitioner is consuming these items when it performs the packaging service. See *Sauder Woodworking Co., supra*, where the Board of Tax Appeals determined that packaging materials did not qualify for the resale exemption because they were not resold in the same form in which they were received. The objection is denied.

Shipping/Delivery Charges

The petitioner maintains that transportation of persons or property are exempt from use tax. In support of its position, the petitioner cites R.C. 5739.02(B)(11) and says that transportation of persons or property is exempt from tax. The petitioner's contention is not well taken. The petitioner is not purchasing a transportation service as contemplated in R.C. 5739.02(B)(11), rather its delivery charges that are at issue. Delivery charge 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.

On August 1, 2003, the definition of price was revised to include delivery charges. R.C. 5739.01(H)(1)(a)(iv).

The petitioner maintains that the audit period starts on January 1, 2003 and thus any delivery charges prior to August 1, 2003 should not be included. The petitioner is correct. However, the petitioner identifies Exhibit E as the transactions in contention. The petitioner has not identified any freight and delivery transactions on Exhibit E that are included in the assessment prior to August 1, 2003.

The petitioner next argues that the Information Release explaining "Delivery Charges" was not published until 2007, therefore, the petitioner maintains, that assuming that the Information Release properly interprets Ohio law, the taxpayer could not reasonably be expected to follow it until that time. The petitioner's contention is without merit. The Information Release is only a guideline provided to aide taxpayers. It is still the taxpayer's duty to comply

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with the law. Indeed, ignorance of the law is no excuse for non-compliance. *Mobile Instrument Serv. & Repair, Inc. v. Tracy* (June 30, 2000), BTA Case No. 98-V-581, unreported.

Next, the petitioner contends that "simply because delivery charges are a part of the 'price' does not mean that an express exemption from use tax under the Ohio Revised Code does not apply. That is, the Tax Commissioner is prohibited from making a rule that conflicts with an Ohio statute." In support of this position, the petitioner cites *Youngstown Sheet & Tube Co. v. Lindley* (1988), 38 Ohio St.3d 232. Then, the petitioner goes on to then argue, again, that "Ohio Revised Code 5739.02(B)(11) expressly, and without applicable condition exempts the transportation of property, irrespective of whether it is part of the 'price'". (Schedule A, pg. 10). For the following reasons, the petitioner contention is without merit. First, "delivery charges" are included in the definition of price in R.C. 5739.01(H)(1)(a)(iv), which is a statute, promulgated by the General Assembly, not an administrative rule promulgated by the Tax Commissioner. Next, at issue is delivery costs associated with items purchased by the petitioner, not a transportation service.⁸

The petitioner further maintains that even if the delivery charges are included in the price and not subject to an express exemption, only vendor-charged delivery costs are included. The petitioner contends that third party delivery charges, such as FedEx remain exempt under Section 5739.02(B)(11). It is unclear what the petitioner means by third party delivery charges. However, when a vendor ships a product via FedEx, that vendor typically includes the cost of delivery in the price to the consumer. This would be a delivery cost that is included in the price and part of the taxable base. Moreover, the petitioner has not identified any transactions from FedEx that are included in the assessment.

Lastly, the petitioner maintains that "imposing use tax on delivery charges that are separately stated on an invoice or charged by the vendor, but not imposing use tax on delivery charges that are stated on a separate invoice or not charged by the vendor, violated the Equal Protection Clauses of the Ohio and United States Constitutions." (Schedule A, pg. 11). It is unclear exactly what the petitioner is arguing.⁹ However, delivery charges are included in the definition of price and taxable, regardless of whether the delivery charge is separately stated on the invoice.

Leased employees

Providing an employment service is taxable under R.C. 5739.01 (B)(3)(k).

⁸ The petitioner is attempting to broaden the scope of R.C. 5739.02(B)(11) which provides that sales tax does not apply to the transportation of persons or property. Specifically, R.C. 5739.02(B)(11), provides that the sales tax does not apply "except for transactions that are sales under division (B)(3)(r) of section 5739.01 of the Revised Code, the transportation of persons or property, unless the transportation is by a private investigation and security service". R.C. 5739.02(B)(11), applies to entities that provide transportation services; such entities normally qualify as a public utility and operate under a certificate of public convenience and necessity, for example, limousine service, taxi-cab, transit bus, UPS or FedEx, etc..

⁹ The petitioner maintains that the auditor stated that delivery charges are not exempt because they are not stated on a separate invoice from the item delivered.

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An 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. R.C. 5739.01(JJ).

Employment service does 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. R.C. 5739.01(JJ)(3).

The petitioner received employees from Manpower and Resource Staffing, Inc. The petitioner has a written agreement with Resource Staffing. (Exhibit G). The petitioner has no written agreement with Manpower. The petitioner contends that it meets the JJ3 exclusion because its contract is for at least one year and the employees are assigned permanently. The petitioner contends that its arrangement with Manpower is similar to the Resource Staffing Agreement.¹⁰

The issue is whether the employees were assigned permanently. In *H.R. Options Inc. v. Zaino* (2004), 100 Ohio St.3d 373, the Supreme Court of Ohio determined that assigning an employee on a permanent basis means assigning an employee to a position for an indefinite period. The employee's contract must not specify an ending date and the employee is not provided as a substitute for a current employee who is on leave. Moreover, the employee must not be provided to meet seasonal or short-term workload conditions. The Court in *H.R. Options* further indicated that the parties' performance under the contract must be consistent with a permanent assignment.

The evidence indicates that the petitioner's performance under the contract is not consistent with a permanent assignment. Indeed, the evidence is compelling that the labor force fluctuates with the seasons. First, the nature of the petitioner's business operations are such that one would expect that the labor force would fluctuate with the seasons. For example, the petitioner packages gift sets for clients such as Bath and Body Works; it is well-known that these gift sets are especially popular during the holiday season. Further, the petitioner provided documentation of the invoices for Manpower and Resource Staffing employees, the auditor conducted a test for performance based on the documentation provided. Based on the auditor's test of performance, he determined that the dollar amount spent on employee labor fluctuates with the season. The audit remarks state that the "employees ramp up prior to the holiday season and then reduce after the holiday season." The auditor prepared a chart that shows that the greatest amount of money is spent on employee labor from August through December. This evidence establishes that the employees are seasonal in nature.

Moreover, there is additional evidence that also supports this conclusion. The petitioner provided invoices from Manpower and Resource Staffing with a list of employee names

¹⁰ The President of Accel, David Abrahami, provided a sworn affidavit that its arrangement with Manpower was for at least one year, and the employees were assigned indefinitely. (Exhibit H).

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provided by both companies. The auditor noted that the names of the employees listed tend to "change quite often in a temporary manner." (Auditor's Remarks, pg. 13). A review of the June 2007 payroll compared to the September 2007 payroll supports the auditor's conclusion. Indeed, according to the documentation provided, there were approximately 128 employees on the payroll that included September 6, 2007. There were only 56 employees on the payroll that included June 27, 2007. This further supports the conclusion that the labor force is increased in the months approaching the holiday season. Out of the 56 employees on the June 27, 2007 payroll, only 29 employees were on the payroll that included September 6, 2007.¹¹ Thus, according to the documents reviewed approximately 52% of the employees that were on the payroll in June were still on the payroll in September, not quite three months later. This demonstrates a higher turnover rate than one would expect for employees that are permanently assigned. We recognize that a high turnover rate, in and of itself, does not conclusively demonstrate that the parties intended for the assignments to be temporary in nature. However, this evidence reinforces the aforementioned compelling evidence that the employees are seasonal in nature, and thus temporary.

Resale

The petitioner next contends that the leased employees are exempt from use tax under the "resale" exemption. Pursuant to R.C. 5739.01(E), the sale is not subject to tax if the purpose of the consumer is to resale the thing in the same form.

The petitioner maintains that the two providers provided the service of leasing employees to the petitioner and the petitioner resold the benefits of the service which was the assembled products. The petitioner's contention is without merit. This precise issue has been decided by the Supreme Court of Ohio. In *Bellemar Parts Indus., Inc. v. Tracy*, (2000), 88 Ohio St.3d 351, the Court held that when a consumer contracts for temporary employees to add to its work force, the benefit of the service is the labor of the employees, not the product of their work. Therefore, the benefit to Accel was the labor itself, not the assembled products. Thus, the petitioner did not resell the benefit to its clients in the same form received.

The petitioner acknowledges that *Bellemar* decided that the resale exception did not apply to assigned labor.¹² Nonetheless, the petitioner attempts to use *Hyatt Corp. v. Limbach* (1994), 69 Ohio St.3d 537 and *CCH Computax, Inc. v. Tracy* (1993), 68 Ohio St.3d 86 to support its position. However the petitioner's contention is not well taken. As recognized by the Supreme Court of Ohio in *Bellemar*, the taxpayers in *Hyatt* and *CCH Computax* did not purchase temporary employment services. In *Hyatt*, the taxpayer purchased cleaning services and received clean linens as a benefit of the service. *Hyatt* resold the clean linens to its customers.

¹¹ The documents compared were titled Resource WE070107 and Resource WE090907.

¹² The petitioner unpersuasively questions the validity of *Bellemar*. The petitioner states that "[o]f the four Justices in the majority in the case, none remain on the Court, compared with two of the dissenting Justices who remain.*** In other words, this issue is by no means settled by the Ohio Supreme Court, and the Court could very well follow its decisions in *Hyatt Corp and CCH Computax, Inc* rather than its decision in *Bellemar Parts*, if presented with the issue in the future." This argument is without merit. First, neither *Hyatt Corp* or *CCH Computax, Inc.* involved temporary employment services. Second, the Court in *Bellemar* stated that its decision left the decisions in *Hyatt Corp and CCH Computax, Inc* undisturbed.

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Likewise, in *CCH*, the taxpayer purchased tax return preparation services and received the prepared tax return. The Court found that the taxpayer resold the tax return in the same form to its customers. The distinction is that in both cases the benefit received from the service was the finished product and the finished product was resold. On the other hand, it was decided in *Bellemar*, that when purchasing temporary labor, the benefit of the service is not the finished product; rather, the temporary employee labor is the benefit.

Manufacturing Operation Exemption Applies to Leased Employees

The petitioner next contends that the manufacturing exemption also applies to the leased employees. The petitioner maintains that sales are exempt where the purpose of the purchaser is to "use the thing transferred" primarily in a manufacturing operation to produce tangible personal property for sale. The petitioner contends that its employees are the "things transferred." The petitioner's contention is without merit for two reasons.

First, it has already been decided that the petitioner is not engaged in a manufacturing operation. Therefore, *even if*, leased employees were exempt in a manufacturing operation, that exemption would not apply to the petitioner. Next, the Supreme Court of Ohio has, again, addressed this specific issue in *Bellemar*. The Court found that the manufacturing exception does not exclude the purchase of employment services from sales tax. Specifically, the Court held that "employment services are not 'things' and therefore cannot be considered 'things transferred' in the context of the manufacturing exception."

Unconstitutional

The petitioner maintains that taxing employment services violates the Equal Protection Clauses of the Ohio and the United States Constitutions. The petitioner argues that its use of employees to perform labor would not be subject to use tax if it directly hired the employees.

The Department of Taxation is an administrative agency without jurisdiction to consider constitutional issues. However, if one were to decide the issue, the claimant's contention would not be well taken. Equal Protection requires similar treatment for the similarly situated. There is no requirement of equal treatment of differently situated persons. See *Home Depot USA, Inc. v. Levin* (2009), 121 Ohio St.3d 482, 905 N.E.2d 630, 2009-Ohio-1431. The petitioner attempts to compare apples to oranges. If the petitioner hired employees directly, the petitioner would not be purchasing taxable employment services and the petitioner would not be similarly situated to a taxpayer that purchased employment services. Therefore, there is no Equal Protection violation because the two taxpayers are not similarly situated.

Next, the petitioner maintains that it would not have to pay use tax if, "instead of manufacturing the boxes and other packaging, it simply purchased manufactured boxes and resold them." In support of its contention, the petitioner relies on the resale exception in R.C. 5739.01(E). (Schedule A, Pg. 15). However, the petitioner's contention is without merit. Again, the petitioner attempts to compare apples to oranges. The petitioner cannot establish that purchasing a taxable employment service is unconstitutional by comparing it to an entirely

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different tax exemption or exception. When the petitioner purchases taxable employment services, it is not similarly situated to a taxpayer whose purchase is exempt from tax because the taxpayer resold the merchandise in the same form.

Double Tax

The petitioner contends that even assuming employment services are being provided, taxing them now results in a prohibited double tax. The petitioner states that the ultimate price of the product sold includes the value of the employee's labor and that since it is taxed when sold, it cannot be taxed a second time now. The petitioner's contention is without merit. The sales/use tax is a transactional tax and it is presumed that *all* sales are subject to tax, unless an exemption applies. The petitioner describes two separate transactions or two separate sales. It is the petitioner's purchase of an employment service that is at issue. The purchase of employment services are taxable, notwithstanding that the fact that the final product is taxable. In other words, the taxability of the final product has no bearing on the transaction at issue, in this case.

Use tax limited to premium paid by Taxpayer for Employees

The petitioner contends that the taxable base should not include the employees' wages. The petitioner states, "any use tax must be limited to the premium charged by the providers, above those employees' wages." (Schedule A, Pg. 15).

Pursuant to R.C. 5739.01 (H)(1)(a), price 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, ***

In accordance with R.C. 5739.01(H)(1)(a), price includes the *total amount of consideration*. The total amount of consideration for employment services clearly includes an employee wage. The petitioner's contention is without merit.

Items on which sales tax was previously paid

The petitioner maintains that the assessment includes items upon which sales tax has already been paid. The petitioner provides invoices in support of its position. The evidence indicates that sales tax was charged on the invoices from Capital City Consulting and Tattletale Portable Alarm Systems.¹³ Therefore, these invoices will be removed from the assessment.

Natural Gas

The petitioner maintains that the assessment erroneously includes gas that was provided by Delta Energy. Pursuant to R.C. 5739.02(B)(7), sales tax does not apply to sales of natural gas

¹³ The petitioner also provides invoices from EasyIt. It is unclear whether the petitioner maintains that these invoices were also erroneously included because the petitioner doesn't list the invoices on its list of erroneous transactions. However, there are no invoices from EasyIt included in the assessment.

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by a natural gas company, if in each case the thing sold is delivered to consumers through pipes or conduits, *** all terms as defined in section 5727.01 of the Revised Code ***

The statute expressly states that the natural gas must be sold by a natural gas company. The petitioner contends that Delta Energy is a natural gas company.

R.C. 5727.01(D)(4) provides that any person is a natural gas company when engaged in the business of supplying or distributing natural gas for lighting, power, or heating purposes to consumers within this state, excluding a person that is a governmental aggregator or retail natural gas supplier as defined in section 4929.01 of the Revised Code.

Delta Energy is a retail natural gas supplier, which is expressly excluded from the definition of a natural gas company. Delta Energy's website provides, "Delta Energy is a natural gas supplier and international energy consultant" <https://www.deltaenergyllc.com/about/>

Moreover, natural gas companies are public utilities that are regulated by the Public Utilities Commission of Ohio (PUCO). PUCO has a list of "Competitive Retail Natural Gas Suppliers" on its website. Delta Energy is listed as a retail natural gas supplier. Therefore, Delta Energy is not a natural gas company. The petitioner's purchase of natural gas from Delta Energy is taxable.

Natural Gas used in Manufacturing Operations

The petitioner next contends that the natural gas is used to heat its warehouse in which its customer's products are located. The petitioner maintains that these products must be kept at a certain temperature to avoid damage, thus, the natural gas is also used in a manufacturing operation and is exempt. However, as determined above, the petitioner is not engaged in a manufacturing operation. Therefore, the natural gas is not used in a manufacturing operation.

Statute of Limitations

The petitioner maintains that the notice of assessment is beyond the statute of limitations. The petitioner contends that under Ohio law, the statute of limitations is one year pursuant to Ohio Revised Code 5741.16. The petitioner makes the following arguments in support of its position:

- The petitioner contends that "under Section R.C. 5741.16(B), in situations where a taxpayer provides a fully completed exemption certificate, the Department is limited to assessing use tax based upon that exemption certificate to one year from the date of sale or one year from the date on which the exemption certificate was provided, whichever is later." (Schedule A, pg. 18).
- The petitioner further argues that if a taxpayer is not subject to use tax, i.e. when the taxpayer presents a certificate of exemption, it necessarily follows that a use tax return is not required.

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- Lastly, the petitioner maintains that, although no return was filed, R.C. 5741.16(C)(2) does not apply because the petitioner gave an exemption certificate to the vendor at the time of sale.

For the reasons that follow, the petitioner's contentions are without merit.

R.C. 5741.16 provides:

(A) Except as provided in division (B) or (C) of this section, no assessment shall be made or issued against a seller or consumer for any tax imposed by or pursuant to section 5741.02, 5741.021, 5741.022, or 5741.023 of the Revised Code more than four years after the return date for the period in which the sale or purchase was made, or more than four years after the return for such period was filed, whichever date is later.

(B) A consumer who provides a fully completed exemption certificate pursuant to division (B) of section 5739.03 or division (E) of section 5741.02 of the Revised Code may be assessed any tax imposed by or pursuant to section 5741.02, 5741.021, 5741.022, or 5741.023 of the Revised Code that results from denial of the claimed exemption within the later of a period allowed by division (A) of this section or one year after the date the certificate was provided.

(C) This section does not bar an assessment:

(1) When the tax commissioner has substantial evidence of amounts of taxes collected by a seller from consumers on purchases, which were not returned to the state by direct remittance;

(2) When the person assessed failed to file a return as required by section 5741.12 of the Revised Code;

(3) When the seller or consumer and the commissioner waive in writing the time limitation.¹⁴

Therefore, pursuant to R.C. 5741.16 no assessment shall be issued more than four years after the return date for the period in which the sale or purchase was made, or more than four years after the return for such period was filed, whichever is later. However, in this case, the petitioner did not have a consumer's use tax account, therefore, the petitioner did not file returns.

¹⁴ Section (B) that references the exemption certificates was effective January 1, 2006. The assessment period at issue is January 1, 2003 through December 31, 2009. Therefore, even if, the petitioner were correct, it wouldn't impact the periods prior to 2006.

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When the consumer fails to file a return as required, the four year statute of limitations does not apply. *Spartan Chem. Co., Inc. v. Tracy* (1995), 72 Ohio St.3d 200.

However, the petitioner maintains that because it provided exemption certificates, under Division (B), the statute of limitations is one year from the date the exemption certificate was provided. Even though the petitioner states that it provided exemption certificates to the auditor, and the auditor didn't review them, the petitioner has not provided any exemption certificates on appeal. Therefore, the petitioner has not provided evidence that Division (B) would even apply. Nevertheless, Division (B) would not change the outcome. First, rather than limiting the period for issuing an assessment as suggested by the petitioner, Division (B) actually extends the statute of limitations. This is evidenced by the language in Division (A). For instance, Division (A) provides, "[e]xcept as provided in division (B) or (C) of this section, no assessment shall be made or issued ***more than four years after the return date for the period in which the sale or purchase was made, or more than four years after the return for such period was filed, whichever date is later." This sentence clearly provides that the no assessment will be issued after four years, except for the situations provided in Divisions (B) or (C).¹⁵

Additionally, the petitioner's contention that it did not have to file a use tax return is without merit. It has been determined that the petitioner owed consumer's use tax. Therefore, the petitioner should have maintained a consumer's use tax account prior to the audit. In accordance with OAC 5703-9-13(I), a taxpayer is required to file a consumer's use tax return, even when there is no tax liability for that period. Thus, the petitioner was required to file consumer's use tax returns.

Therefore, the four-year statute of limitations does not apply when the petitioner failed to file the required consumer's use tax return. The objection is denied.

Amnesty

The petitioner contends that it is entitled to participate in the amnesty program which was enacted pursuant to uncodified section 757.42, in accordance with House Bill No. 153. Under the amnesty program, a consumer must pay the full amount of use tax outstanding from January 1, 2009 and after, and the Tax Commissioner will waive all delinquent use tax, penalties, and interest owed by the consumer prior to January 1, 2009.

However, as acknowledged by the petitioner, Section (E) of the uncodified version provides that "[a] consumer against which the Tax Commissioner has issued an assessment on or before the effective date of this section is not eligible to participate in the use tax amnesty program established under this section." The petitioner was assessed prior to the effective date of HB 153. Nevertheless, the petitioner argues that under R.C. 5739.13(B), an assessment is not final such that the taxpayer owes use tax until the petition for reassessment has been resolved. The petitioner further states, that because the petition for reassessment has not been resolved here, there is no binding assessment and the petitioner qualifies for the amnesty program. The petitioner's contention is without merit. A taxpayer is not eligible for the amnesty program if an

¹⁵ See also Bill Analysis, AM. Sub. H.B. 66, 126th General Assembly

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assessment has been *issued*. The law explicitly states that a consumer is not eligible to participate in the amnesty program once an assessment has been issued, not once an assessment is final. The assessment against Accel Inc., was issued January 18, 2011, before the effective date of section 757.42 and HB 153.¹⁶

The petitioner next maintains that under R.C. 5703.58 (B), the Department of Taxation is barred from assessing use tax against Accel for years prior to 2008. Additionally, the petitioner maintains that the 2003 tax year is improperly assessed because it is outside the statute of limitations. Specifically, the petitioner maintains,

“there can be no question that the Department of Taxation unlawfully audited and preliminarily assessed the 2003 tax year. Under ORC 5703.58(B) before the recent change in the law, the tax commissioner was prohibited from assessing use tax after seven years from the return date for the use tax. Here, the preliminary assessment was issued January 18, 2011 such that the Department of Taxation is prohibited from even preliminarily assessing use tax for any period prior to January 18, 2004.” (Letter dated, October 19, 2011).

The petitioner’s contention is without merit. First, while R.C. 5703.58(B) was amended to say that the Tax Commissioner may not issue an assessment against a consumer for use tax if the use tax was due before January 1, 2008; the amendment was not effective until September 29, 2011. Therefore, it does not apply to the petitioner’s assessment that was issued January 18, 2011. Next, the petitioner’s contention that 2003 is out of statute is also without merit. While R.C. 5703.58(B), as amended, places a seven-year time limit for which an unpaid use tax liability may be assessed; again, that amendment was effective September 29, 2011. However, contrary to the petitioner’s assertion, under prior law, a ten-year limit was imposed by R.C. 5703.58(A). The petitioner’s objection is denied.

Penalty

The petitioner maintains that the penalty is contrary to law or in the alternative should be abated. The petitioner contends that it is presumed that the Department imposed the penalty under the authority of R.C. 5739.133, which governs sales tax.

R.C. 5739.133 provides in relevant part:

(A) A penalty may be added to every amount assessed under section 5739.13 or 5739.15 of the Revised Code as follows:

(1) In the case of an assessment against a person who fails to collect and remit the tax required by this chapter or Chapter 5741. of the Revised Code, up to fifty per cent of the amount assessed;

¹⁶ HB 153 was effective 9/29/2011.

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- (2) In the case of a person whom the tax commissioner believes has collected the tax but failed to remit it to the state as required by this chapter or Chapter 5741. of the Revised Code, up to fifty per cent of the amount assessed;
- (3) In the case of all other assessments, up to fifteen per cent of the amount assessed.

The petitioner acknowledges that certain subsections of R.C. 5739.133 incorporate provisions governing use tax. Nonetheless, the petitioner maintains that R.C. 5739.133 (A)(3) fails to incorporate Chapter 5741, thus the 15% penalty is contrary to law.

However, R.C. 5741.14 provides that the procedures prescribed by sections 5739.13 to 5739.15 of the Revised Code, including those governing the imposition of penalties and interest, apply to assessments made pursuant to sections 5741.11 and 5741.13 of the Revised Code.¹⁷ Nonetheless, the petitioner maintains that R.C. 5741.14 only incorporates the provisions relative to procedures concerning the imposition of penalties. The petitioner states that rather than set forth a "procedure", Section 5739.133(A) sets forth the rate at which penalties will be imposed.

In support of its position, the petitioner cites *Int'l Bus. Mach. Corp. v. Levin* (2010), 125 Ohio St.3d 347, in an attempt to draw an analogy based on a totally different Revised Code Section and a totally different tax concept. In that case, IBM was granted a refund under R.C. 5739.071(A) and claimed an entitlement to interest on that refund. R.C. 5739.071(A) allowed for a refund of 25% of sales or use tax paid on the purchase of computers, related equipment, or software, to a provider of electronic information services. R.C. 5739.071(A), provided that applications for refund would be made in the same manner and subject to the same time limitations as provided in sections 5739.07, which is the general refund provision of sales tax law, and 5741.10, which is the general refund provision of use tax law. IBM argued that since interest was added to refunds granted under R.C. 5739.07 and R.C. 5741.10, it was entitled to interest on a refund granted under R.C. 5739.071(A). The Ohio Supreme Court rejected this argument based on a number of factors, including that R.C. 5739.071 (A) did not incorporate the entitlement to interest because the incorporation language was limited to two aspects of the refund claim: the manner and the timing of making the application for the refund.¹⁸ Additionally, the Supreme Court of Ohio recognized that "the interest provision in R.C. 5739.132(B), by its express terms does not apply to refunds granted under R.C. 5739.071(A)." However, this analogy does not support the petitioner's contention. Indeed, the Supreme Court of Ohio has recognized that a 15% penalty can be imposed to a consumer's use tax assessment by virtue of R.C. 5741.14. *Jennings & Churella Constr. Co., v. Lindley* (1984), 10 Ohio St.3d 67, 461 N.E.2d 897.

¹⁷ The petitioner further argues that Section 5739.133 was not in existence when Section 5741.14 was enacted. Therefore, Section 5741.14 does not incorporate the later enacted 5739.133. The petitioner's contention is not persuasive. As acknowledged by the petitioner, R.C. 5741.14 was amended in 1997, which specifically added the language, "including those governing the imposition of penalties and interest."

¹⁸ R.C. 5739.071 provides that "[a]pplications for a refund shall be made in the same manner and subject to the same time limitations as provided in Sections 5739.07 and 5741.10 of the Revised Code."

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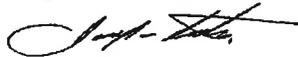
In the alternative, the petitioner maintains that the penalty should be abated. The evidence indicates that the penalty should be reduced to 5%. The assessment is modified as follows:

	<u>Amount</u>	<u>Penalty</u>	<u>Total</u>
Consumer's Use Tax	\$2,447,159.84	\$122,357.99	\$2,569,517.83
Preassessment Interest	\$651,862.91	\$0.00	<u>\$651,862.91</u>
Total			\$3,221,380.74

Current records indicate that no payment has been made on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above referenced total. Payment shall be made payable to Ohio Treasurer Josh Mandel. Any payment made on this final determination should be mailed to: Ohio Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-1090.

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

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



JOSEPH W. TESTA
TAX COMMISSIONER

/s/ Joseph W. Testa

Joseph W. Testa
Tax Commissioner



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.

OHIO RELAY SERVICES FOR
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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

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. APP54

(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. As used in this division, "cleaning" does not include sanitation services necessary for an establishment described in 21 U.S.C. 608 to comply with rules and regulations adopted pursuant to that section.

(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 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

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 131st General Assembly File No. TBD, HB 64, §803.330.

See 130th General Assembly File No. 25, HB 59, §803.190.

5739.02 Levy of sales tax - purpose - rate - exemptions.

For the purpose of providing revenue with which to meet the needs of the state, for the use of the general revenue fund of the state, for the purpose of securing a thorough and efficient system of common schools throughout the state, for the purpose of affording revenues, in addition to those from general property taxes, permitted under constitutional limitations, and from other sources, for the support of local governmental functions, and for the purpose of reimbursing the state for the expense of administering this chapter, an excise tax is hereby levied on each retail sale made in this state.

(A)

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

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

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

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

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

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

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

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

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- (3) Sales of food sold to students only in a cafeteria, dormitory, fraternity, or sorority maintained in a private, public, or parochial school, college, or university;
- (4) Sales of newspapers and sales or transfers of magazines distributed as controlled circulation publications;
- (5) The furnishing, preparing, or serving of meals without charge by an employer to an employee provided the employer records the meals as part compensation for services performed or work done;
- (6) Sales of motor fuel upon receipt, use, distribution, or sale of which in this state a tax is imposed by the law of this state, but this exemption shall not apply to the sale of motor fuel on which a refund of the tax is allowable under division (A) of section 5735.14 of the Revised Code; and the tax commissioner may deduct the amount of tax levied by this section applicable to the price of motor fuel when granting a refund of motor fuel tax pursuant to division (A) of section 5735.14 of the Revised Code and shall cause the amount deducted to be paid into the general revenue fund of this state;
- (7) Sales of natural gas by a natural gas company, of water by a water-works company, or of steam by a heating company, if in each case the thing sold is delivered to consumers through pipes or conduits, and all sales of communications services by a telegraph company, all terms as defined in section 5727.01 of the Revised Code, and sales of electricity delivered through wires;
- (8) Casual sales by a person, or auctioneer employed directly by the person to conduct such sales, except as to such sales of motor vehicles, watercraft or outboard motors required to be titled under section 1548.06 of the Revised Code, watercraft documented with the United States coast guard, snowmobiles, and all-purpose vehicles as defined in section 4519.01 of the Revised Code;
- (9)
- (a) Sales of services or tangible personal property, other than motor vehicles, mobile homes, and manufactured homes, by churches, organizations exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986, or nonprofit organizations operated exclusively for charitable purposes as defined in division (B)(12) of this section, provided that the number of days on which such tangible personal property or services, other than items never subject to the tax, are sold does not exceed six in any calendar year, except as otherwise provided in division (B)(9)(b) of this section. If the number of days on which such sales are made exceeds six in any calendar year, the church or organization shall be considered to be engaged in business and all subsequent sales by it shall be subject to the tax. In counting the number of days, all sales by groups within a church or within an organization shall be considered to be sales of that church or organization.
- (b) The limitation on the number of days on which tax-exempt sales may be made by a church or organization under division (B)(9)(a) of this section does not apply to sales made by student clubs and other groups of students of a primary or secondary school, or a parent-teacher association, booster group, or similar organization that raises money to support or fund curricular or extracurricular activities of a primary or secondary school.
- (c) Divisions (B)(9)(a) and (b) of this section do not apply to sales by a noncommercial educational radio or television broadcasting station.
- (10) Sales not within the taxing power of this state under the Constitution or laws of the United States or the Constitution of this state;

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

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

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

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

(13) Building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property under a construction contract with this state or a political subdivision of this state, or with the United States government or any of its agencies; building and construction materials and services sold to construction contractors for incorporation into a structure or improvement to real property that are accepted for ownership by this state or any of its political subdivisions, or by the United States government or any of its agencies at the time of completion of the structures or improvements; building and construction materials sold to construction contractors for incorporation into a horticulture structure or livestock structure for a person engaged in the business of horticulture or producing livestock; building materials and services sold to a construction contractor for incorporation into a house of public worship or religious education, or a building used exclusively for charitable purposes under a construction contract with an organization whose purpose is as described in division (B)(12) of this section; building materials and services sold to a construction contractor for incorporation into a building under a construction contract with an organization exempt from taxation under section 501(c)(3) of the Internal Revenue Code of 1986 when the building is to be used exclusively for the organization's exempt purposes; building and construction materials sold for incorporation into the original construction of a sports facility under section 307.696 of the Revised Code; building and construction materials and services sold to a construction contractor for incorporation into real property

outside this state if such materials and services, when sold to a construction contractor in the state in which the real property is located for incorporation into real property in that state, would be exempt from a tax on sales levied by that state; building and construction materials for incorporation into a transportation facility pursuant to a public-private agreement entered into under sections 5501.70 to 5501.83 of the Revised Code; and, until one calendar year after the construction of a convention center that qualifies for property tax exemption under section 5709.084 of the Revised Code is completed, building and construction materials and services sold to a construction contractor for incorporation into the real property comprising that convention center;

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

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

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

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

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

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

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

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

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

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

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

(25)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

(35)

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

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

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

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

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

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

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

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

(a) Motor racing vehicles;

(b) Repair services for motor racing vehicles;

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

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

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

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

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

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

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

- (c) To resell, hold, use, or consume the thing transferred as evidence of a contract of insurance;
- (d) To use or consume the thing directly in commercial fishing;
- (e) To incorporate the thing transferred as a material or a part into, or to use or consume the thing transferred directly in the production of, magazines distributed as controlled circulation publications;
- (f) To use or consume the thing transferred in the production and preparation in suitable condition for market and sale of printed, imprinted, overprinted, lithographic, multilithic, blueprinted, photostatic, or other productions or reproductions of written or graphic matter;
- (g) To use the thing transferred, as described in section 5739.011 of the Revised Code, primarily in a manufacturing operation to produce tangible personal property for sale;
- (h) To use the benefit of a warranty, maintenance or service contract, or similar agreement, as described in division (B)(7) of section 5739.01 of the Revised Code, to repair or maintain tangible personal property, if all of the property that is the subject of the warranty, contract, or agreement would not be subject to the tax imposed by this section;
- (i) To use the thing transferred as qualified research and development equipment;
- (j) To use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility when the inventory is primarily distributed outside this state to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or by means of direct marketing. This division does not apply to motor vehicles registered for operation on the public highways. As used in this division, "affiliated group" has the same meaning as in division (B)(3)(e) of section 5739.01 of the Revised Code and "direct marketing" has the same meaning as in division (B)(35) of this section.
- (k) To use or consume the thing transferred to fulfill a contractual obligation incurred by a warrantor pursuant to a warranty provided as a part of the price of the tangible personal property sold or by a vendor of a warranty, maintenance or service contract, or similar agreement the provision of which is defined as a sale under division (B)(7) of section 5739.01 of the Revised Code;
- (l) To use or consume the thing transferred in the production of a newspaper for distribution to the public;
- (m) To use tangible personal property to perform a service listed in division (B)(3) of section 5739.01 of the Revised Code, if the property is or is to be permanently transferred to the consumer of the service as an integral part of the performance of the service;
- (n) To use or consume the thing transferred primarily in producing tangible personal property for sale by farming, agriculture, horticulture, or floriculture. Persons engaged in rendering farming, agriculture, horticulture, or floriculture services for others are deemed engaged primarily in farming, agriculture, horticulture, or floriculture. This paragraph does not exempt from "retail sale" or "sales at retail" the sale of tangible personal property that is to be incorporated into a structure or improvement to real property.
- (o) To use or consume the thing transferred in acquiring, formatting, editing, storing, and disseminating data or information by electronic publishing;
- (p) To provide the thing transferred to the owner or lessee of a motor vehicle that is being repaired or serviced, if the thing transferred is a rented motor vehicle and the purchaser is reimbursed for the cost of

the rented motor vehicle by a manufacturer, warrantor, or provider of a maintenance, service, or other similar contract or agreement, with respect to the motor vehicle that is being repaired or serviced.

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

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

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

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

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

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

(48)

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

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

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

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

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

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

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

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

(52)

(a) Sales to a qualifying corporation.

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

(i) "Qualifying corporation" means a nonprofit corporation organized in this state that leases from an eligible county land, buildings, structures, fixtures, and improvements to the land that are part of or used in a public recreational facility used by a major league professional athletic team or a class A to class AAA minor league affiliate of a major league professional athletic team for a significant portion of the team's home schedule, provided the following apply:

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

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

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

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

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

(D) The levy of this tax on retail sales of recreation and sports club service shall not prevent a municipal

corporation from levying any tax on recreation and sports club dues or on any income generated by recreation and sports club dues.

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

Amended by 131st General Assembly File No. TBD, HB 64, §101.01, eff. 9/29/2015.

Amended by 131st General Assembly File No. TBD, HB 53, §101.01 (Vetoed), eff. 7/1/2015.

Amended by 130th General Assembly File No. TBD, HB 533, §1, eff. 9/11/2014.

Amended by 130th General Assembly File No. 25, HB 59, §101.01, eff. 6/30/2013, and 9/29/2013(Vetoed Provisions).

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.48, SB 232, §1, eff. 6/17/2010.

Amended by 128th General Assembly File No.47, SB 181, §1, eff. 9/13/2010.

Amended by 128th General Assembly File No.9, HB 1, §101.01, eff. 10/16/2009.

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Related Legislative Provision: See 130th General Assembly File No. 25, HB 59, §803.230.

See 130th General Assembly File No. 25, HB 59, §803.190(D).