

**IN THE SUPREME COURT  
OF OHIO**

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

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**APPELLEE/CROSS-APPELLANT ACCEL INC.'S COMBINED MERIT BRIEF**

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## APPELLEE/CROSS-APPELLANT ACCEL'S MERIT BRIEF

### **I. INTRODUCTION.**

While the Appellant Ohio Tax Commissioner (“Commissioner”) has sought to make this case much more complicated than it needs to be, the matters presented are relatively straightforward and simple, and hinge on the determination of pertinent facts concerning the operations of the Appellee/Cross-Appellant/taxpayer Accel Inc. (“Accel”).

Accel is headquartered in New Albany, Ohio. Accel’s business primarily consists of assembling gift sets for its customers, typically retailers such as Bath & Body Works and Victoria’s Secret. Accel’s gift sets are put together on an assembly line following precise specifications agreed upon by Accel and its customer during the lengthy design phase of a project.

Accel did not pay sales or use tax on the items used in its assembly process and incorporated into its products, consistent with the exemptions set forth in R.C. 5739.02(B)(15) and (B)(42).<sup>1</sup> Accel also did not pay tax on the labor it leased from two third parties under the exception in R.C. 5739.01(JJ)(3) and because it did not supervise or control the labor. The Ohio Department of Taxation (the “Department”) undertook an audit of Accel relative to consumer’s use tax for the periods 2003 to 2009. The central issues in the audit were whether (a) Accel is manufacturing or assembling, and thus exempt from use tax, or whether Accel is merely packaging and thus subject to tax; and (b) whether Accel’s leased labor was exempt from tax because it did not supervise or control the labor or the labor was permanently assigned under a contract of at least one year.

Purchases of equipment and materials (including packages) for use in manufacturing or assembling are exempt from use tax. R.C. 5739.02(B)(15) and (B)(42). The Revised Code goes a

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<sup>1</sup>Exemptions and exceptions from sales tax are applicable to use tax. R.C. 5741.02(C)(2).

step further, however, and provides that “packaging” is neither manufacturing nor assembling. Accel contends that it is manufacturing and assembling, and that its purchase of equipment used and materials incorporated into its products are exempt from use tax. The Commissioner contends that Accel is packaging, and not entitled to exemption. The Commissioner also found the leased labor was subject to tax.

There are thus three fairly straightforward questions in this case: first, whether Accel is merely “packaging”; and, second, assuming it is not, is Accel “manufacturing” or “assembling”? The third question is whether the labor was taxable as an “employment service”?

The first two questions require a detailed factual examination of Accel’s operations. During the Board of Tax Appeals (“BTA”) hearing, Accel presented the testimony of its Co-CEO David Abraham and its Cost Accounting Manager Joe Scott. Both Mr. Abraham and Mr. Scott provided testimony on Accel’s process. Mr. Scott in particular provided detailed testimony concerning the various stages of Accel’s assembly process including the design of the products, and the precise assembly line process by which the gift sets are built. Accel also submitted documentary evidence in the form of its “fill and assembly specification,” which details each step of the assembly process both before and after the product is placed on the line, and its “line balance report,” wherein Accel calculates the different assembly stages, the number of people required on each line, the spacing of the product on the line, the speed of the conveyor belt, etc. For the third question, Accel presented the testimony of its CFO, Dan Harms, and the testimony of Moises Lluberes, the CFO of one of the leased labor suppliers, Resource Staffing, Inc. (“Resource”) who testified that his employees were not supervised or controlled by Accel and were permanently assigned.

From the testimony presented by Accel's fact witnesses, the BTA was thoroughly educated as to precisely what Accel does. The Commissioner offered no testimony or other evidence to challenge Accel's witnesses; to the contrary, the Commissioner's lone fact witness, Dan Campbell (the Audit Agent), agreed with Accel's witnesses concerning Accel's process. Rather than disputing the facts relevant to Accel's operation, the Commissioner's position was a curious blend of semantics and legal argument. The Commissioner's primary argument was that Accel was a packager because Accel referred to itself as such in a handful of marketing materials. Essentially, the Commissioner argued that because Accel had referred to itself from time to time as a packager, it must be classified as a packager for use tax purposes. But Mr. Abraham testified that Accel's occasional use of the term "packaging" to describe its operations was a marketing tactic to help get Accel in the door with potential customers. Mr. Abraham explained the complexities in marketing a unique company like Accel, and after experimenting with several different marketing plans, occasionally describing itself as "packaging" seemed to pull the right clients in its direction.

The Commissioner also argued that the BTA and this Court had (in the Commissioner's opinion) deemed similar operations of other taxpayers to be "packaging," citing several cases. However, those operations were drastically different than Accel's, and thus readily distinguishable, a point made by the BTA in its written opinion. Finally, the Commissioner argued the leased employees were taxable.

After hearing two days of testimony, and considering the exhibits presented by Accel, the BTA issued a lengthy opinion wherein it squarely addressed the issues of whether Accel was packaging versus manufacturing or assembling. With regard to whether Accel was packaging, the BTA gave little regard to the Commissioner's "label" argument, and pointed out that in several

instances Accel referred to its operations as “assembly” such as in its fill and assembly specification. The BTA engaged in a thorough analysis of the evidence presented by Accel, including Mr. Scott’s testimony and Accel’s documentary evidence, and held that under the facts presented, Accel was not merely packaging. In so finding, the BTA noted that Ohio defines a packager as one who places an object within a package. The BTA pointed to the complexity of Accel’s operation in distinguishing it from cases cited by the Commissioner involving packagers who merely placed items in a box for shipping.

The BTA then turned to the second question: whether Accel was manufacturing or assembling. Ultimately, the BTA determined that Accel was assembling. In making this finding, the BTA looked at the facts in the record concerning Accel’s operation and based on those facts determined that they fit the definition of assembling under Ohio law. Thus, the BTA found that Accel was not packaging but was instead assembling. Under the plain language of the Revised Code, Accel’s purchases used in its assembly operations are exempt from use tax.

On the leased labor, the BTA (after the hearing and a lengthy analysis) found that the employees leased from Resource were non-taxable because they were permanently assigned under a contract of at least one year and not supervised or controlled by Accel.

The Commissioner appealed, primarily objecting to the BTA’s factual determinations. However, this Court’s role is not to rehash factual determinations made by the BTA, determinations based on live testimony no less. The BTA’s determinations are entitled to deference absent an abuse of discretion, and as there is voluminous evidence in the record from which the BTA reasonably made its findings, the BTA’s decision must be affirmed except as noted in Accel’s Cross-Appeal.

## II. STATEMENT OF FACTS.

Accel is a unique manufacturing company that designs, assembles, and creates gift sets. (H.T. 28-29, 172; Supp. 88, 126)<sup>2</sup>. Accel manufactures each product in three phases: a design phase, a planning phase, and an assembly phase. (H.T. 57-61; Supp. 95-96). During the design and planning phases, Accel works with its customer to transform its customer's idea for a gift set into a buildable reality. (*Id.*)

Accel and its customer develop a detailed "fill and assembly specification" for each product that provides step-by-step instructions on how each gift set will be assembled. (H.T. 57; Amend. Jt. Stip. Facts ¶ 8; Hearing Ex. S; Supp. 2, 95). Accel then develops a quote for its customer on the cost of making each gift set on a per unit basis. (H.T. 60; Supp. 96). Accel introduced an example of its assembly process, as detailed in a fill and assembly specification:

### PRE-ASSEMBLY:

1. Apply XL dry peel label to bottom of candle.
2. Tape around Cap on Cream Tube.
3. Swift IL card into inside/back of basket in middle so that .5" of top of card is showing above rim.
4. Erect platform.
5. Shred weight = 0.078 lb (9" length, 1/20" fine cut)

### ASSEMBLY:

1. Glue product to platform from left to right: back row: AB, Body Cream, Gel (slightly forward of Body Cream), Mist (to right and slightly behind Gel). Frame in front of AB and Body Cream with 1 glue dot behind frame adhering to Cream tube. Lotion in front of Body Cream and Gel. Candle touching right of Lotion and front of Gel.
2. Swift tack sponge to front left side of platform. Be sure to swift through string close to the sponge ball.
3. Insert platform into basket. IL card should be sticking up in the back of basket.

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<sup>2</sup>"H.T." means the BTA hearing transcript. References to "Supp." are to the Commissioner's Supplement, unless otherwise noted.

4. Apply extra glue lines to top of platform per attached photo. Apply shred into basket. Enough to cover all visible platform area. Make sure shred is adhered to the glue underneath.
5. Swift UPC ticket between weave on back of basket, centered below rim.
6. Fold 1 sheet of bubble in half and place over gel and lotion caps.
7. Fold 2 sheets of bubble into a square and place over candle lid.
8. Insert basket into PVC band.
9. Insert 1 sheet of bubble under band over top of product caps.
10. Shrink PVC band.
11. Apply Remove at Store sticker to front of PVC band.

(Accel BTA Hearing Ex. S; Amend. Jt. Stip. Facts ¶ 8; Supp. 2). A number of other “pre-assembly” steps are involved in creating a gift set, including purchasing custom-made surrogate that is precisely cut and folded at a precise height. (See, e.g., H.T. 70; Supp. 99).

Accel also internally develops “line balance reports” that further break down the assembly process on Accel’s assembly lines. (H.T. 78-84; Amend. Jt. Stip. Facts ¶ 9; Accel BTA Hearing Ex. T; Supp. 2, 102). The gift sets themselves are manufactured on an assembly line with individuals at each station on the line performing a specific assembly function. (See H.T. 63-64, 76-77; Supp. 97, 100). The line balance report also specifies variables such as “line spacing,” “station time,” and the speed of the assembly line to maximize quality and productivity. (*Id.*)

After the design and planning phases, Accel begins physically assembling the gift sets.<sup>3</sup> Accel introduced as Exhibit E three physical examples of completed gift sets. (H.T. 23-24, 352, 356; Supp. 87, 218-19). Accel uses its own labor, and during the audit period Accel also leased labor from two companies: Resource and Manpower. The gift set is then built consistent with the fill and

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<sup>3</sup>Accel’s cost accounting manager Joe Scott provided detailed testimony as an example of how one gift set is produced. (H.T. 65-93; Supp. 97-104). The Parties stipulated that the project Mr. Scott described on the stand was exemplary of the products Accel makes as a whole. (H.T. 75; Supp. 2, 100. See also Amend. Jt. Stip. Facts ¶¶ 8-9).

assembly specification for that product. (See H.T. 72-77; Supp. 99-100). In assembling the gift set, each component must be precisely placed, custom-made cardboard platforms may be folded and inserted into the set to raise the height of certain components, and shred (*i.e.*, finely cut paper) may be added to the gift set to give it a “gift feel.” (H.T. 73-74, 115; Supp. 99-100, 110). Accel then adds a universal product code ticket, or “UPC,” to the gift set to make the gift set a single sellable unit. (H.T. 74; Supp. 100). Once all components have been assembled and affixed into the gift set, a plastic wrapping is placed around the gift set that is heat treated to shrink to shape around the gift set. (H.T. 74-75, 105-06; Supp. 100, 107-08). Depending upon the design, a bow or ribbon may also be placed around the gift set. (H.T. 102; Supp. 107). The completed gift sets are then placed into a box and shipped by Accel to its customer for sale at stores. (H.T. 64; Supp. 97).

The Department audited Accel for consumer’s use tax for years 2003 through 2009. Following the audit, the Department claimed Accel was “packaging” and Accel’s purchases of the ribbons, glues, plastics, corrugate, and other items that Accel incorporated into the gift sets, and the equipment used to make the gift sets, were subject to use tax. The Department also contended that the lease of labor from Manpower and Resource was subject to use tax. The Department preliminarily assessed Accel use tax, penalties, and interest totaling \$3,479,194.19.

Accel appealed the preliminary assessment by timely filing a Petition for Reassessment with the Commissioner. On June 26, 2012, the Commissioner issued his Final Determination, which reduced the preliminary assessment to \$3,221,380.74.

Accel timely filed a notice of appeal with the BTA. The BTA conducted a Hearing on the matter, which spanned approximately two (2) days. At the Hearing, Accel presented testimony from its co-CEO David Abraham, its CFO Dan Harms, and its Cost Accounting Manager Joe Scott. The

Commissioner presented the testimony of his Audit Agent, Dan Campbell, who testified he had never audited a taxpayer like Accel. (H.T. 209-10; Supp. 133-34). Accel and the Commissioner also introduced testimony of expert witnesses. Accel and the Commissioner objected to the qualification of the other's expert. The BTA qualified both experts.

On July 15, 2015, the BTA rendered its opinion. In its opinion, the BTA found that the "evidence presented by Accel indicates that it does more than merely package products." (BTA Op. at 3). The BTA further found the case law cited by the Commissioner did not support that Accel was packaging, stating Accel's "processes are in stark contrast to, for example, the mere 'packaging' performed by the taxpayer in *Fitchel & 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." (BTA Op. at 3). The BTA concluded "Accel does more than simply put consumer goods into a carton, as was the case in *Express Packaging*."<sup>4</sup> (*Id.*) The BTA held that Accel was engaged in assembly as its operations consisted of "attaching or fitting together parts to form a product[,]" such that its purchases of corrugate, plastics, ribbons, glues, etc. used in its operations are exempt from use tax under R.C. 5739.02(B)(42)(a) and 5739.02(B)(15). (See BTA Op. at 3-4). With regard to the leased employees, the BTA concluded that the employees Accel obtained from Resource were provided on a permanent basis under a contract of at least one (1) year such that under R.C. 5739.01(JJ)(3) they were not subject to use tax. (BTA Op. at 5). The BTA found that the testimony of Dan Harms, Accel's CFO, and Moises Lluberes, Resource's CFO, "indicates that Resource Staffing assigned employees permanently to Accel; indeed, doing so was

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<sup>4</sup>*Express Packaging, Inc. v. Limbach*, BTA No. 89-K-22, 1992 WL 236077 is another case raised by the Commissioner before the BTA. Comm'r Post-Hearing Br. at 12.

part of Resource Staffing's unique business model." (BTA Op. at 5). That is, Resource focused on long-term, permanent leasing placements that stay with the same client each year and are trained on the client's specific operations. (H.T. 304, 305, 306, 308; Supp. 157-58). Mr. Harms testified that Accel wanted permanent employees so it did not have to incur additional time and expense to continuously train new employees. (H.T. 288-89; Supp. 153). Mr. Lluberes testified that from Resource's perspective, its agreement with Accel only made economic sense if the employees were permanently assigned to Accel. (H.T. 309, 311-13, 333; Supp. 158-59, 164). The BTA further found that although there was some natural employee turnover, the turnover did not obviate the exception to the definition of "employment services" under R.C. 5739.01(JJ)(3). (BTA Op. at 5). And of the approximately 650 employees leased to Accel, Mr. Lluberes testified that well over half stayed with Accel over one year, and some stayed for five or six years. (H.T. 325-26; Supp. 162-63). The BTA stated that "the testimony presented at this board's hearing indicates that Accel adjusted its labor needs for each project by decreasing each employees' [sic] 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." (BTA Op. at 5). So if an employee assigned by Resource to Accel was not working at Accel, Resource would not assign the employee elsewhere; the employee was permanently devoted to Accel. (H.T. 290, 328-330; Supp. 154, 163-64). The BTA also found that Resource supplied its own supervisors, on Resource's payroll (not Accel's) to supervise and direct the employees so they were not "under the supervision or control of another" under R.C. 5739.01(JJ). (BTA Op. at 5).

The BTA, however, stated that Accel did not provide sufficient evidence to establish that the employees provided under Accel's agreement with Manpower (its other labor supplier) were

permanently assigned under an agreement of at least one (1) year, and the BTA held the lease of those employees was subject to use tax. The BTA also held that some miscellaneous items not challenged by Accel at the BTA hearing remained subject to use tax.

### **III. LAW AND ARGUMENT.**

1. Appellee Accel’s Responses to the Commissioner’s Proposed Propositions of Law.

A. Accel’s Response to Commissioner’s Proposition of Law No. 1:

**Where a taxpayer has affirmatively established its right to an exemption through evidence produced at a BTA hearing, the BTA properly finds that the taxpayer is entitled to the exemption.**

Although exemptions from taxation must be “strictly construed, and the person claiming the exemption must affirmatively establish his right thereto,” the construction must be reasonable and not defeat the legislative intent. *Campus Bus Serv. v. Zaino*, 98 Ohio St.3d 463, 2003-Ohio-1915, ¶ 8; *Cincinnati v. Testa*, 143 Ohio St.3d 371, 2015-Ohio-1775, ¶ 16. Where, as Accel has done here, the taxpayer shows that it factually meets the criteria for receiving a tax exemption, a determination as such by the BTA is to be affirmed if the “record contains reliable and probative support for [the] BTA determinations.” *Nat’l City Bank v. Wilkins*, 111 Ohio St.3d 485, 2006-Ohio-6110, ¶ 12.

In this case, and contrary to the Commissioner’s claim, the BTA did strictly construe the relevant exemption statutes (R.C. 5739.02(B)(15) and (B)(42), and R.C. 5739.01(R), (S), and (JJ)(3)), and following a two day hearing and a review of the testimony and other evidence correctly found that Accel qualified for the tax exemptions. Moreover, taxing the items Accel incorporates into gift sets now is not intended because it would result in a second tax when the gift set (with Accel’s components) is sold at a store. See, e.g., R.C. 5739.02(C). Double tax is “prohibited” (*Jewel Companies v. Porterfield*, 23 Ohio St.2d 121, 130 (1970)) and is not intended to fall upon

Accel's purchases used to make gift sets. See Bailey v. Evatt, 142 Ohio St. 616, 620-21 (1944) (stating the purpose of manufacturing sales tax exemption is to avoid double tax and to encourage production of property for sale).

B. Accel's Response to Commissioner's Proposition of Law No. 2:

**BTA hearings are conducted de novo, and where a taxpayer shows through evidence submitted to the BTA that the Commissioner's findings are unreasonable and unlawful, the BTA properly reverses the Commissioner's decision.**

Contrary to the Commissioner's claim, hearings before the BTA are *de novo*. *Key Serv. Corp. v. Zaino*, 95 Ohio St.3d 11, 16, 2002-Ohio-1488. The BTA is authorized to conduct its own investigation to and to make "its own findings independent of the Tax Commissioner." *Id.*

On review by the BTA, the Commissioner's determination is "presumptively valid, absent a demonstration that those finds are clearly unreasonable or unlawful." *Hatchadorian v. Lindley*, 21 Ohio St.3d 66, 69 (1986). Under R.C. 5717.04, this Court's review of a BTA decision is limited to a determination, based on the record, of the reasonableness and lawfulness of the decision. *Crown Comm., Inc. v. Testa*, 136 Ohio St.3d 209, 2013-Ohio-3126, ¶ 16. "The BTA's findings of fact are entitled to deference." *Cincinnati*, 2015-Ohio-1775, ¶ 13; see also, *Soin v. Greene Cty. Bd. of Revision*, 110 Ohio St.3d 408, 410-11, 2006-Ohio-4708, ¶¶ 13-14 (stating that this Court "does not sit as a super BTA . . . [I]t is not the function of this court to substitute its judgment on factual issues for that of the Board of Tax Appeals."). If this Court finds the BTA's determinations are based upon "reliable and probative support," it will affirm. *The Chapel v. Testa*, 129 Ohio St.3d 21, 2011-Ohio-545, ¶ 9. Accel met its burden by showing that the Commissioner's findings were unreasonable and unlawful, and the BTA properly reversed them.

Documentation, gift set samples and live testimony were introduced at the BTA hearing by which the BTA determined that the Commissioner's findings that Accel is "packaging" and that Resource was providing an "employment service" were unreasonable and unlawful. Because the BTA's determinations were reasonable and lawful and supported by substantial evidence, this Court must affirm.

C. Accel's Response to Commissioner's Proposition of Law No. 3:

**Packages and packaging equipment sold to persons primarily engaged in assembling or manufacturing to produce tangible personal property for sale as mentioned in R.C. 5739.02(B)(42)(a) and (g) are exempt from Ohio use tax under R.C. 5739.02(B)(15).**

R.C. 5739.02(B)(42)(a) exempts from use tax purchases where the purpose of the purchaser is to "incorporate the thing transferred as a material or part into tangible personal property to be produced for sale by manufacturing [or] assembling," and Section 5739.02(B)(42)(g) exempts purchases of machinery used to make the property. See R.C. 5739.011(B). R.C. 5739.02(B)(15) exempts from use tax purchases of packages and related equipment by a taxpayer primarily engaged in an activity mentioned in Section 5739.02(B)(42)(a), including manufacturing or assembling. But manufacturing and assembly do not include "packaging." So there are two (2) relevant questions: first, whether Accel is "packaging"; second, whether Accel is "manufacturing" or "assembling."

i. **The BTA Correctly Determined, Based on the Evidence Presented at the Hearing, that Accel was not Packaging.**

In its written opinion, the BTA determined that Accel was not merely packaging. R.C. 5739.02(B)(15) defines "packaging" narrowly as "placing in a package." The same Section defines "package" to include bags, baskets, cartons, etc. So the Commissioner is arguing that Accel's gift

sets are “packages” and that Accel simply “places” items in them. But as the BTA found, Accel does far more than this by transforming the components into a new product. BTA Op. at 3.

The definition, “placing in a package,” is narrow. It includes only one verb - “placing”; actions such as designing, producing, and creating are not within the definition and these activities must be treated as something more than merely packaging (*i.e.*, assembling and manufacturing). Accel’s manufacturing expert testified Accel’s operations extend well beyond “placing” an item in a “package”:

If it was simply just placing things in a box, that’s really untrained people that you say, just put this in a box, put some packaging around it, and seal the tape. This isn’t. This is following a routing. This is following a bill of materials. This is ensuring quality. This is measuring quality. This is measuring through-put numbers.

So there is a lot more to it, and if one is not familiar or has not run a manufacturing company, it’s very easy to gloss over . . . .

H.T. 172.

Accel’s processes stand in stark contrast to what are commonly known as “pick and pack” operations, which are a classic example of merely “packaging” as used in R.C. 5739.02(B)(15). See BTA Op. at 3-4. A “pick and pack” operation involves simply placing a number of miscellaneous products into a box in response to a customer order (usually online) in a manner that will be most effective for shipment, through the use of protective materials. H.T. 31-33. The BTA correctly found that Accel is not merely packaging or engaged in a “pick and pack” operation; Accel creates a new product. BTA Op. at 3-4; see also, H.T. 28-29, 33, 65-93, 114-15.

The Commissioner relies heavily on the cases of *Fitchel & Sachs*, *Sauder Woodworking Co.*, and *National PharmPak* to support its contention that Accel is “packaging.” The BTA found that

each of those cases is clearly distinguishable in that each involves somebody simply putting something into a box rather than designing and creating a new product. BTA Op. at 3.

In *Fichtel & Sachs Industries, Inc. v. Wilkins*, 108 Ohio St.3d 106, 2006-Ohio-246,<sup>5</sup> a taxpayer argued that putting automobile clutch parts in a box for shipment to customers did not constitute “processing.” If the taxpayer’s operations constituted “processing,” the parts would have been subject to personal property tax. This Court found there to be no change in form of the clutch parts and therefore the taxpayer was not “processing.” *Id.*, ¶ 40.

The BTA correctly found Accel’s operations are distinguishable from those of the taxpayer in *Fichtel & Sachs*, which the BTA found constituted a “pick and pack” operation. See BTA Op. at 3-4. The BTA correctly found Accel’s operations involve far more than simply placing consumer goods in a carton, which is what the taxpayer in *Fichtel & Sachs* did. *Id.* Accel takes hygiene items, assembles them and other components together and creates a gift set, which did not exist before Accel’s operations. Clutch parts separated from the box remain just that - clutch parts. But a component removed from a gift set no longer serves as a gift; it is simply a hygiene product. H.T. 28-29, 165-67. The components Accel adds are no longer hygiene items once the gift set is completed; they become a gift someone would be delighted to receive. H.T. 28-29, 33, 165-66. The BTA correctly found *Fichtel & Sachs* involves operations that are distinguishable from Accel’s.

In *Sauder Woodworking Co. v. Limbach*, 38 Ohio St.3d 175 (1988), the taxpayer (a furniture manufacturer) sought to exempt from sales/use tax cartons in which furniture was sold, and certain

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<sup>5</sup>*Fichtel & Sachs* is a personal property tax case cited by the Commissioner. In that case, the Commissioner argued that placing automobile clutch parts in a box for shipment was processing, a form of manufacturing.

foams and films included with the furniture to minimize damage during transportation. The audit underlying *Sauder Woodworking Co.* occurred during a short period when the “packaging” exemption in R.C. 5739.02(B)(15) was suspended. So the taxpayer sought to exempt the items at issue under the manufacturing operation exemption. This Court disagreed, finding that the items were not used in manufacturing as the manufacturing was complete by the time the furniture was placed in the cartons, and the cartons, foams, etc. were not an inherent part of the furniture.

But unlike the items in *Sauder Woodworking Co.*, the items Accel incorporates are an inherent part of the gift sets; the Commissioner’s own expert testified that without the component items Accel adds, the gift sets would not function as such. H.T. 492, 494-95. Removing the packaging the taxpayer in *Sauder Woodworking* added would not change the nature of the furniture inside. But if components are removed from a gift set, the components do not serve the same function of a presentable gift. H.T. 28-29, 165-67, 201-02. Indeed, Mr. Abraham testified that simply putting miscellaneous hygiene items in a plastic bag and giving them to someone would be confusing, and likely insulting. H.T. 28-29. But giving the person an Accel-assembled gift set eliminates that confusion and leaves no doubt that the person received a gift. H.T. 28-29, 165-66.

In *Nat’l PharmPak Servs., Inc. v. Lawrence*, BTA Nos. 99-M-1014, 1015, 1016, 2001 WL 855750, the taxpayer took the position that its purchase of drugs in bulk and placement of predetermined numbers of drugs into smaller, matching containers was not processing for purposes of personal property tax. The Commissioner argued otherwise. The BTA sided with the taxpayer, finding that the taxpayer did not engage in “processing,” as the packaged product remained inventory before and after the taxpayer’s operations. 2001 WL 855750, \*5.

But Accel is far different. The sundry items that Accel incorporates into its gift sets are not the product Accel is making. The product Accel is making is a completed gift set. H.T. 37. The hygiene products themselves are not held by Accel as inventory; instead they are raw materials that are incorporated into the gift sets to create the finished product. Until a gift set is completed, the individual components (including the hygiene items) are deemed by Accel and its customer to be “works in progress.” *Id.* Once complete, the gift set itself is given a separate UPC code and is a separate, distinct product from its components. H.T. 74.

In a case not referenced by the Commissioner, *Ball Corp. v. Limbach*, 62 Ohio St.3d 474 (1992), a taxpayer provided its customers with partitioned cardboard cartons that were assembled. The Court remanded the matter to the BTA to determine whether the carton forming equipment, to the extent it made packages, could be exempt as used in manufacturing. *Id.* at 479-80.

The BTA found in that case by making the cardboard cartons, the taxpayer was engaged in manufacturing: “We consider, however, that the Supreme Court recognized that, in this case, the boxes are part of the marketable product and that the Appellant ‘manufactures’ the boxes. These facts, we believe, take this out of the usual fact situation. This is a case where the boxes are an inherent part of the final product and ‘manufacturing’ does not end before the boxes are created by the automatic carton-forming equipment.” *Ball Corp. v. Limbach*, BTA No. 88-H-1091, 1992 WL 177188, \*3.<sup>6</sup> Likewise, the surrogate, ribbon, shred, plastic, glue, etc. that Accel incorporates into

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<sup>6</sup>Ohio courts have typically held that packaging occurs after the product has been changed into its final state or form. *Gen. Mills, Inc. v. Limbach*, 35 Ohio St.3d 256, 258 (1988). But Accel’s gift sets do not become gift sets until Accel has completed its operations and the components become a single product; until that point, they are “works in progress.” H.T. 28-29, 37, 74, 92, 165-67. Indeed, the Commissioner’s argument ignores the fact that the gift set manufactured by Accel **is the end product**, and by making it Accel is manufacturing and assembling, not merely packaging. See H.T. 37.

a gift set become part of the gift set itself; that is what the customer is purchasing when the customer purchases the gift set. H.T. 33. And the final product - the gift set - does not exist until Accel has finished its operations; without Accel doing what it does, there is no gift set, only individual hygiene items. *Id.* So Accel's operations are part of a manufacturing operation to produce tangible personal property - a gift set - for sale. Again, this is manufacturing and assembling, not packaging.

And the gift sets Accel produces do not meet the legal definition of "packages," although some of the components may constitute package materials as defined in R.C. 5739.02(B)(15). Notably, "[n]ot all items that restrain movement in more than one direction are packages." *Cole Nat'l Corp. v. Collins*, 46 Ohio St.2d 336, 338 (1976). Even though an item may restrain movement, if the predominant economic purpose is to facilitate marketing, the product is not a package. *Id.* at syllabus; BTA Op. at 3. *Cole* should be compared with *Newfield Publications, Inc. v. Tracy*, 87 Ohio St.3d 150, 153 (1999), where this Court stated that the function of a package "is to contain a product for shipping or handling."

Accel's gift sets reach far beyond restraining movement for shipment; they are presentable gifts that can be given. And items added by Accel during the manufacturing and assembly process are done to enhance the gift appeal. See H.T. 114-15. The gift set as a whole is designed so as be aesthetically pleasing for the gift recipient. H.T. 28-29, 73, 114-15, 165-66. This is a far cry from something designed solely to restrain movement in a direction or to contain a product for shipping.

And while the Commissioner has pointed to Mr. Scott's testimony that certain items are included in the gift set to restrain movement, that does not transform the gift set into a package. *Cole Nat'l Corp.*, 46 Ohio St.2d at 336. The items that Accel includes to restrain movement of the

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finished product are no different than the screws, bolts, etc. that are used to construct a machine and keep the components in place. Just as a machine must be held together to function as a machine, the gift set must be held together to function as a gift set.

So Accel's operations extend far beyond the very narrow definition of "packaging" as used in R.C. 5739.02(B)(15). And the gift sets Accel creates extend far beyond the definition of "packages" as used in Section 5739.02(B)(15) and in this Court's case law. By doing what Accel does, Accel changes the state or form of various hygiene items and other components into a distinctly new product: a gift set. This is manufacturing and assembly under Ohio use tax law.

ii. **Accel's Occasional Reference to itself as a Contract Packager in its Marketing Materials does not Transform it into a Packager.**

In an attempt to support his claim that Accel is "packaging," the Commissioner resorts to referencing marketing labels that Accel uses to advertise its unique company. That is, in certain instances, Accel describes its operations as a "contract packager." But the testimony at the hearing was that Accel does so for marketing purposes because those terms (i.e. "contract packager") are familiar to potential customers. H.T. 29-30, 43, 45-48. And the Commissioner neglects to inform the Court that Accel's marketing labels also use the word "assembly." H.T. 30, 52, 53. In any event, Mr. Abraham testified that marketing experts recommended Accel use certain "buzz words" to get customers' attention, although words like "packaging" do not accurately describe what Accel actually does. H.T. 29-32, 47, 52. Mr. Scott, who has experience at manufacturing facilities, testified that Accel is not in the packaging "industry" and the "only" reason Accel refers to itself as "packaging" is for marketing purposes. H.T. 96, 101. And if the labels Accel uses to describe its

operations are relevant, the evidence shows that Accel’s leadership (including engineers) internally refer to Accel as assembling. H.T. 32, 52-53, 96-97, 99.

This Court should reject the Commissioner’s attempt to employ marketing labels against Accel, and instead look at the substance of what Accel actually does. “A name is of course unimportant if, like Juliet, one sees beyond the name to the substance of that which is named.” *Banks v. Jennings*, 184 Ohio App.3d 269, 2009-Ohio-5035, ¶ 9, fn 4 (2<sup>nd</sup> Dist.) (further stating, “What’s in a name? That which we call a rose By [sic] any other name would smell as sweet.” (quoting Shakespeare, *Romeo and Juliet*, Act II, Scene ii)). This Court should likewise look at the substance of what Accel actually does and affirm the BTA’s holding that Accel is assembling.

The Commissioner also attempts to take issue with references to “packaging” made in certain of Accel’s tax returns and financial statements. But Accel’s CFO Mr. Harms testified that those documents are not prepared by Accel; they are prepared by third parties. H.T. 295, 299; Amd. Jt. Stip. Facts ¶ 5. And in later years, Accel’s tax returns referred to Accel as manufacturing. Supp. 1. Regardless, since 2006 Accel has taken the domestic production deduction on its Federal income tax return, which the IRS has acknowledged and not disputed, and which is only available to manufacturers, not packagers. Amd. Jt. Stip. Facts ¶ 4; H.T. 282-85, 299; *United States v. Dean*, 945 F. Supp.2d 1110, 1116 (C.D. Cal. 2013).

iii. **Industry and Academic Definitions of “Packaging” and “Packager” Have No Bearing in this Case.**

Perhaps recognizing that Accel does not fit the plain language of the Revised Code’s definition of “packaging” and this Court’s descriptions of “packages,” the Commissioner attempts to expand those definitions through the testimony of Dr. Robert Clarke. Dr. Clarke examined Accel

on what he termed “industry and academic” definitions of “packages”; he did not analyze Accel’s operations under Ohio’s definition, contained in R.C. 5739.02(B)(15). H.T. 522-25. In fact, **Dr. Clarke testified that he was not even aware the Revised Code defined “packaging.”** *Id.*

Dr. Clarke’s definitions of “packaging” as used in the academic world extend far beyond placing an item in a package, as Ohio defines it for use tax purposes. And Dr. Clarke testified that packages can serve multiple functions, including containment, protection, communication, and utility or convenience. H.T. 472. But only “protection” and “containment” are even arguably applicable to the definitions of “packages” used by this Court. There are no utility, convenience, or communication functions derived from this Court’s definition of “package.” *See Newfield Publ., Inc.*, 87 Ohio St.3d at 153; *Cole Nat’l Corp.*, 46 Ohio St.2d at 338 (finding an object that restrained movement but primarily served a marketing function (*i.e.*, communication) was not a package). Dr. Clarke’s industry and academic definitions of packaging are so expansive that even an automobile or train car could qualify as a “package.” H.T. 543-44. This Court should not accept the Commissioner’s invitation to turn everything into a “package.”

D. Accel’s Response to Commissioner’s Proposition of Law No. 4:

**Assembly as used in R.C. 5739.02(B)(42)(a) has the same meaning as defined in R.C. 5739.01(R), and by making gift sets, Accel is assembling.**

The BTA found that Accel’s operations are not “packaging” under Ohio use tax law. BTA Op. at 3. Instead, the BTA found that Accel is “assembling” as defined in R.C. 5739.01(R) and mentioned in R.C. 5739.02(B)(42)(a), such that Accel’s purchases used in its operations are exempt. BTA Op. at 3-4. Because the BTA’s finding is reasonable and lawful, it must be upheld.

i. **The BTA Correctly Found that Accel is Assembling.**

The BTA's decision is reasonable and lawful because there was substantial evidence presented at the Hearing to support that Accel is primarily engaged in assembling, not packaging. So its purchases of any packages, raw materials, and equipment it uses in its operations are exempt from use tax under R.C. 5739.02(B)(15), (B)(42)(a) and (B)(42)(g).

R.C. 5739.01(R) defines "assembly" as "attaching or fitting together parts to form a product, but do[es] not include packaging a product." Assembly "means more than merely gathering together fabricated materials. It means to fit together various parts to make an operative whole." *Scholz Homes, Inc. v. Porterfield*, 25 Ohio St.2d 67, 72 (1971). And that is just what Accel does. Accel attaches or fits together a number of assorted hygiene items, cardboard platforms, shred, and other components with glues or plastics to create an entirely new operative whole, a gift set. Even the Commissioner's audit agent, Mr. Dan Campbell, admitted at the BTA Hearing that Accel is combining products. H.T. 232.

Through its assembly and manufacturing process, Accel makes something the components individually are not - a gift set. BTA Op. at 3-4. By doing so Accel makes a new operative whole; each individual component when removed from the gift set does not serve the same function as it does when all of the components are assembled together. H.T. 28-29, 92, 165-67, 200-02.

The Court should reject the Commissioner's argument that each item used in a gift set operates independently and does not create an operative whole. As explained above, there is no evidence in the Record to support that the components Accel incorporates into its gift sets do not work together to form an operative whole. Even the Commissioner's own expert testified that all the components work together. H.T. 492, 494-95. Regardless, it is immaterial that a bottle of

shampoo can be removed from the gift set and used as shampoo. A screw can be removed from a machine and still be used as a screw, but that does not mean the machine was not manufactured. What matters is that when all the components are combined together they become something that individually they are not – a gift set. The bottle of shampoo cannot be removed from the gift set and function as a gift; shampoo only enables one to wash his or her hair. H.T. 28-29, 165-66. The end use of a gift set is as a gift. H.T. 202. Unlike a simple box of soap where the customer may simply throw away the box, Mr. Abraham testified that the items Accel incorporates into a gift set are what the customer is buying. H.T. 33. Put simply, the testimony before the BTA is that Accel’s gift sets as a whole serve a function that their individual components do not. H.T. 28-29, 165-67.

**ii. Accel is Primarily Engaged in a Manufacturing Operation.**

R.C. 5739.01(S) defines “manufacturing operation” as “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.” “The terms manufacturing and processing imply essentially a transformation or conversion of material 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.” *Interlake, Inc. v. Kosydar*, 42 Ohio St.2d 457, 458-59 (1975).

At the BTA Hearing, Mr. Scott testified at length as to Accel’s complex process to create a gift set. H.T. 65-93. Before Accel’s operations, the gift set does not exist; Accel’s customer comes to Accel with an idea for a gift set, and Accel and its customer collaborate on how to make the gift set a reality. H.T. 57; BTA Op. at 3. Accel and its customer develop a highly detailed fill and

assembly specification (which is further broken down into a line balance report) that provides instruction on how to construct each gift set. BTA Hearing Ex. S; H.T. 57. Then Accel physically assembles the gift sets on assembly lines.

After Accel's processes, all of the components together become a gift set; a different marketable product from its components. H.T. 112-13, 165-67. Accel has created a single, sellable unit that serves one function rather than a variety of different products that serve different functions; the components are "works in progress" until Accel is done. H.T. 37, 112-13, 202.

Accel's expert witness testified without qualification that Accel changes the state or form of the individual components into a distinct new product - a presentable gift:

**Q. And were you able to form an opinion as to whether or not Accel changes the state or the form of the materials it's using?**

A. Absolutely.

**Q. Okay.**

A. Because this [gift set] (indicating) has a very different form and function than if I put this [bottle of soap] (indicating) in a plastic bag and handed it to somebody. If somebody handed me this [gift set] (indicating), I would be delighted. This [gift set] is a gift (indicating). This [bottle of soap in a bag] is soap (indicating).

**Q. And how is it that you're concluding that a gift set is something different than just the individual components? How is the state or form changed?**

A. Well, the state or form is changed because each of the products is placed in a particular location and affixed in their particular location and that the fit, form, and function of this finished product is very different than just this [individual bottle of soap] (indicating).

So – and what happens is that if I take one of these out, then that's no longer a gift and [sic] that each of these products similar to – if I can

use an example, it's very similar to how a circuit board assembly is done, where each part has its own unique location that it has to be placed into, and has to be placed in that correct location for that unit to work.

But if I remove one of these parts, then the – this doesn't have the same fit, form, or function that it did when it had this part attached to it.

H.T. 165-66; see also H.T. 28-29.

Because Accel is engaged in assembly, an activity mentioned in Section 5739.02(B)(42)(a), Accel's purchases of any packages and packaging equipment are exempt from use tax under R.C. 5739.02(B)(15), assuming that the items Accel uses are "packages" in the first place. Alternatively, the items are raw materials that Accel incorporates into the finished product (the completed gift set), and they and the equipment are exempt under R.C. 5739.02(B)(42). Either way, Accel is changing the state or form of the components in the gift set through assembling and manufacturing. Other court decisions have reached similar conclusions.

In *United States v. Dean*, 945 F. Supp.2d 1110 (C.D.Cal. 2013),<sup>7</sup> the IRS challenged a taxpayer's right to the domestic production deduction available only to manufacturers. Internal Revenue Code ("IRC") Section 199 permits a taxpayer to deduct an amount of the taxpayer's "domestic production gross receipts" derived from product that was "manufactured, produced, grown, or extracted." *Dean*, 945 F. Supp.2d at 1116-17. The applicable Treasury Regulation (Section 1.199-3(e)(1)) defines "manufactured, produced, grown or extracted" to include "changing the form of an article, or by combining or assembling two or more articles." *Id.* at 1116. But those

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<sup>7</sup>*Dean* is the only other case in the United States involving the issue of whether a gift set assembler is manufacturing or packaging. And the Federal District Court found the taxpayer there was manufacturing.

activities expressly exclude packaging and repackaging. *Id.*; see also T. Reg. 1.199-3(e)(2). R.C. 5739.01(S) defines “manufacturing operation” in a similar manner as involving a change in form.

So the definition cited by *Dean* in the Treasury Regulation and the definition contained in the Revised Code are substantively similar, if not identical, in that both at bottom contemplate whether a particular article has been changed in its form through combination, assembly, or otherwise. Compare R.C. 5739.01(S) with Treasury Reg. 1.199-3(e)(1). Not only does the *Dean* case involve a virtually identical definition of manufacturing, but the taxpayer in *Dean* engaged in an assembly process strikingly similar<sup>8</sup> to Accel’s:

Houdini’s assembly line consists of workers who place the individual food items into baskets in accordance with detailed work instructions prepared by Houdini. In preparing a finished gift basket, employees at several different stations on the line put different items into the basket. After the items have been placed inside the basket, a plastic wrapping is heated to shrink around the basket. Once the plastic wrapping is completed, a bow is placed on the basket, if called for in the design of the basket. For a gift tower, the food-safe packages are placed directly into decorative boxes. The boxes in the gift tower are then connected either through cardboard tabs or through sticky-dot adhesives.

*Id.* at 1113 (internal citations omitted).

The *Dean* taxpayer argued that by making gift sets it was changing the form of the materials to create a distinct new product, and the court agreed:

Defendants argue that Houdini’s production process “chang[es] the form of an article” within the meaning of Treasury Regulation § 1.199-3(e)(1). The Court agrees. Houdini first selects various items

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<sup>8</sup>Accel’s expert witness toured the Houdini facility and Accel’s and testified that the two operations were “strikingly similar.” H.T. 205-206. Further, during his deposition, Audit Agent Dan Campbell was read a portion of a case document from the *Dean* case describing Houdini’s operations and he agreed those operations were similar to Accel. H.T. 230-231.

– chocolates, cookies, candy, cheeses, crackers, wine or alcohol, packaging materials, and a basket or boxes – for its final products. Next, the individual items are assembled in a gift basket or gift tower based on one of many detailed plans. This complex production process relies on both assembly line workers and machines. The final products, gift baskets and gift towers, are distinct in form and purpose from the individual items inside. The individual items would typically be purchased by consumers as ordinary groceries. But after Houdini’s production process, they are transformed into a gift that is usually given during the holiday season.

945 F. Supp.2d at 1117-18. Likewise, the individual sundry components in Accel’s gift sets may be purchased by themselves as ordinary shampoos, lotions, or soaps. Without Accel doing what it does, the hygiene products are simply hygiene products. See H.T. 28-29, 165-67. But when Accel’s manufacturing process is complete, they become something different – a gift set. Like *Dean*, this Court should find Accel is manufacturing and assembling.

In *Pretty Products, Inc. v. Limbach*, 1985 WL 4184 (Ohio Ct. App. 5<sup>th</sup> Dist.), the court held that the attachment of cardboard “headers” to sets of car floor mats constituted a manufacturing operation for sales tax purposes because a new product was created. *Id.* at \*3. Accel’s activities are far more extensive than simply attaching a header to a grouping of floor mats. Accel transforms miscellaneous components into a gift set; a distinctly new product that its components are not. H.T. 28-29, 112-13, 165-66; BTA Op. at 3-4. And here, the Commissioner is likewise improperly focused on the gift set components rather than the finished product itself. See H.T. 109-13; Com’r. Br. at 26. Instead of looking at the function of the individual components, the Commissioner ought to look at how those components, once combined together, make a new whole. This Court should affirm the BTA’s decision that Accel is primarily engaged in assembling, a manufacturing operation.

iii. **The BTA Found that Accel was Changing the State or Form of Items by Assembling a Gift Set, Although the Definition of Assembling Does Not Require a Change in State or Form.**

Although the Commissioner claims the BTA found Accel does not effect a change in state or form through its operation, the Commissioner is incorrect. The BTA found that Accel is assembling parts to create a new product, and therefore changing the individual gift set components' state or form into something different. BTA Op. at 3-4. Again, the Commissioner improperly focuses on the gift set components rather than on how those individual components, once combined together, become something different. An engine is a finished product, but when assembled into an automobile something different is created. Likewise, each hygiene product functions on its own, but once incorporated into a gift set it becomes something different. H.T. 28-29, 112-13, 165-66.

Although the words “change in state or form” do not appear in the definition of assembly at R.C. 5739.01(R) and as used in Section 5739.02(B)(42)(a), the Commissioner argues they ought to be, invoking the doctrine of *noscitur a sociis*. Com'r Br. at 24. But one need look no further than the case cited by the Commissioner - *State ex rel. Rear Door Bookstore v. Tenth Dist. Ct. App.*, 63 Ohio St.3d 354, 361-62 (1992) - to see that the doctrine does not apply here. In that case, this Court rejected application of *noscitur a sociis* where the statutory words had separate meanings and the words were written in the disjunctive through the use of “or.” *Id.* Here, Section 5739.02(B)(42)(a) uses the word “or” to separate manufacturing and assembling, so “the legislature gave a separate and distinct meaning” to those terms. *Id.* at 362. So *noscitur a sociis* does not apply.

And it is not for this Court to rewrite the Revised Code. *Seeley v. Expert, Inc.*, 26 Ohio St.2d 61, 71 (1971); *In re Adoption of Walters*, 112 Ohio St.3d 315, 2007-Ohio-7, ¶ 9. Each word used in Section 5739.02(B)(42)(a) must be afforded its own meaning. 2007-Ohio-7, ¶ 9.

E. Accel’s Response to Commissioner’s Proposition of Law No. 5:

**Under R.C. 5739.01(JJ)(3), employment services are not taxable when provided pursuant to a contract of at least one year providing for the permanent assignment of the provided personnel. When an employment services contract, along with the surrounding facts and circumstances, indicate employees are assigned for an indefinite period and are not provided as temporary, seasonal, short-term or substitute employees, the services are not taxable regardless of whether the words “permanent assignment” or some other magic language is used in the contract. Permanent assignment exists even though employee hours are reduced due to cash flow and natural turnover.**

The Commissioner’s Fifth Proposition of Law is moot since the Leased Labor Agreement between Accel and Resource and the Addendum thereto (the “Addendum” or “Accel Hearing Exhibit “X”) (as explained below, the BTA erred in striking Exhibit X)<sup>9</sup> provide for Resource permanently assigning its employees to Accel, and this Court has previously instructed the BTA to review contractual language in light of the surrounding “facts and circumstances” in determining whether employees are provided in an exempt manner under R.C. 5739.01(JJ)(3). *Bay Mech. & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, ¶ 19. The Commissioner argues it was improper for the BTA to review anything beyond the language of their contract. Comm’r Br. at 29. However, this argument contradicts this Court’s prior ruling that conducting an analysis under R.C. 5739.01(JJ)(3) “justifies focusing on ‘what actually is being done’ by requiring that the provider actually ‘supply [ ] personnel’ on a permanent-assignment basis.” *Bay Mech.*, 2012-Ohio-4312, ¶ 23.

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<sup>9</sup>The BTA’s error in striking Exhibit X is the subject of Accel’s Assignment of Error No. 5 in its Cross-Appeal, and its proposition of Law No. 3, below.

Employment services are generally subject to sales and use tax. R.C. 5739.01(B)(3)(k).

“Employment service” is defined to include:

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.

RC 5739.01(JJ). Excluded from this definition are transactions where the personnel are permanently assigned to the purchaser under a contract of at least one year. R.C. 5739.01(JJ)(3). “Permanent” means the employee is provided for an indefinite period under a contract that does not specify an ending date. *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, ¶ 19. The contract need not state “permanent” for the leasing to be on a permanent basis. *Bay Mech.*, 2012-Ohio-4312, ¶ 23.

Here, the parties do not dispute that the Leased Labor Agreement between Resource and Accel (Accel Hearing Ex. U) meets the one-year requirement. BTA Op. at 4 and Leased Labor Agreement at 3, Section 5. The Agreement further supports the BTA’s finding that the arrangement met the second requirement – the permanent assignment of employees. The Leased Labor Agreement specifically provides: “[Accel] further has the right, at its sole discretion, to accept or cancel the assignment of any employee by notifying [Resource].” *Id.* at p. 1, Section 1. Under this language, Accel, and not Resource, had the right to cancel an employee’s assignment, meaning Resource’s assignment of an employee to Accel was permanent unless Accel rejected the employee. Only allowing Accel the right to cancel an assigned employee, and not Resource, was consistent with the parties’ intent to permanently assign employees to Accel.<sup>10</sup>

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<sup>10</sup>The principal of interpretation, *expressio unius est exclusio* means that the mention of one thing implies the exclusion of another. *Bd. of Edu., Erie Cty. Sch. Dist. v. Rhodes*, 17 Ohio

Accel and Resource also entered into an Addendum to the Leased Labor Agreement that reiterated Resource was providing its employees to Accel on a permanent basis. H.T. 315-21; Accel Hearing Ex. X.<sup>11</sup> The October 6, 2006 Addendum, titled “First Amendment to Agreement for Employee Leasing,” stated “Each employee provided pursuant to this Agreement is assigned to Client *on a permanent (not temporary) basis*. Client and Resource acknowledge and agree that the employees provided pursuant to this Agreement are permanent core personnel as opposed to temporary supplemental personnel.” Accel Hearing Ex. X at Agreement Term 2, emphasis added. Of course, the Commissioner does not argue the Addendum fails to explicitly provide for the permanent assignment of Resource’s labor since it even uses the word “permanent.” Rather, the Commissioner seeks exclusion of the Addendum from the record, despite having subpoenaed it. Regardless of whether or not the Addendum is considered, the written terms of the Leased Labor Agreement express permanency by giving Accel sole discretion to reject employees, and more explicit “magic words” of permanency need not exist for the BTA to properly find, by testimony and other evidence, that a permanent assignment contract existed. *See, Bay Mech.*, 2012-Ohio-4312, ¶23 (“the absence of magic words is not dispositive of a permanent-assignment claim”).

The intent of Accel and Resource that the labor assignments be permanent was also clearly established by testimony before the BTA. Accel’s CFO, Dan Harms, and Resource’s CFO, Moises Lluberes, both testified that the parties always intended for the personnel to be permanently assigned to

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App.3d 35, 38 (10<sup>th</sup> Dist. 1984). Applied here, the mention of Accel’s right, at its sole discretion, to cancel or reject an employment assignment by Resource implies Resource did not have the same right.

<sup>11</sup>As explained below, the BTA erred in not admitting Hearing Ex. X.

Accel. H.T. 287-90, 312-16, 321. Resource reviewed Accel's operations and culture to confirm permanent assignment would fit and address its labor problems. H.T. 310, 311.

The BTA found that Resource had a unique business model of permanent assignment, allowing it to be profitable. In Accel type environments, the model focused on attracting and retaining potential employees for the low wage, monotonous, and physically challenging positions through the promise of permanent assignment. H.T. 310-12; see also BTA Op. at 5. The positions involved workers standing all day and having to do constant, repetitive hand motions to assemble products, low pay of \$7.25/hr., and a remote location. H.T. 312. Resource promised the workers continuity and good benefits, including vacation pay, benefits after 90 days, and a production bonus, which counteracted the less attractive aspects of the positions. H.T. 311-13.

The BTA also properly found that Accel utilized Resource's unique permanent assignment model to avoid constant training of new employees and to provide needed continuity. BTA Op. at 4. Permanent assignment saved Accel from incurring additional time and expense in training new employees while saving Resource the substantial expense of recruitment, screening, training and background checks. H.T. 288-89, 309, 331.

The parties' performance was also consistent with permanent assignment. The testimony and other evidence relied upon by the BTA, including the parties' course of dealing, clearly showed that Resource's assignment of employees to Accel was permanent in fact. Mr. Lluberes testified that Resource sometimes reduced the number of employees assigned to Accel when Accel fell behind on its bills. H.T. 338-39. However, rather than remove employees from permanent assignment, Resource proportionately reduced the hours of all assigned employees to maximize the continuity of each employee. H.T. 341, 342. The BTA therefore correctly found:

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 product by decreasing each employees' [sic] hours, rather than by accepting a smaller number of employees during less busy time periods.

BTA Op. at 5. The Commissioner did not present testimony or evidence to contradict this finding that the employees assigned to Accel were not seasonal. Although the Commissioner cites testimony of his expert that meeting seasonal demands is typical for labor suppliers serving the retail industry (Comm'r Br. at 37), this testimony does not relate to Resource's unique permanent assignment business model (or its practice of uniformly reducing employee hours rather than laying off employees).

The BTA properly found that there is nothing in R.C. 5739.01(JJ)(3) or case law that requires employees to work a consistent number of hours to qualify as permanently assigned. BTA Op. at 5. Would the Commissioner propose that when a person's hours were reduced from 40 to 20 hours per week the person is no longer permanently assigned? Of course not because personnel are permanently assigned under R.C. 5739.01(JJ)(3) as long as they are still employed, regardless of their hours. Truly seasonal persons would be laid off, which did not occur in this case.

Additionally, Mr. Lluberes testified that Resource never assigned employees to work elsewhere after they were assigned to Accel since Resource needed to: (a) avoid breaching the agreement with Accel; and (b) ensure the employees were always available to Accel to avoid the cost of recruiting and training replacements (with which Mr. Harms agreed). H.T. 290, 328-30. Accordingly, the BTA correctly found that all Resource employees assigned to Accel were assigned for an indefinite period (i.e., permanently assigned). BTA Op. at 5.

Although there was some turnover of Resource employees, it did not obviate the permanent assignment exception under R.C. 5739.01(JJ)(3). BTA Op. at 5. Permanent assignment may still be found where natural turnover exists. See, *Excel Temporaries, Inc. v. Tracy*, BTA No. 97-T-257, 1998 WL 775284. In *Excel Temporaries*, as in this case, the BTA recited the following facts in support of permanent assignment: (a) the customer needed positions filled permanently to gain the benefits of training; (b) leased employees were not reassigned to other customers; and (c) the arrangement was intended to be long term. *Id* \*5-6.<sup>12</sup> Of approximately 650 employees provided to Accel, well over half stayed for over a year without interruption, while some remained for five or six years until the relationship between Resource and Accel terminated. H.T. 325-26; see also, Accel Hearing Ex. Y, “Summary of Resource Staffing Employees Provided to Accel” (“Accel Hearing Exhibit Y”) (as explained below, the BTA erred in striking Exhibit Y).<sup>13</sup> Neither Accel nor Resource controlled whether these at-will employees remained at Accel, although it was their intention that they would. H.T. 288-90, 312-16, 321.

Resource’s long-term and permanent assignment model worked well for Accel since Accel had negative experiences with other labor suppliers with too much turnover due to nature of the

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<sup>12</sup>*Excel Temporaries, supra*, at \*5. As the BTA observed in concluding natural turnover of employees does not equate to lack of permanence: “We recognize, however, that there are those positions which, by their nature, are susceptible to a frequent turnover in personnel. They may be difficult to staff initially. Once hired, employees may soon discover that the job is not right for them, or they may find a better position elsewhere.” *Id.* at \*6. When employees are employed on an at-will basis, termination or the employee leaving does not determine whether the employee was engaged on a permanent basis; it is the intent of the parties which is controlling. *Id.*

<sup>13</sup>The BTA’s error in striking Exhibit Y is the subject of Accel’s Assignment of Error No. 5 in its Cross Appeal, as well as in its Proposition of Law No. 3 below.

work, low pay, and location. H.T. 314. Other staffing services focused on daily or temporary placements. H.T. 306, 307. A Resource permanently assigned employee stayed with the same client, year after year, and was trained to perform the specific client duties, including Accel's specific form of manufacturing. H.T. 308. This continuity made the employee much more profitable to both the client and Resource. H.T. 309.

Importantly, Resource did not design its unique model to avoid Ohio sales tax or any other states' tax, as it utilized this same permanent assignment model in 38 of the 42 states in which it conducted business. H.T. 309, 338. Instead, Resource's permanent assignment model made the services more efficient and reliable. H.T. 288-89, 309, 331. This minimized turnover and served Accel's objectives not achieved with other staffing services. H.T. 314. Per the Leased Labor Agreement and surrounding facts and circumstances, the BTA properly found that all Resource employees were permanently assigned to Accel. BTA Op. at 5. Since these employees were assigned on a permanent basis, the charges were not subject to use tax.

As an additional basis for nontaxability, the BTA also properly found Resource's leased employees were not "under the supervision or control of another," which is the threshold requirement to meet the "employment service" definition in R.C. 5739.01(JJ). To ensure quality, Resource provided its own supervisors at Accel's facility, who had direct control over the leased employees' work. H.T. 327. These onsite supervisors were on Resource's payroll, not Accel's, and Accel did not bear the cost of the onsite supervisors. H.T. 327-28. The Commissioner presented no contrary evidence. Resource was, therefore, not providing an employment service to Accel. BTA Op. at 5.

For all of these reasons, amounts paid by Accel to Resource are nontaxable, and the BTA's decision concerning exemption of those payments should be upheld.

F. Accel's Response to Commissioner's Proposition of Law No. 6:

**The BTA properly qualified Carol Ptak as an expert in manufacturing and admitted her testimony.**

The BTA is “vested with 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 Cty. Bd. of Revision*, 44 Ohio St.2d 13, 19-20 (1975) (internal citations omitted). “An assertion of an abuse of discretion by the BTA connotes more than an error of law or judgment. It implies that the BTA's attitude was unreasonable, arbitrary, or unconscionable.” *EOP-BP Tower, L.L.C. v. Cuyahoga Cty. Bd. of Revision*, 106 Ohio St.3d 1, 2005-Ohio-3096, ¶ 14. The BTA certainly did not act unreasonably, arbitrarily or unconscionably in qualifying Ms. Ptak as an expert.

The Commissioner claims that Ms. Ptak (1) misrepresented her degree; (2) misrepresented her status as a professor; and (3) misrepresented that she authored certain books.

First, Ms. Ptak did not misrepresent her degree. At the Hearing, Ms. Ptak explained that she holds a masters degree in business administration with a concentration in manufacturing and materials management. H.T. 142. She identified her level of education (masters degree) in her area of study (manufacturing and materials management). Accel BTA Hearing Ex. G; Supp. 49-56. The Commissioner does not dispute that Ms. Ptak holds this degree. Nor does the Commissioner argue that this degree makes Ms. Ptak less credible or undermines her qualifications.

Ms. Ptak did not misrepresent her professor status. Ms. Ptak's report states that she was the “professor in operations management at the undergraduate and graduate level at Pacific Lutheran University as the invited Distinguished Executive in Residence.” *Id.* Although the Commissioner

attempts to create confusion over Ms. Ptak's claim, her status as "invited Distinguished Executive in Residence" was clearly listed in her background of her expert report. And Ms. Ptak testified that she was listed as a "professor" and referred to at the University as "professor." H.T. 138-39. As Ms. Ptak taught classes at a university at the graduate and undergraduate setting, Ms. Ptak is a professor in every sense of the word.

Finally, the Commissioner claims that Ms. Ptak misrepresented that she was the author of several books when she was instead the "co-author."<sup>14</sup> But Ms. Ptak listed in her expert report any other authors of each book she was involved with. See Supp. 54.

The BTA did not abuse its discretion by qualifying Ms. Ptak as an expert. Ms. Ptak has an MBA with a concentration in manufacturing and materials management. H.T. 142. Prior to earning that degree, Ms. Ptak worked for a biological manufacturing company and a medical device manufacturing company. H.T. 145-46. Ms. Ptak also was and is involved with the formerly named "American Production and Inventory Control Society," or "APICS."<sup>15</sup> *Id.* Ms. Ptak has been certified by APICS in production and inventory management, and has taught classes on that subject for APICS. *Id.* Ms. Ptak testified that "production" as used by APICS means "manufacturing." H.T. 160-61. Ms. Ptak also has been employed as a production control manager for an aerospace company, which involved the fabrication and assembly of all overhead bins for Boeing's 737 and

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<sup>14</sup>The Commissioner also claims that Ms. Ptak identified her as an author of a book for which she only wrote the forward. Ms. Ptak testified at the Hearing that she contributed to the book as a whole. H.T. 136.

<sup>15</sup>The Commissioner's entire attack on APICS as a manufacturing authority is based on Dr. Clarke's "Googling" manufacturing standards and noting that no references to APICS appear at the top of the search results. H.T. 533.

757 jets. H.T. 146-47. Ms. Ptak has also been involved with the small manufacturing specific industry group at APICS. H.T. 147. Ms. Ptak was eventually elected as the Vice-President, and later became the President and CEO of APICS. H.T. 147-48. Ms. Ptak also worked at People Soft at which she developed a strategy for its manufacturing product. H.T. 149. Ms. Ptak testified that she has authored seven books on manufacturing. H.T. 134; Supp. 54. And Ms. Ptak testified that she has experience with other gift set manufacturers. H.T. 168. Ms. Ptak's credentials are more fully set forth in her expert report (Hearing Exhibit G) and her resume (Hearing Exhibit P).

So Ms. Ptak is a highly decorated expert on manufacturing with more than thirty (30) years of experience. Although the Commissioner attempts to gloss over Ms. Ptak's extensive experience and create confusion by referencing terms like "supply chain," Ms. Ptak testified that supply chain encompasses manufacturing. H.T. 157, 189. Even the Commissioner's own expert testified that supply chain is the movement of raw materials through "a conversion process." H.T. 371-72.

The issue in this case is the use of items purchased by Accel in its operations. Ms. Ptak's expertise in manufacturing, her experience with a gift set manufacturer, and her understanding of supply chain, makes her uniquely qualified to serve as an expert in this case. She has the specialized knowledge, skill, and experience regarding the transformation of raw materials into finished goods and the BTA properly qualified her as an expert witness.

2. Cross-Appellant Accel's Propositions of Law:

A. Accel's Proposition of Law No. 1:

**The BTA erred in failing to consider a Federal Court case involving substantially similar law and facts to be at least persuasive authority.**

Accel cited *United States v. Dean*, 945 F. Supp.2d 1110 (C.D. Cal. 2013) to support that it

is manufacturing. But the BTA refused to acknowledge that the *Dean* case was even persuasive authority on the issue of whether Accel was engaged in manufacturing or packaging, noting only that it “highlights the unique nature of a gift set as a discrete consumer good.” BTA Op. at 3.

While Accel agrees that the *Dean* case highlights the unique nature of a gift set as a discreet consumer good, the BTA erred in not recognizing that *Dean* is at least persuasive authority the BTA should closely follow in addressing a similar Ohio use tax issue. Indeed, this Court has relied upon or referenced federal authority as persuasive on similar issues arising under Ohio law. See, e.g., State v. Bess, 126 Ohio St.3d 350, 2010-Ohio-3292, ¶¶ 22, 27.

In addition, failure to follow the conclusions in *Dean* and to find Accel to be a manufacturer consistent with that opinion is unconstitutional in violation of the Supremacy Clause (U.S. Const. Art. VI). The determination by the Federal Court in *Dean* that a gift set assembler is a manufacturer for purposes of federal law under a substantially similar definition and set of facts ought to carry over for Ohio use tax purposes and be controlling on whether Accel is manufacturing. To hold otherwise would result in inconsistent treatment where a taxpayer such as Accel is treated as a manufacturer for federal tax law purposes, but not a manufacturer for state use tax purposes.

B. Accel’s Proposition of Law No. 2:

**A taxpayer who designs and assembles gift sets is engaged in manufacturing as traditionally defined under Ohio sales and use tax law.**

The BTA’s opinion in dicta stated that Accel is not engaged in manufacturing as “traditionally defined” under Ohio sales and use tax law. BTA Op. at 3. It is unclear what the BTA meant by this reference. To the extent the BTA suggests Accel is not manufacturing, as explained above, Accel’s operations fit the plain language of Ohio’s definitions of “assembly,” a

“manufacturing operation” and this Court’s interpretation of the word “manufacturing.” Moreover, as explained above the purpose of the exemption statutes (including for manufacturing or processing) is to avoid a “prohibited” double tax such that Accel’s operation qualifies as manufacturing as “traditionally defined.” See Bailey v. Evatt, 142 Ohio St. 616, 620-21 (1944); see also Jewel Companies, Inc. v. Porterfield, 23 Ohio St.2d 121, 130 (1970). Accel changes the state or form of the hygiene items and other components of each gift set through assembly to create a new unique whole. This is manufacturing under Ohio sales and use tax law.

C. Accel’s Proposition of Law No. 3:

**The Ohio Rules of Evidence do not prescribe any applicability to proceedings before the BTA.**

As a general rule, administrative agencies are not bound by the strict rules of evidence applied in court. *Provident Savings Bank & Trust Co. v. Tax Commission*, 10 O.O. 469, 474, 26 Ohio Law Abs. 175, 181 (1931). Evidence Rule 101(A) specifically provides:

Applicability. These rules govern *proceedings in the courts* of this state and before court-appointed referees and magistrates of this state, subject to the exceptions stated in division (C) of this rule.

(emphasis added). So the Ohio Rules of Evidence do not prescribe any applicability to proceedings before the BTA. *Day Lay Egg Farm v. Union Cty. Bd. of Revision*, 62 Ohio App.3d 555, 559 (3<sup>rd</sup> Dist. 1989). Administrative boards are permitted some leeway in admitting hearsay consistent with due process. *Haley v. Ohio State Dental Bd.*, 7 Ohio App.3d 1, 6 (2<sup>nd</sup> Dist. 1982). If within the evidence relied upon by the BTA, there is sufficient competent evidence of probative value to support its decision, the decision is neither against the weight of the evidence nor unlawful merely because alleged incompetent evidence has also been received. *Day Lay*, 62 Ohio App.3d at 559.

The BTA erred in failing to admit Accel’s Hearing Exhibit X and Accel’s Hearing Exhibit Y (collectively, the “Excluded Exhibits”). Accel Hearing Exhibit X was captioned “First Amendment to Agreement for Employee Leasing, dated October 6, 2006,” while Accel Hearing Exhibit Y is a summary of the tenures of Resource’s employees provided to Accel. The Excluded Exhibits were properly admissible before the BTA for multiple reasons, including but not limited to: (1) they were provided to the Commissioner at least four (4) days before the hearing; (2) they are not subject to evidentiary rules that would exclude them; (3) excluding them unduly prejudices Accel due to their highly probative value; (4) they are not inadmissible hearsay; (5) the Commissioner is not prejudiced by admitting them; (6) they were produced by third parties over which Accel had no control, pursuant to a subpoena issued by the Commissioner, and the third party asserted it did not receive the subpoena; and (7) Accel played no part in any alleged delay in the production of them.

The Commissioner filed a Motion to Strike Testimony and Documents (“Motion to Strike”), which sought to strike the Excluded Exhibits from the record. Accel filed “Appellant’s Response in Opposition to Appellee’s Motion to Strike Testimony and Documents” (“Accel’s Response”). Accel Supp. 18-69. The BTA erroneously struck the Excluded Exhibits after wrongly finding that (a) they “...were not produced until the eve of hearing” and not disclosed under the BTA’s rules, and (b) the Excluded Exhibits contained inadmissible hearsay. BTA Op. at 4. The BTA did not strike any testimony concerning the Excluded Exhibits.

On or about February 13, 2014, the Commissioner issued a subpoena to Resource, a nonparty in this case, requesting a March 17, 2014 deposition (the “Subpoena”). A copy of the Subpoena was attached to Accel’s Response as Exhibit “A.” The Subpoena also requested certain documents by March 17, 2014. Resource did not appear at the scheduled deposition and did produce the

documents at that time, claiming it did not receive the Subpoena and was unaware of it. The Commissioner was aware that Resource was represented by counsel and had communications with Resource's counsel concerning this case as early as December 13, 2012. See, December 13, 2012 emails between Resource's counsel, Steve Dimengo ("Dimengo"), and the Commissioner's counsel, Daniel Fausey ("Fausey"), attached to Accel's Response as Exhibit "B." However, Resource's attorney advised that the Commissioner did not inform him of the Subpoena, nor provide him with a copy of the Subpoena until only ten (10) days before the Hearing. See, April 4, 2014 email from Fausey to Dimengo, attached to Accel's Response as Exhibit "C."

In response to receiving the Subpoena at such a late date, Resource's counsel suggested that the Commissioner seek a continuance of the Hearing. See, copy of April 6, 2014 email from Dimengo to Fausey, attached to Accel's Response as part of Exhibit "C." The Commissioner's counsel rejected this suggestion. See, April 7, 2014 email from Fausey to Dimengo, attached to Accel's Response as part of Exhibit "C." Just four (4) days after receiving the Subpoena from the Commissioner, Resource produced responsive documents, including the Excluded Exhibits. See, April 10, 2014 email from Dimengo to Fausey, attached to Accel's Response as part of Exhibit "D." Despite receiving the Excluded Exhibits four (4) days before the Hearing, the Commissioner's counsel replied, "I doubt that I will have time to review this prior to Monday's hearing." See, April 11, 2014 email from Fausey to Dimengo, attached to Accel's Response as part of Exhibit "D." The BTA erroneously found that the Hearing Exhibits "...were not produced until the eve of hearing." BTA Op. at 4.

It was unduly prejudicial and an abuse of the discovery process for the Commissioner to subpoena records from an unrelated third-party witness shortly before a hearing and then to claim

that he was being prejudiced by their production and use as evidence. Resource was accompanied by its counsel at the Hearing, though Accel's representative only saw Accel Hearing Exhibit X a couple of days before the Hearing. H.T. 318-319, 340. Upon learning of Resource's production of the Excluded Exhibits, Accel had the right to utilize the records disclosed through the Subpoena process initiated by the Commissioner.

The BTA erroneously struck the Excluded Exhibits under BTA Rule 5717-1-15(I), which obligates parties to provide copies of documentary exhibits they intend to offer in accordance with the case management schedule. The entity to which the Commissioner issued the Subpoena, Resource, was not governed by BTA Rule 5717-1-15(I) since it was not a party to the proceeding.

Both of the Excluded Exhibits contained highly probative information favorable to Accel's tax exemption claims. Accel Hearing Exhibit X explicitly provided for permanent labor assignment. In excluding Accel Hearing Exhibit X, the Commissioner is now mistakenly claiming that there is no explicit contractual support for Resource's permanent assignment of employees to Accel. Though the Leased Labor Agreement's terms and testimony concerning the intent and practice of Resource and Accel show permanence even without the admission of Accel Hearing Exhibit X, this Exhibit further supports permanent assignment. Accel Hearing Exhibit Y is also highly probative of permanent assignment because it shows the longevity of Resource's assignment of specific employees to Accel.

The BTA also erred in finding that the Excluded Exhibits contained inadmissible hearsay. Assuming the Evidence Rules apply to BTA hearings (which they do not), hearsay is an out of court statement offered to prove the truth of the matter asserted. Evid. R. 801(C). A witness is barred on hearsay grounds from testifying as to the statements made by another only when the statement is

offered to prove the truth of the matter asserted in the statement, and only where the statement falls outside any exceptions to the rule against hearsay. See, State v. Davis, 62 Ohio St.3d 326, 344 (1991).

Accel Hearing Exhibit Y does not contain hearsay, but a summary of Resource employees who worked for Accel that were also identified in invoices produced to the Commissioner. H.T. 323-24. Evidence Rule 1006 permits the admission of summaries of voluminous writings. Under Evidence Rule 1006, spreadsheets containing information taken from voluminous invoices are admissible as summaries. *Avery Dennison Corp. v. Con-Way Transp. Services, Inc.*, 2006-Ohio-6106, ¶ 53 (11<sup>th</sup> Dist. 2006). Mr. Lluberres testified that he oversees the accounting department at Resource and that he instructed Resource's accounting department to compile Accel Hearing Exhibit Y. H.T. 322. Mr. Lluberres further testified that Accel Hearing Exhibit Y accurately summarized every Resource employee who worked at Accel from 2005 until 2011. H.T. 324. Accel Hearing Exhibit Y was highly probative of the services provided by Resource to Accel, was produced in response to the Commissioner's Subpoena, and summarized information already available to the Commissioner. In fact, the Commissioner's Audit Agent, Dan Campbell, testified that he reviewed the invoices summarized in Accel Hearing Exhibit Y to determine "how often the names changed, showing how employees change ...". H.T. 254-55. Although the Commissioner has objected to the use of Accel Hearing Exhibit Y, he stipulated to the introduction of the underlying invoices at the Hearing. H.T. 276. The Commissioner was not prejudiced by Accel Hearing Exhibit Y, which would be admissible under Rule of Evidence 1006 even if the Rules of Evidence applied to BTA cases, which they do not.

The Commissioner was also not prejudiced by the introduction of Accel Hearing Exhibit X,

which amended the Leased Labor Agreement between Accel and Resource. The Leased Labor Agreement was produced by Accel in discovery, while the Accel Hearing Exhibit X was produced by Resource in response to the Subpoena. The business records exception permits admission of Accel Hearing Exhibit X as evidence even if the rule against hearsay applied to BTA cases, which it does not. Under the business records exception: the record (1) must be one recorded regularly in a regularly conducted [business] activity; (2) must be made by a person with knowledge of the act or event recorded; (3) must be recorded at or near the time of the act; and (4) must have a foundation laid through the testimony of a records custodian or another qualified witness. *Davis*, 62 Ohio St.3d at 342; Evid. R. 803(6). While the witness need not have personal knowledge of the creation of the record or been in the employ of the company at the time the record was made, the witness must be able to vouch from personal knowledge of the record-keeping system that such records were kept in the regular course of business. *Davis*, 62 Ohio St.3d at 342.

Although Mr. Lluberres of Resource did not sign Accel Hearing Exhibit X, he clearly testified as to the nature of the document, when it was created, and that Resource kept record of it in the ordinary course of business. H.T. 316-19. Through his testimony, Mr. Lluberres displayed personal knowledge of Accel Hearing Exhibit X and the record-keeping system that Resource used to maintain it in the ordinary course of business. Accel Hearing Exhibit X therefore qualifies as a business record under that exception to the rule against hearsay and should not have been stricken by the BTA.

Both of the Excluded Exhibits were admissible under the BTA's administrative rules and were not bound by the Rules of Evidence. Even if the Rules of Evidence applied to the Excluded Exhibits, they would qualify for exceptions to the rule against hearsay. The Commissioner would

not have been prejudiced by the Excluded Exhibits and should not have been rewarded for engaging in late discovery with a third-party shortly before the Hearing and then feigning surprise when documents produced as a result of his Subpoena are utilized at the Hearing. The Excluded Exhibits should not have been stricken from the record by the BTA.

D. Accel's Proposition of Law No. 4:

**The BTA erred in finding the labor leased by Manpower is subject to use tax where the only evidence in the record is that it permanently assigned the labor under a contract of one year.**

As explained above, during the audit period Accel leased labor from two providers: Resource and Manpower. Accel argued both arrangements were excluded from use tax under R.C. 5739.01(JJ)(3). Accel produced an Affidavit from its Co-CEO, Mr. David Abraham to support the exemption regarding Manpower. BTA Hearing Ex. V; H.T. 343. The BTA determined that the Manpower relationship was subject to use tax.

The BTA's determination regarding the Manpower relationship is unreasonable and unlawful. Mr. Abraham's Affidavit states that although Accel and Manpower did not have a written contract, they contemplated a long term relationship of at least one year, or longer. BTA Hearing Ex. V, ¶ 3. Failure to have a written contract does not mean that the exclusion from tax in R.C. 5739.01 (JJ)(3) cannot be satisfied.<sup>16</sup> *Excel Temporaries, Inc. v. Tracy*, BTA No. 97-T-257, 1998 WL 775284, \*7. Although there may be some changes in the employees leased by Manpower, the

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<sup>16</sup>Notably, Accel's invoices with Manpower extended through 2004 for purposes of the audit. See Comm'r Hearing Ex. A. The audit here began in 2010. H.T. 209. R.C. 5741.15 only obligates Accel to maintain records for a period of four (4) years, through 2008. It would be unreasonable and unfair to penalize Accel for complying with its statutory obligation to maintain records, offering testimony regarding the relationship with Manpower, and then to deprive it of its claim for exemption because it did not have further documentation.

BTA has found that employee turnover does not obviate the exception to R.C. 5739.01(JJ)(3). BTA Op. at 5; see also 1998 WL 775284, \*6. And Accel obtained employees permanently from Manpower as indicated by same reasons that Accel obtained permanent employees from Resource; Accel needed people who were trained to create the most productive environment. See H.T. 288-89, 307-09; Hearing Ex. V, ¶¶ 4, 7. Moreover, Mr. Abraham's Affidavit stated that the employees assigned from Manpower were indefinitely assigned. Hearing Ex. V, ¶ 4. The Commissioner did not produce any evidence to contradict Mr. Abraham's Affidavit. So the only evidence regarding the Manpower employees is that they were indefinitely assigned under a contract of at least one year. This does not meet the definition of an "employment service" under R.C. 5739.01(JJ)(3).

The BTA found that Accel's lease of employees from Resource was excluded from use tax because the employees were provided on a permanent basis under a contract of at least one (1) year. BTA Op. at 4-5. And the only evidence in the record before the BTA was that Accel's relationship with Manpower operated in a similar manner. See BTA Hearing Ex. V. Because the BTA found Accel's relationship with Resource qualified for the exclusion from the definition of "employment services," the BTA erred in not reaching the same result for the Manpower relationship.

E. Accel's Proposition of Law No. 5:

**The BTA erred in admitting testimony that is neither relevant to the ultimate issue nor helpful to the trier of fact.**

To support its claim that Accel is a packager, the Commissioner, over Accel's objection introduced the testimony of Dr. Robert Clarke. H.T. 406-07, 416-18, 521-26, 577-79. Although R.C. 5739.02(B)(15) defines "packaging" for sales and use tax purposes as "placing in a package," Dr. Clarke admitted that he was not aware of that definition. *Id.* at 521-27.

Instead, Dr. Clarke testified on academic definitions of packaging, which greatly differ from the Revised Code's narrow definition of "placing in a package." Dr. Clarke also described a much broader definition of "package" that served functions far beyond those described by this Court. Perhaps best illustrating the fallacy in Dr. Clarke's expansive definition is that even an automobile or train car is a package. See H.T. 543-44. In any event, the academic definitions of "packaging" that Dr. Clarke attempted to utilize are far broader than Ohio's limited definition of "placing in a package." So Dr. Clarke's testimony is not helpful in determining whether Accel qualifies for the exemptions contained in R.C. 5739.02(B)(15) or (B)(42), or whether Accel is simply packaging.<sup>17</sup>

"In order to be admitted at trial, expert testimony must (1) relate to scientific, technical, or other specialized knowledge; (2) assist the trier of fact to understand the evidence or to determine a fact in issue; (3) be relevant and material to an issue in the case; and (4) have probative value which outweighs any prejudicial impact." *State v. Daws*, 104 Ohio App.3d 448, 462 (2<sup>nd</sup> Dist. 1994). "If the trier of fact can understand the issues and the evidence and arrive at a correct determination, expert testimony is unnecessary and inadmissible." *Id.* at 462-63.

Here, Dr. Clarke did not, and can not, opine on the only relevant definition of packaging—that contained in R.C. 5739.02(B)(15). H.T. 521-27. There is no real dispute here over what Accel does; the question is whether Accel's operations constitute "packaging" rather than "assembling" or a "manufacturing operation" under Ohio law. Academic definitions of packaging (on which Dr. Clarke testified there is no consensus - H.T. 520), and an opinion on whether Accel falls within

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<sup>17</sup>Dr. Clarke's methodology is also fatally flawed. Despite purporting to render an expert opinion on what Accel does, Dr. Clarke did not actually observe Accel's assembly process or believe it to be important to do so. H.T. 550-51.

them, are not helpful to the determination of whether Accel is packaging as defined in Section 5739.02(B)(15). Thus, Dr. Clarke's testimony on these topics should have been stricken.

F. Accel's Proposition of Law No. 6:

**R.C. 5703.58(B) prohibits the Commissioner from making or issuing “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.” When the Commissioner corrects the underlying initial assessment in a Final Determination, the Commissioner has “made or issued an assessment” for purposes of 5703.58(B) such that the Final Determination cannot assess consumer's use tax owed prior to January 1, 2008.**

The Final Determination is largely outside of the statute of limitations in R.C. 5703.58(B) because it attempts to assess Accel consumer's use tax for periods prior to January 1, 2008.

Accel received a preliminary assessment from the Department on or about January 24, 2011. Accel then timely filed a Petition for Reassessment to appeal the preliminary assessment. Under R.C. 5741.14, R.C. 5739.13(B) governs petitions for reassessment filed in use tax cases. Under Section 5739.13(B), where a taxpayer files a petition for reassessment, the preliminary assessment does not become final and the use tax does not become due and owing until after the Commissioner's Final Determination, which may (a) cancel the assessment, (b) correct the assessment, or (c) affirm the assessment. See R.C. 5703.60(A).

For purposes of R.C. 5703.58(B), the making and issuing of a final determination constitutes issuing an assessment. R.C. 5703.58(B) was amended on September 29, 2011 to prohibit the Commissioner from making or issuing “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.” Under Ohio law, an “assessment” means notice of

underpayment or non-payment of tax. R.C. 5703.50(D). The Commissioner “issues” the assessment when the Commissioner provides the taxpayer with written notice of the assessment. *Carstab Corp. v. Limbach*, 40 Ohio St.3d 89, 90 (1988).

Here, the Commissioner gave Accel written notice of the assessment of use tax in his Final Determination, which was dated June 26, 2012. H.T. 281; BTA Hearing Ex. A. The Final Determination constituted an “assessment” as defined in R.C. 5703.50(D) because it gave Accel notice of underpayment of tax; until that point the preliminary assessment is subject to change (and in fact it was changed) by the Commissioner in accordance with R.C. 5703.60.

The Final Determination assessed use tax on Accel for the period of January 1, 2003 through December 31, 2009. But the majority of that assessment is outside of the statute of limitations under R.C. 5703.58(B), as it covers periods prior to January 1, 2008. So the BTA erred by not reversing the Commissioner’s Final Determination to the extent it assessed tax prior to January 1, 2008.

G. If the Court reverses the BTA’s determination that Accel is manufacturing and assembling, the Court must remand this matter to the BTA for consideration of alternative grounds for exemption that Accel raised.

Accel’s cross-appeal pointed out that the BTA failed to consider the alternative grounds Accel raised for exemption, presumably because they were rendered moot by the BTA’s decision. Specifically, Accel’s notice of cross-appeal preserves Accel’s arguments that to the extent Accel is not manufacturing or assembling: (a) Accel is reselling the corrugate, ribbon, glue, etc. in the same form in which they are received so they are exempt from use tax under R.C. 5739.01(E)<sup>18</sup>; and (b)

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<sup>18</sup>Curiously, the Commissioner in his Brief suggests that the gift sets Accel manufactures arrive whole, and that no change in state or form occurs. Comm’r Br. at 5, 18. Accel disagrees with this characterization and submits that it is contrary to the evidence at the BTA hearing and the BTA’s findings. Regardless, the Commissioner denied Accel’s claim for exemption under the “resale exemption.” Of course, if the gift sets arrive whole as the Commissioner now claims,

Accel is making retail sales such that its purchases of corrugate, ribbon, glue, etc. are exempt under R.C. 5739.02(B)(15). See *The Limited Stores, Inc. v. Tracy*, BTA No. 91-K-1287, 1994 WL 93140. If the BTA's decision on Accel assembling is not affirmed, the Court ought to remand this matter to the BTA for determinations on these issues.

**IV. CONCLUSION.**

Based on the above, the Court ought to affirm the BTA's decision that Accel is assembling and that Resource was not providing an employment service, and reverse the BTA's decision to exclude the Excluded Exhibits, to admit Dr. Clarke's testimony and to tax the labor from Manpower.

Respectfully submitted,  
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he should have granted Accel the resale exemption. But he did not, suggesting there is more to Accel's operations than the Commissioner is willing to say.

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing *Appellee/Cross-Appellant Accel Inc. Merit Brief* and accompanying *Appendix* and *Supplement* was served on January 19, 2016 via electronic mail and regular U.S. Mail, postage prepaid, upon the following:

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