

TABLE OF CONTENTS

TABLE OF AUTHORITIES v

INTRODUCTION 1

LAW AND ARGUMENT 3

Proposition of Law No. 1:

Tax exemption statutes are strictly construed against the party claiming exemption and the taxpayer bears the burden to show it is entitled to exemption..... 3

Proposition of Law No. 2:

The BTA must affirm the Tax Commissioner’s findings unless Appellant proves they are unreasonable and unlawful 4

Proposition of Law No. 3:

Packaging is expressly excluded from the sales tax exemptions available to manufacturers under R.C. 5739.02(B)(42)(a) and (g) 5

A. “Packaging” is expressly excluded from the sales tax exemptions available to manufacturers under R.C. 5739.02(B)(42)(a) and (g) 6

B. Accel is a packaging company as a matter of fact, law, and industry and academic standards..... 8

1. *Accel is a packager as a matter of fact* 8

2. *Accel is a packager as a matter of law* 9

a. Accel’s cannot distinguish its operations from this Court’s precedent by referring to other taxpayers as “pick-and-pack” operations..... 12

b. It is irrelevant whether Accel’s packaging enhances the “perceived value” of the finished goods 14

3. *Accel is a packager under the industry and academic understanding of the field* 15

- a. The Tax Commissioner’s expert witness properly provided competent and credible evidence on the factual issues in this case..... 15
- b. Dr. Clarke’s testimony was helpful to understand the meaning of the word “packaging” as the term is used in the packaging industry and academia 17

Proposition of Law No. 4:

- In order to constitute “assembling,” as that term is used in R.C. 5739.02(B)(42)(a), the taxpayer must change the state or form of the finished good, as is required by the other terms used in that tax exemption statute, including “manufacturing,” processing,” and “refining.” 19*
- A. “Assembling,” as that term is used in R.C. 5739.02(B)(42)(a), connotes a change the state or form of the finished goods. 19
 - B. Accel is not engaged in “assembling” as that term is understood in R.C. 5739.02(B)(42)(a) 20

Proposition of Law No. 5:

- Purchases of employment services are taxable unless the employment services contract expressly “specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” R.C. 5739.01(JJ)(3). When an employment services contract fails to provide an express term for “permanent” employees, the Board cannot supply the missing terms by inquiring into facts and circumstances of the employment relationship to exclude the transaction from tax..... 24*
- A. The employment services exclusion requires, as a threshold, a contract for employment services that meets the statutory elements set forth at R.C. 5739.01(JJ)(3), including “permanent” assignment. The Accel/Resource Staffing contract does not contain the statutory elements necessary to claim an exclusion from taxation 24
 - 1. *An employment services contract must expressly specify permanence of employees 24*
 - 2. *The Accel contract does not meet the statutory requirements for exclusion..... 27*

3. *As established by the evidence in the record, Accel’s laborers were temporary and not “permanent” within the meaning of R.C. 5739.01(JJ)(3)*..... 28

Proposition of Law No. 6:

The BTA should not allow a witness to testify as an expert when she has fudged her qualifications on her resume and lacks the requisite skill, experience, and training to testify 31

CROSS-APPELLEE TAX COMMISSIONER’S MERIT RESPONSE..... 34

Counter Proposition of Law No. 1:

A decision from a federal trial court in a different district, and relating to a federal statute that is dissimilar to Ohio’s laws and that applies a different set of facts has no precedential value in Ohio, particularly when this Court has already issued controlling decisions on the actual Ohio law issues involved. 34

Counter Proposition of Law No. 2:

For sales tax purposes, a packaging operation does not qualify as a manufacturing operation simply because it borrows from manufacturing processes and concepts, such as line work and package design...... 34

Counter Proposition of Law No. 3:

The BTA may exclude proffered evidence for violations of its own rules, for hearsay, and for unfair surprise or undue burden on the opposing party...... 35

Counter Proposition of Law No. 4:

The BTA correctly determined that the evidence in this appeal conclusively established that Accel’s lease of labor from Manpower was taxable. The Tax Commissioner’s findings are upheld by the BTA unless the challenger affirmatively proves that the Tax Commissioner’s findings were unreasonable or unlawful...... 41

Counter Proposition of Law No. 5:

The BTA appropriately allowed qualified expert witness testimony on the academic and industry definitions of the term “packaging,” a term that is undefined in the relevant statutes..... 43

Counter Proposition of Law No. 6:

The Tax Commissioner correctly issued an assessment against Accel before January 1, 2008. Moreover, and in any event, the Tax Commissioner’s assessment was issued prior to the effective date of R.C. 5703.58. 47

Counter Proposition of Law No. 7:

When a party fails to present any evidence and meaningfully argue an issue before the Board of Tax Appeals, waiver applies, and that party is barred from raising such claims on appeal to this Court 49

CONCLUSION 50

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>A. Schulman, Inc. v. Levin</i> , 2007-Ohio-5585	3
<i>Alcan Aluminum Corp. v. Limbach</i> , 42 Ohio St.3d 121 (1989).....	4, 5
<i>Almondree Apartments of Columbus, Ltd. v. Bd. of Revision of Franklin Cty.</i> , No. 87AP-1216, 1988 WL 70505 (10th Dist. June 28, 1988)	37
<i>Am. Fiber Sys. v. Levin</i> , 2010-Ohio-1468	5
<i>Apple Grp., Ltd. v. Granger Twp. Bd. of Zoning Appeals</i> , 2015-Ohio-2343	18
<i>Ares, Inc. v. Limbach</i> , 51 Ohio St.3d 102 (1990).....	42
<i>Arga Co. v. Limbach</i> , 36 Ohio St.3d 220 (1988).....	41
<i>Bay Mech. & Elec. Corp., v. Levin</i> , BTA No. 2008-K-1687, 2011 WL 2446198 (June 14, 2011)	30
<i>Bay Mechanical & Elec. Corp. v. Testa</i> , 2012-Ohio-4312	<i>passim</i>
<i>Bellemar Parts Industries, Inc. v. Tracy</i> , 88 Ohio St.3d 351 (2000).....	50
<i>Bicknell v. Evatt</i> , 140 Ohio St. 492 (1942).....	49
<i>Bostic v. Conner</i> , 37 Ohio St.3d 144 (1988).....	15
<i>Brunswick City School Dist. Brd. of Edn. v. Medina Cty. Bd. of Revision</i> , BTA No. 2010-A-3091, 2012 WL 6846168 (Dec. 11, 2012)	36
<i>Carstab Corp. v. Limbach</i> , 40 Ohio St.3d 89 (1988).....	48

<i>Chesapeake & O. Ry. Co. v. Pub. Utilities Comm'n</i> , 163 Ohio St. 252 (1955).....	37
<i>Cincinnati Cmty. Kollel v. Testa</i> , 2013-Ohio-396	7
<i>Creative Images v. Tracy</i> , BTA No. 1991-K-367, 1993 WL 242257 (June 25, 1993)	38
<i>Custom Beverage Packers, Inc. v. Kosydar</i> , 33 Ohio St.2d 68 (1973).....	1, 11, 19
<i>E. Ohio Distrib. Co. v. Bd. of Liquor Control of Ohio</i> , 98 N.E.2d 330 (10th Dist. 1950)	37
<i>Express Packaging, Inc., v. Limbach</i> , BTA No. 89-K-22, 1992 WL 236077 (Sept. 18, 1992)	23
<i>Federated Dept. Stores, Inc. v. Lindley</i> , 5 Ohio St.3d 213 (1983).....	5
<i>Fichtel & Sachs Industries, Inc. v. Wilkins</i> , 2006-Ohio-246	<i>passim</i>
<i>General Mills, Inc. v. Limbach</i> , 35 Ohio St.3d 256 (1988).....	21, 23
<i>H.R. Options, Inc. v. Zaino</i> , 2004-Ohio-1	<i>passim</i>
<i>Haljo, Inc., et al. v. Limbach</i> , BTA No. 1989-B-945, 1992 WL 236075 (Sept. 18, 1992)	49
<i>HK New Plan Exch. Prop. Owner II, L.L.C. v. Hamilton Cty. Bd. of Revision</i> , 2009-Ohio-3546	35
<i>Jewel Companies v. Porterfield</i> , 23 Ohio At.2d 121, 130 (1970)	4
<i>Key Serv. Corp. v. Zaino</i> , 95 Ohio St.3d 11 (2002).....	5
<i>Knowlton v. Schultz</i> , 2008-Ohio-5984 (1st Dist. 2008)	44
<i>Kraynak v. Youngstown City School Dist. Bd. of Edn.</i> , 2008-Ohio-2618	44

<i>LTC Properties, Inc. v. Licking Cty. Bd. of Revision,</i> 2012-Ohio-3930	35
<i>Miller v. Bike Athletic Co.,</i> 80 Ohio St.3d 607 (1998).....	16, 45
<i>Nat'l City Bank v. Wilkins,</i> 2006-Ohio-6110	3
<i>Nat'l Trends, Inc. v. Krimson Corp.,</i> No. 91 CIV. 3178, 1994 WL 97058 (S.D.N.Y. Mar. 23, 1994)	12
<i>National Pharmpak Services, Inc., v. Lawrence, Tax Commissioner,</i> BTA Nos. 1999-M-1014, 2001 WL 855750 (July 27, 2001)	13
<i>National Tube Co. v. Glander,</i> 157 Ohio St. 407 (1952).....	7, 20, 23
<i>Newfield Publications, Inc. v. Tracy,</i> 87 Ohio St.3d 150 (1999).....	1, 11, 19
<i>Nusseibeh v. Zaino,</i> 2003-Ohio-855	5
<i>Our Place, Inc. v. Ohio Liquor Control Comm.,</i> 63 Ohio St.3d 570 (1992).....	33
<i>Phoenix Warehouse of California, LLC v. Townley, Inc.,</i> No. 08 CIV. 2856 NRB, 2011 WL 1345134 (S.D.N.Y. Mar. 29, 2011)	12
<i>Queen City Valves v. Peck,</i> 161 Ohio St. 579 (1954).....	24, 50
<i>Roy, et al. v. Gray, et al.,</i> 2011-Ohio-357 (1st Dist 2011)	44
<i>Sauder Woodworking Co. v. Limbach,</i> 38 Ohio St.3d 175 (1988).....	<i>passim</i>
<i>Schnipke v. Safe-Turf Installation Group, LLC,</i> 2010-Ohio-4173 (3rd Dist. 2010)	44
<i>Scholz Homes, Inc. v. Porterfield,</i> 25 Ohio St.2d 67 (1971).....	1, 11, 20, 23
<i>Sikorski v. Link Elec. & Safety Control Co.,</i> 117 Ohio App.3d 822 (1997)	44

<i>State ex rel. Simmons v. Geauga Cty. Dept. of Emergency Serv.</i> , 131 Ohio App.3d 482 (11 th Dist. 1998)	44
<i>State Farm Mut. Auto. Ins. Co. v. Anders</i> , 2012-Ohio-824 (10th Dist. 2012).....	39
<i>State v. Greer</i> , 39 Ohio St.3d 236 (1988).....	50
<i>State v. Hood</i> , 2012-Ohio-6208	39, 40
<i>State v. Nemeth</i> , 82 Ohio St. 3d 202 (1998).....	16, 44
<i>Terry v. Caputo</i> , 2007-Ohio-5023	16, 44
<i>United States v. Dean</i> , 945 F.Supp.2d 1110 (C.D. Cal. 2013).....	22, 23, 34
<i>Winn v. Licking Cty. Bd. of Revision</i> , BTA No. 2011-130, 2013 WL 6833250 (Oct. 15, 2013).....	36

Statutes

Section 199 of the Internal Revenue Code.....	22, 23
Ohio Adm.Code 5717-1-06.....	36
Ohio Adm.Code 5717-1-11.....	36
Ohio Adm.Code 5717-1-15.....	36
R.C. 1.42	18
R.C. 1335.05	41
R.C. 5703.58	47, 48, 49
R.C. 5703.60	49
R.C. 5717.04	50
R.C. 5739.01(E)	50
R.C. 5739.01(JJ).....	<i>passim</i>
R.C. 5739.01(S)	1, 3, 6, 8, 9, 33

R.C. 5739.01 (R).....	1, 3, 6, 8, 9, 33
R.C. 5739.02	23, 46
R.C. 5739.02(B)(15)	<i>passim</i>
R.C. 5739.02(B)(42)(a) and (g)	<i>passim</i>
R.C. 5741.13	48, 49

Other Authorities

Evid.R. 702	15, 16, 17, 33
Evid.R. 801	38
Evid.R. 802	38
Evid.R. 803-05	39
Evid.R. 1006	40

INTRODUCTION

The Tax Commissioner and Accel agree about one thing: this is a straightforward case.

First, Accel is a packaging company engaged in packaging operations, by its own admissions. Ex. C-O, HT 290-291. Ohio sales and use tax laws expressly exclude packaging from the scope of their exemptions. See, R.C. 5739.01(S) and (R); and R.C. 5739.02(B)(42)(a) and (g). And, the materials purchased by Accel conform to this Court's description of the form and function of packaging. *Custom Beverage Packers, Inc. v. Kosydar*, 33 Ohio St.2d 68, 73 (1973) (A package "restrain[s] movement of the packaged object in more than one plane of direction."); *Newfield Publications, Inc. v. Tracy*, 87 Ohio St.3d 150, 153 (1999) ("The function of a package, is to contain a product for shipping or handling.") Accordingly, Accel's purchases of packaging material are taxable. Accel is a packager under any lens – legal, academic, industry, and even by Accel's own representations.

Contrary to Accel's assertions, Accel is not a "manufacturing operation" and it is not engaged in "assembling," because Accel makes no change in the state or form of finished goods. *Sauder Woodworking Co. v. Limbach*, 38 Ohio St.3d 175, 176 (1988); Ex. B, Expert Report of Dr. Clarke, at 14, 18-19; HT at 489-490. As this Court has already said – and precedent establishes – in order to "assemble" for purposes of Ohio tax laws, there must be a change in state or form of the finished goods. R.C. 5739.01(S); *Scholz Homes, Inc. v. Porterfield*, 25 Ohio St.2d 67, 72 (1971); see, also *Fichtel & Sachs Industries, Inc. v. Wilkins*, 2006-Ohio-246 ¶ 36. Here, there is no such change in state or form. Accel receives cosmetic gift sets whole from the retailer and wraps them in packaging for storage and transport. Ex. B at HT at 14-19; 452; 489-90; 549. The fact that Accel may arrange the finished goods and glue or stack them does not transform their packaging process into manufacturing. *Scholz Homes*, 25 Ohio St.2d at 72

Second, Accel leases temporary labor services that are subject to taxation. Accel is a business that services the retail industry. The retail industry is highly seasonal. Accordingly, Accel hires temporary “general laborers” to fill its seasonal workload demands. In Ohio, the lease of temporary labor is subject to sales tax. R.C. 5739.01(JJ).

Contrary to Accel’s assertions, its leased labor does not qualify for the exclusion from sales tax for “permanent” leased labor. R.C. 5739.01(JJ)(3); *H.R. Options, Inc. v. Zaino*, 2004-Ohio-1, ¶ 18. Accel’s contract with Resource Staffing does not expressly provide or suggest that the employees provided are “permanent” as the statute requires, and Accel didn’t even have a written agreement with Manpower. ST at 185-192; 196-197. But even if Accel’s contracts *could* meet the express demands of R.C. 5739.01(JJ)(3), the manifest facts in this case demonstrate that Accel’s leased labor was purchased to meet temporary, general short-term staffing needs. See, Prop. Law 5, Sec. A, 3, below. *Bay Mechanical & Elec. Corp. v. Testa*, 2012-Ohio-4312, ¶ 19; *H.R. Options* at ¶ 18, 22.

The BTA also lost its way with regard to the leased labor, relying solely on the biased and self-interested oral testimony of the head of the labor company. This witness admitted that he had “skin in the game.” HT at 333. He had agreed to indemnify Accel if there was any tax on its purchases of labor. *Id.* And, his company was also then under audit by the Department of Taxation on the same issue with different contractors. *Id.*

Additionally, the Board abused its discretion as evidentiary gatekeeper when it allowed the testimony of Accel’s proffered expert witness. Accel’s proffered expert fudged her credentials and should have been excluded on that basis alone. Even so, she lacked the experience and education to offer expert testimony on the issue of “change in state or form.”

LAW AND ARGUMENT

Proposition of Law No. 1:

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

In this case, the relevant exemption statutes provide that purchases used in manufacturing and manufacturing operations are entitled to tax exemption. R.C. 5739.02(B)(42)(a), R.C. 5739.01(R), and R.C. 5739.01(JJ)(3). Those same statutes provide that manufacturing and assembling *do not include* “packaging.” Ignoring statutory prohibition, the Board liberally construed the statutes to *include* packaging as “assembling,” in contravention of this Court’s precedent and the plain language of the exemption statutes. (TC’s Merit Brief at 14-25).

Statutes containing tax exemptions are to be “strictly construed” and when there is a close-call, doubt is to be resolved *against* the exemption. *A. Schulman, Inc. v. Levin*, 2007-Ohio-5585, ¶ 7. The Board did just the opposite. It construed the tax exemption statutes broadly and liberally in favor of tax exemption. This was an error of law.

Accel’s Merit Brief does nothing to challenge this proposition of law as set forth by the Tax Commissioner. Instead, Accel repeats this Court’s standard of review for BTA *fact finding*. Accel Merit Brief at 10 (citing *Nat’l City Bank v. Wilkins*, 2006-Ohio-6110, ¶12). Accel’s argument is beside the point, because this proposition of law regards this Court’s review of the BTA’s determinations of law, not the BTA’s fact finding.

The issue is whether the BTA correctly construed the relevant tax exemption statutes. Statutory construction is an issue of *law* not of *fact*. Thus, this Court’s standard of review for BTA fact finding is unhelpful for this issue.

With regard to issues of law, this Court ““will not hesitate to reverse a BTA decision that is based on an incorrect legal conclusion.”” *Nat’l City*, 2006-Ohio-6110 at ¶12 (quoting

Gahanna-Jefferson Local School Dist. Bd. of Edn. v. Zaino, 93 Ohio St.3d 231, 232 (2001)). Because the Board erroneously applied a broad and liberal construction of the tax statutes *in favor* of tax exemption, the Board erred as a matter of law. This Court should not hesitate to reverse the Board's erroneous constructions of the statutes, and apply the correct, strict standard of review, against exemption.

Accel also strangely raises the notion that "double taxation is prohibited" in relation to the issue of whether the BTA correctly construed these statutes. Accel Merit Brief at 10 (citing *Jewel Companies v. Porterfield*, 23 Ohio At.2d 121, 130 (1970)). Accel's "double tax" argument is puzzling. Accel hasn't explained what it means by double tax, who pays it, and why it is prohibited, so the Tax Commissioner cannot adequately respond. Still, the case cited by Accel has no bearing on the present appeal, whether factually or as a matter of law, and Accel fails to explain why it would. Accel fails to explain what "double tax" was involved in *Jewel* and what "double tax" would possibly be at issue in this appeal. However, the Tax Commissioner is not aware of any other person who is paying tax on Accel's purchases of packaging materials.

Proposition of Law No. 2:

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

The Board also contravened this Court's instructions to affirm the Tax Commissioner's findings unless "clearly unreasonable and unlawful." *Alcan Aluminum Corp. v. Limbach*, 42 Ohio St.3d 121, 123 (1989). Instead, the Board merely substituted its own fact finding for that of the Tax Commissioner. In response, Accel argues that the BTA's hearings are "de novo" and that the BTA is authorized to make its own findings of fact and investigation. Accel Merit Brief

at 11-12. But Accel is confusing the de novo nature of BTA hearings with the separate standard of review for the BTA to apply to Tax Commissioner findings.

The BTA is both a review body and an administrative tribunal that receives evidence. In the role of administrative tribunal, its hearing is de novo only in the sense that the BTA “is statutorily authorized to conduct full administrative appeals in which the parties are entitled to produce evidence *in addition to* that considered by the Tax Commissioner.” *Key Serv. Corp. v. Zaino*, 95 Ohio St.3d 11, 16, (2002) (citing *Bloch v. Glander*, 151 Ohio St. 381, 387 (1949) (emphasis added). And, “[t]he BTA may investigate to ascertain further facts and make *its own findings independent* of those of the Tax Commissioner.” *Id.* (emphasis added).

But, as an appellate review tribunal, the BTA is also limited by the appropriate standard of review. Namely, on appeal to the BTA, the Tax Commissioner’s fact findings “are presumptively valid” unless the appellant demonstrates to the BTA that they “are clearly unreasonable or unlawful.” *Alcan Aluminum Corp*, 42 Ohio St.3d at 123; see, also, *Am. Fiber Sys. v. Levin*, 2010-Ohio-1468, ¶ 42 (citing *Hatchadorian v. Lindley*, 21 Ohio St.3d 66 (1986), paragraph one of the syllabus); *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 215 (1983); *Nusseibeh v. Zaino*, 2003-Ohio-855 ¶ 10.

In this case, the BTA failed to apply the appropriate standard of review. Instead of determining that the Tax Commissioner’s findings were “clearly unreasonable and unlawful,” the BTA merely made its own findings. In so doing, the BTA disregarded the presumption in favor of the Tax Commissioner’s findings that Accel was engaged in a packaging operation and that its leased labor was for temporary and short-term staffing needs.

Proposition of Law No. 3:

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

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

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

The plain language of the tax exemption statutes at issue provide that Accel is not eligible for tax exemption for its purchase of packaging materials.

There are three exemptions at play:

- R.C. 5739.02(B)(42)(a) exempts sales in which the **purchased items are incorporated by manufacturing**, assembling, processing, or refining;
- R.C. 5739.02(B)(42)(g) exempts sales in which the purchased items are **used primarily in a manufacturing operation**; and
- R.C. 5739.02(B)(15) exempts sales of packaging and packaging materials to **persons engaged in manufacturing, assembling, processing, refining, and manufacturing operations**.

Accel argues that it is engaged in “assembling.” But Accel cannot be “assembling” under the plain language of the statute, because “packaging” is expressly excluded from the definition of “assembling” provided by R.C. 5739.01(S) and “manufacturing operation” in R.C. 5739.01(R).

- R.C. 5739.01(R) provides that “‘Assembly’ and ‘assembling’ mean attaching or fitting together parts to form a product, **but do not include packaging a product.**” (Emphasis added).
- R.C. 5739.01(S) provides that “‘Manufacturing operation’ means a process in which materials are changed, converted, or transformed into a different state or form from which they previously existed and includes refining materials, assembling parts, and preparing raw materials and parts by mixing, measuring, blending, or otherwise committing such materials or parts to the manufacturing process. ‘Manufacturing operation’ **does not include packaging.**” (Emphasis added).

As a matter of law, packaging is *expressly excluded* from the definitions of “assembling” and “manufacturing operation,” and therefore can never be included. Because Accel’s packaging cannot qualify as “assembling” or “manufacturing,” Accel can never qualify for the exemptions found in R.C. 5739.02(B)(42)(a) and (g). The BTA’s failure to apply the plain language of a statute is an error of law that will be reversed by this Court. *See, e.g., Cincinnati Cmty. Kollel v. Testa*, 2013-Ohio-396, ¶ 25.

Further, as explained above, the BTA erred by giving the term “assembling” a broad, more expansive definition than provided by statute and this Court’s precedent. Statutes granting tax exemptions are narrowly construed against exemption and, in all close cases, exemption is denied. *National Tube Co. v. Glander*, 157 Ohio St. 407 (1952). In this case, the Board liberally construed the definition of “assembling” in favor of exemption, and should be reversed.

In response to the Tax Commissioner’s straightforward explanation and application of the plain language of the applicable statutes, Accel advances a circular reading of the tax laws. Accel ignores that the relevant definitions exclude “packaging.” Instead, Accel dives directly into R.C. 5739.02(B)(15), which exempts packaging materials purchased by a person engaged in a manufacturing or assembling operation. In Accel’s view, Accel is not “packaging,” but “assembling” and therefore, its purchases of “packaging material” should be exempt. So, Accel claims that it is not engaged in packaging, but it is purchasing exempt packaging material. And this exempt packaging material is the only thing Accel purchases relative to the so-called “finished good” – i.e., Accel purchases no raw materials or manufacturing inputs – merely exempt packaging materials. The argument is dizzying, and ultimately unsustainable.

R.C. 5739.02(B)(15) exempts sales of packaging materials to persons engaged in manufacturing or assembling under R.C. 5739.02(B)(42)(a) or people engaged in a

“manufacturing operation” under R.C. 5739.02(B)(42)(g). Therefore, the appropriate statutory analysis starts with the definitions of “assembling” under R.C. 5739.01(R) and “manufacturing operation” under R.C. 5739.01(S), which both expressly exclude packaging. Thus, Accel’s statutory construction is an impossibility, as explained above.

And, indeed, R.C. 5739.02(B)(15) doesn’t apply to Accel at all. R.C. 5739.02(B)(15) expressly exempts sales of packaging to the *retailer, reseller or manufacturer* of the product “including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale * * * .” But Accel does not manufacture anything. Instead, Accel packages pre-manufactured goods, *by its own admission*. As Accel’s majority-owner and co-CEO Tara Abraham explained:

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

In any event, even if Accel’s twisted reading of the statutes were correct, Accel would still not qualify, because Accel is engaged in a purely packaging operation under the facts, law, and industry and academic standards, as explained below.

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

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

At the BTA hearing, the Tax Commissioner exhaustively demonstrated that in every public-facing document, on its website, and its statements to the media, Accel called itself a packaging company. HT 32; Ex. D-G, J-O. Moreover, the Tax Commissioner showed that Accel labeled itself a packaging company on its own, internal documents like financial

statements and tax returns – documents with no marketing purposes. HT 291-98, Joint Stips.¶ 4-5; Ex. K-O. Thus, by its own estimation, Accel is a packager engaged in packaging operations.

Accel attempts to deflect its own admissions as “occasional” statements or “only for marketing purposes.” See Accel’s Merit Brief at 18-19. But the evidence was unequivocal and unrebutted. Accel is a packing company, and believes itself to be a packaging company – except perhaps when it comes to taxes. Then, and only then, Accel claims it is a “manufacturer.”

This Court should ignore the artifice, and recognize Accel for what it has always claimed to be and what it is – a packaging operation.

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

No direct definition of “package” appears in the definitional section of the sales tax law, R.C. 5739.01. Accel’s attempt to cabin the definition of “packaging” to the verb form provided in R.C. 5739.02(B)(15) is wrong. The definition found in R.C. 5739.02(B)(15) applies only to that statute, not the whole of R.C. Chapter 5739. And, Accel doesn’t even provide the full definition in R.C. 5739.02(B)(15).

Ordinarily, definitions in the Revised Code appear in section .01 of the given Chapter. But no definition of “packaging” appears in R.C. 5739.01. In contrast, “manufacturing operation” and “assembling” *are* defined in R.C. 5739.01, and those definitions *expressly exclude* packaging. R.C. 5739.01 (R) and (S).

The statute proffered by Accel as the “only” definition of “packaging is R.C. 5739.02(B)(15). That statute expressly exempts sales of packaging to the *retailer, reseller or manufacturer* (not applicable to Accel) of the product “including material, labels, and parts for packages, and of machinery, equipment, and material for use primarily in packaging tangible personal property produced for sale * * * .”

In order to qualify for this exemption, the purchaser must be engaged in “manufacturing” or “assembling” under R.C. 5739.02(B)(42)(a) or a “manufacturing operation” under R.C. 5739.02(B)(42)(g). It is only after a person meets the requirements of those statutes, that their purchases of “packaging” qualify for exemption under R.C. 5739.02(B)(15), and only then do the definitions of “packaging” in R.C. 5739.02(B)(15) apply. In other words, R.C. 5739.02(B)(15)’s definitions of packaging do not apply to the use of the term in R.C. 5739.02(B)(42)(a) and (g), but is merely a self-referent for the type of packaging that is exempted in R.C. 5739.02(B)(15).

But, even if the definition in R.C. 5739.02(B)(15) was considered the primary definition for the purposes of sales tax, Accel would still be engaged in packaging, and thus would be expressly excluded from the definition of “assembling” and “manufacturing operation.”

As Accel omits to disclose, R.C. 5739.02(B)(15)’s definition of packaging includes a noun form *and* a verb form (Accel provides only the verb):

(1) Noun: “‘Packages’ includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers.”

(2) Verb: “‘Packaging’ means placing in a package.”

It is telling that Accel omits the “noun” form of this definition from its brief, because all of the taxed materials at issue easily match this definition. Accel’s packaging materials included “bindings,” “wrappings,” and “containers” such as glue, shrink wrap, bubble wrap, baskets, and shipping cases. HT at 452, 475-77, 491-92, 545-48; see Ex. B at 13-15.

Accel’s business exactly fits the verb form definition too. Accel’s business is “placing [finished goods] in a package.” “Accel is enclosing products primary packages, unto a secondary unit.” HT at 545-548. Although Accel claims that it does “more” than “merely placing in a

package,” that claim is directly rebutted by this Court’s understanding of what “packaging” is and by Accel’s own witness testimony.

Expanding upon the statutory definition of packaging, this Court has explained that packaging “restrain[s] movement of the packaged object in more than one plane of direction.” *Custom Beverage Packers*, 33 Ohio St.2d at 73. Such materials, “may not necessarily fully enclose, but they do restrain movement of the packaged object in more than one plane of direction.” *Id.* That multi-directional restraint is the hallmark of packaging. See, Ex. B at 6-8.

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

Thus, under this Court’s precedent, packaging: (1) restrains the movement of an object; (2) and contains the product for shipping and handling. That is exactly the service that Accel provides. According to Accel’s CEO: “Once the gift sets themselves are complete, we are responsible to ensure they can withstand the rigors of shipping; our goal is to have the gift set look the same on the store shelf as it did coming off our line.” Ex. G.

And, according to Accel’s Cost Accounting Manager “these materials are used” pursuant to “how a product is going to be built and how it’s going to be held together so when it ships from our facility to our customer’s facility that it does not lose its shape or form.” HT 90-92. In fact, Mr. Scott—the employee charged with implementing the customer’s design and production plan—testified that the materials provided by Accel are the only things keeping the items in the gift set from moving around inside the basket. *Id.* at 115-16.

a. Accel's cannot distinguish its operations from this Court's precedent by referring to other taxpayers as "pick-and-pack" operations.

Accel tries to distance its operations from this Court's precedent by attempting to label the packagers in this Court's precedent as "pick and pack" operations. But Accel is wrong.

As Accel's CEO explained, a "pick and pack" operation ordinarily occurs in warehouses, wherein customer orders are "picked" from various shelves and the "packed" into a shipping container. See, HT at 30-33. A typical example of a pick and pack arrangement is found in the case of *Phoenix Warehouse*, wherein a supplier of cosmetics and cosmetic gift sets hired a warehouse contractor to "pick" the cosmetics ordered by Wal-Mart, Target, CBI, and Kohl's from warehouse shelves and then "pack" the goods for shipment to those retailers. *Phoenix Warehouse of California, LLC v. Townley, Inc.*, No. 08 CIV. 2856 NRB, 2011 WL 1345134 (S.D.N.Y. Mar. 29, 2011) at *1 ("literally 'picking' the goods off of the shelf and 'packing' them for shipping.") Pick-and-pack operations are also sometimes referred to as "fulfillment services." See, *Nat'l Trends, Inc. v. Krimson Corp.*, No. 91 CIV. 3178, 1994 WL 97058, at *1 (S.D.N.Y. Mar. 23, 1994).

In packaging terms, pick-and-pack operations take products that are already in "primary" packaging "secondary" packaging, and place such products into "shipping" packaging for the purposes of transport. "Primary" packaging "physically holds the product," it is the product's "shelf-ready packaging," while "secondary" packaging is "a separate packaging material or form that holds multiple primary packages." See, HT at 475-478; 543-545. Primary and secondary packages "in turn may be packed for purposes of protection into distribution packages or shippers." Ex. B at 19. Although primary and secondary packaging may also protect the product for shipping and transport, they are distinct from "distribution packages or shippers." *Id.*

Accel's attempt to characterize the packaging operations in *Fichtel & Sachs*, *Sauder Woodworking*, and *National Pharmpak Services, Inc.* as pick-and-pack operations fails. In each of those cases, the packaging at issue was the product's "primary" or "secondary" shelf-ready packaging—just like Accel's packaging—and not its "shippers." For instance, in *Fichtel & Sachs*, the company placed pre-manufactured clutch disks, pressure plates, and clutch releases, grease, and throw-away parts into individually-labeled, car-specific "clutch kits." *Fichtel & Sachs*, 2006-Ohio-246 ¶ 12. And in *Sauder Woodworking*, the taxpayer placed "flat-pack" furniture parts, hardware, instructions, and protective material in shelf-ready cartons. *Sauder Woodworking*, 38 Ohio St.3d at 176. Finally, in *National Pharmpak*, the packager placed pre-manufactured drugs into smaller containers with labels, cotton, and lids. See, *National Pharmpak Services, Inc., v. Lawrence, Tax Commissioner*, BTA Nos. 1999-M-1014, 1015, 1016, 2001 WL 855750, at *5 (July 27, 2001).

Similarly, Accel's gift-basket process involves taking pre-manufactured items and enclosing multiple of such items into secondary packaging. See, HT at 452, 479-91.

Additionally, Accel *does* also engage in pick-and-pack operations. See, ST at 331, HT at 34-35. Although we have focused in this appeal on the packaging of gift sets, Accel provided pick and pack services during the audit period as well, and made no effort to distinguish which of its taxable purchases were used for gift baskets and which were for pick and pack operations. *Id.* Moreover, many of the assessed sales to Accel included tertiary "shippers" such as cartons, wrap, and padding. See, ST at 74, HT at 100-106. Thus, Accel's claim that it is different from a "pick and pack" operation doesn't hold water factually.

b. It is irrelevant whether Accel’s packaging enhances the “perceived value” of the finished goods.

Accel seeks exemption for its packaging on the theory that the packaging is “incorporated into” the finished goods because the packing material enhances the value of the goods in question. Accel believes that the service it provides elevates the value of the items in a gift set – in other words, its packaging is a “value add.” See Accel Merit Brief at 15-18.

This argument falls apart under scrutiny. First, the “gift set” that Accel claims to be “assembling” arrives to Accel complete – no further manufacturing is needed. Accel simply readies pre-manufactured goods for shipping and display by packaging. Any “change in perceived value” (if there is one) is brought about by the collection of the pre-manufactured goods themselves, and the collection arrives to Accel already complete.

Regardless, in *Sauder Woodworking*, this Court flatly rejected the same argument now advanced by Accel: “An operation which merely enhances the value of the product without producing a change in state or form does not constitute processing.” *Id.*, citing *Custom Beverage Packers*, 33 Ohio St.2d 68. Just like in *Sauder*, the manufacturing and processing here is complete “prior to the [finished good] being placed in the cartons on the packaging line.” *Id.*; Ex. G (“Accel’s “packaging is a secondary process that comes after manufacturing. Contract manufacturers manufacture the bottles and the various lotions and also fill the bottles with the lotion. Accel Inc. takes the filled bottles and puts together the gift sets.”)

That is to say, even if Accel’s process of packaging the cosmetic sets into appealing packaging *did* somehow enhance the value of the set, it *still* would not be a transformation of raw materials into a finished goods to qualify for the “assembling” exemption. As in *Sauder*, the

items Accel places in its packages are manufactured and processed prior to arriving at its facility, and are equally functional and usable prior to being placed in a gift set.

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

a. **The Tax Commissioner's expert witness properly provided competent and credible evidence on the factual issues in this case.**

At hearing, the BTA recognized Dr. Clarke as an expert in both packaging and manufacturing and took his testimony. HT at 418. The BTA was right to do so.

The admission of expert testimony is discretionary. *Bostic v. Conner*, 37 Ohio St.3d 144, 148 (1988). And the use of expert testimony is guided by Evid.R. 702. Under this Rule, a witness may testify as an expert if: (1) the witness' testimony relates to matters beyond the knowledge or experience possessed by lay persons, (2) the witness is qualified as an expert by specialized knowledge, skill, experience, training, or education regarding the subject matter of the testimony, and (3) the witness' testimony is based on reliable scientific, technical, or other specialized information.

Dr. Clarke is a tenured professor at the Michigan State University's School of Packaging, a well-known and respected university, which is home to the largest, and original degree-bearing packaging school in the world. HT at 359-61, 379-80, Ex. B at 3. He holds a PhD in Engineering Management, a Master's in Business Administration and a Bachelor's degree in Packaging. Ex. B, App. A. Dr. Clarke has worked for and with packaging companies, as well as with manufacturing companies in the industry, as a consultant, and as an academic and researcher. HT at 371, 397-98, 408-11, 412-13, 414-16, 418-19. Dr. Clarke has taught classes about packaging and manufacturing and written peer-reviewed articles about packaging and manufacturing. HT 414-15.

At hearing, Accel's counsel agreed that Dr. Clark was qualified as an expert in packaging. "I mean the witness has clearly established that he's qualified to talk about packaging." HT 417.

With regard to his manufacturing credentials, Dr. Clarke gave exhaustive testimony on his first-hand experience with finished-goods production, from design to prototype to testing production. HT 380-381, 397-398, 408-419; *see, also*, Ex. B at 4. For instance, Dr. Clarke testified about developing and producing a "no-drip neck ring" for Wesson Oil bottles. HT 380-81. Another example was redesigning the glass bottles for Hunt's ketchup to get the proper flow from the bottle and appropriate tolerances for the cap. *Id.* at 383-385, 408-411. He even bought competitors' products and cut them apart to re-engineer their production processes. *Id.*

As this Court has explained, if a witness is qualified under Evid.R. 702, "[c]ourts should favor the admissibility of expert testimony whenever it is relevant." *State v. Nemeth*, 82 Ohio St. 3d 202, 207, (1998). "Relevance" for this Court requires the tribunal "to judge whether an expert's testimony is 'relevant to the task at hand' in that it logically advances a material aspect of the proposing party's case." *Terry v. Caputo*, 2007-Ohio-5023, ¶ 26 (quoting *Valentine v. PPG Industries, Inc.*, 2004-Ohio-4521 (4th Dist. 2004) (quoting *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 597 (1993))). Ultimately, "to be admissible, the expert testimony must be relevant and assist the trier of fact in determining a fact issue or understanding the evidence." *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611 (1998).

Here, Dr. Clarke's testimony "logically advanced material aspects" of the Tax Commissioner's case. And, it was helpful to the BTA to determine fact issues and understand the evidence. Dr. Clarke visited Accel's facility, was given a tour, took pictures, and spoke with employees. HT at 462-464. His decades of experience in the manufacturing and packaging

industries and his review of the pertinent facts relevant to this matter, allowed him to explain that the processes and materials used by Accel are for purposes of packaging and not manufacturing, a distinction beyond the knowledge of a lay witness. Ex. B. Evid.R. 702.

Dr. Clarke's testimony also helped explain that manufacturing processes may be, and often are employed in the packaging industry – a fact outside layperson knowledge. HT at 483-87. He testified that a “packaging line” looks like any other production line. *Id.* The difference is, on the packaging line, no transformation of raw materials to finished goods occurs. HT 484; 489-490. Similarly, supply-chain concepts like “lean operations,” “just in time,” “ERT,” and “MRP,” are used in the packaging industry as well. *Id.*

Moreover, Dr. Clarke's testimony established that Accel is a “co-packager” or “contract packager,” which is a type of packing operation within the world of packaging. HT 472. Dr. Clarke also set forth the commonly-understood “levels” of packaging, such as primary, secondary, tertiary, and distribution packaging/shippers. HT 544-545. He also explained that Accel's process does not effect a change in state or form of a finished good through manufacturing or assembling – again, a factual issue beyond the ken of laypeople. Ex. B at 18 (“I conclude that Accel does not induce any substantive change, conversion or transformation to the incoming inventory components * * *. A gift set is, in essence, a secondary package with primary containers enclosed therein and, even when given a different stock keeping unit (SKU), this does not connote ‘manufacturing’ or ‘assembling’ a new product.”)

- b. Dr. Clarke's testimony was helpful to understand the meaning of the word “packaging” as the term is used in the packaging industry and academia.**

There is no “primary” definition of “packaging” for sales and use tax, and the definitions of “packaging” in R.C. 5739.02(B)(15) are so elemental as to be useless. Dr. Clarke's testimony

was proper to help the BTA understand the packaging and manufacturing aspects of the Tax Commissioner's case. And beyond that, Dr. Clarke's testimony as to the academic and industry definitions of "packaging" helped the Board to understand the meaning of the word.

The meaning of "packaging" is at issue in this case—as is the issue of whether Accel's operations constituted "packaging." Thus, the Tax Commissioner's unrebutted academic and industry definitions of the term "packaging" were not only useful, they were critical.¹

As a matter of statutory construction, "[w]ords and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly." R.C. 1.42. In this case, Dr. Clarke's expert testimony was directly relevant to understanding the "technical or particular" meaning of the term "packaging" in the academic and industry uses, to aid the Board in understanding the meaning of that word. See, *Apple Grp., Ltd. v. Granger Twp. Bd. of Zoning Appeals*, 2015-Ohio-2343, ¶ 37 (Kennedy, J. dissenting) ("R.C. 1.42 instructs that '[w]ords and phrases that have acquired a technical or particular meaning * * * shall be construed accordingly.' Therefore, the testimony of experts engaged in the field * * * is relevant to determining the meaning of the term.")(citing *Order of Ry. Conductors of Am. v. Swan*, 329 U.S. 520, 525 (1947)).

Dr. Clarke's written report and testimony provided several written definitions of packaging, including one that contains the "noun" and "verb" dichotomous definitions of packaging that often occur – such as in R.C. 5739.02(B)(15). Ex. B at 7.

Ultimately, Dr. Clarke concluded that, in the academic and industry understanding of the term, "a reasonable working definition of packaging is that it's an enclosure system that things

¹ Accel's witness was unqualified to testify on the issue of packaging, as she admitted: "I'm not familiar with packaging. My whole career has been manufacturing, so I can't speak to what a packager would do. * * * I'm not a packager, so I don't know. I've never worked in that industry." HT at 179-80.

go into, which performs one or more of the functions of containment, protection, communication, and utility.” TC’s Ex B at 8. This definition neatly marries: (1) the verb form packaging; (2) the noun form; and (3) this Court’s explanation of the essential function and purposes of packaging in *Newfield Publications*, 87 Ohio St.3d at 153 and *Custom Beverage Packers*, 33 Ohio St.2d at 73 (a package “restrain[s] movement of the packaged object in more than one plane of direction” and “contain[s] a product for shipping or handling.”) Thus, Dr. Clarke’s use of the term “packaging” is entirely consistent with Ohio law, and helpful to understand how the phrase is defined in the industry and academic world.

Proposition of Law No. 4:

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

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

As explained, “packaging” can never qualify as “assembling,” because the General Assembly has expressly so provided, through the applicable statutory definitions. But even if “packaging” was not expressly excluded from “assembling,” Accel would still not qualify as “assembling,” because Accel’s process does not change the state or form of the finished goods.

Although Accel claims “assembling” means something less than a change in state or form, this Court has already held otherwise. In *Sauder Woodworking*, this Court considered a claim of “manufacturing or assembling” together and rejected both, because there was no change in state or form of the product during the packaging. *Sauder Woodworking*, 38 Ohio St.3d at 177; *see, also, Fichtel & Sachs*, 2006-Ohio-246, ¶ 36, (quoting *Natl. Tube*, 157 Ohio St. 407).

“Assembling” requires a “change in state or form” to the finished product. *Sauder Woodworking*, 38 Ohio St.3d at 177; *see, also, Fichtel & Sachs*, 2006-Ohio-246, ¶ 36, (quoting *Natl. Tube*, 157 Ohio St. 407). “Assembling” in the tax law “means more than the mere gathering together of fabricated materials.” *Scholz Homes*, 25 Ohio St.2d at 72. The required act is the fitting together of “various parts * * * so as to make into an operative whole.” *Id.*

This Court’s understanding of the term is consistent with the rules of statutory interpretation. The surrounding statutory terms, “‘manufacturing’ and ‘processing’ [also] imply essentially a transformation or conversion of materials or things into a different state or form from that in which they originally existed-the actual operation incident to changing them into marketable products.” *National Tube*, 157 Ohio St. 407 at paragraph four of the syllabus

Furthermore, the terms of statutes granting tax exemptions are construed narrowly against exemption. *National Tube*, 157 Ohio St. 407. Thus, it would not make sense to apply Accel’s definition of assembling, which is broader and easier to satisfy than the meaning already assigned by this Court. Therefore, the BTA erred as a matter of law when it applied a different meaning for the term “assembling” under R.C. 5739.02(B)(42)(a).

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

To support its argument, Accel provides the “analogy” of a “screw” in a machine to compare to its packaging of gift sets. But the analogy is not apt. Instead of installing a screw in a machine, Accel’s process is more akin to receiving two, pre-manufactured machines (say, for instance, a clutch and a pressure plate) and wrapping them in packaging.

A better analogy would be a company that takes pre-manufactured salt and pepper shakers and wraps them together for shipping and shelf display as a “salt and pepper set.” This would not constitute a change in state or form of the finished good – the salt and pepper shakers

arrived pre-manufactured and in their primary packaging. The “set” as a finished good already exists when it arrives – wrapping the set in packaging does not induce a change in state or form.

The same is true of Accel’s process. The “gift baskets” arrive to Accel in their finished, pre-manufactured form. Accel merely gathers together the various beauty items and places them in packaging. “[T]he secondary and tertiary packaging of incoming inventory by Accel does not produce a change in either the state or form of these products. Bottles, jars, tubes, candles, bathrobes, etc. come in, and they are packaged and shipped while retaining the same physical or chemical state, and form, as they had upon arrival.” Ex. B at 14.

Accel’s argument that there is a “change” in these products from individual beauty supplies to a “gift set” is an artifice. The finished good – the so-called “gift set” arrives at Accel complete and pre-manufactured. Ex. B at 14, 18-19. Accel merely gathers the contents together and packages them for shipping and shelf display. HT at 452, 475-77, 491-92, 545-48; see Ex. B at 13-15. This is a classic packaging function. *Id.*; *Sauder Woodworking*, 38 Ohio St. 3d at 177.

And, contrary to Accel’s assertion, the BTA did *not* find that Accel’s process produced “a change in state or form.” Indeed, the BTA found that there was *no* “change in state or form” of this finished goods. See, Decision and Order at 3 (quoting *Sauder Woodworking*, 38 Ohio St.3d at 176 (“An operation which merely enhances the value of the product without producing a change in state or form does not constitute processing.”))

To avoid the clear application of the statutory requirements and the actual facts, Accel relies upon two inapplicable cases and the testimony of their proffered expert witness, who lacked expertise and credibility.

First, Accel cites to *Pretty Products, Inc. v. Limbach*, 5th Dist. Coshocton No. 85-CA-10, 1985 Ohio App. LEXIS 9344 (Nov. 15, 1985). This decision is of no use for this appeal. The

opinion is an unpublished Court of Appeals decision with *no* analysis that *predates* this Court's controlling decision in *Fichtel* by 11 years.

Next, Accel relies heavily on *United States v. Dean*, 945 F.Supp.2d 1110 (C.D. Cal. 2013). This decision is of no utility in this appeal. It is a federal decision from California District Court, interpreting Treasury Regs that have no relation to the applicable Ohio statutes.

Still, Accel asserts that the Supremacy Clause of the United States Constitution somehow *required* the Board to apply to *Dean* case to this matter. Accel Merit Brief at 38. That is, Accel suggests that the BTA violated the U.S. Constitution by failing to follow the decision in *Dean*. This argument is so off-base that it is difficult to conjure a response. Suffice it to say, in this Ohio sales and use tax appeal, the BTA was not required by the U.S. Constitution to follow a decision of a California District Court on US Treasury Regs as applied to a different taxpayer for federal income tax purposes.

Dean is not even persuasive authority. The Treasury Regs at issue in *Dean* are not analogous to Ohio's statutes. In *Dean*, the federal government sued various individual income taxpayers in a federal district court to recover allegedly over-paid refunds to a retailer. *Dean* at 1114. The legal provisions interpreted by the federal district court were from the Internal Revenue Code and the Treasury Regs. *Dean* at 1115, 1117-1119. In contrast, this appeal concerns Ohio statutes and relative to a use tax assessment by the Ohio Tax Commissioner. There are no federal income tax questions in this appeal. And Accel is not a retailer

The individual taxpayers in *Dean* claimed that the income was properly deducted under Section 199 of the Internal Revenue Code, which allows a taxpayer to deduct a specified percentage of "qualified production activities income." IRC. § 199(a)(1)(A). In turn, "qualified production activities income" is derived from the taxpayer's "domestic production gross receipts"

less, among other things, certain expenses for the costs of “qualifying production property, which was manufactured, produced, grown, or extracted by the taxpayer.” § 199(c)(4)

Section 199 does not define “manufactured, produced, grown, or extracted” (“MPGE”). Treasury regulations do, define the term as ““manufacturing, producing, growing, extracting, installing, developing, improving, and creating [qualified production property (“QPP”)]; making QPP out of scrap, salvage, or junk material as well as from new or raw material by processing, manipulating, refining, or changing the form of an article, or by combining or assembling two or more articles.”” *Dean* at 1115 (quoting Treas. Reg. § 1.199–3(e)(1), 26 C.F.R. 1.99–3 (2006)).

As the Court in *Dean* noted, the Treasury regulation provides a “broad” definition of MPGE. *Dean*, 945 F. Supp. 2d at 1115-16. Ohio’s statutes, on the other hand are more narrow and Ohio construes its tax exemption statutes narrowly. *National Tube*, 157 Ohio St. 407.

Under its own terms, the Treasury Regulation in *Dean* can be satisfied by “changing the form of an article” OR by “manipulating,” “combining,” or “assembling two or more articles.” Accordingly, “assembling” under the Treasury Regulation means something less than “changing the form of an article.” In stark contrast, Ohio’s sales tax exemption for materials used in manufacturing *require* a change in state or form of the finished goods, whether “manufacturing,” “processing,” or “assembling” is involved. *Sauder Woodworking*, 38 Ohio St.3d at 177.

Regardless of any possible persuasive value of *Dean*, this Court need not resort to persuasive authority. Binding Ohio statutes and precedent provide the applicable legal framework for resolving this matter of Ohio sales and use tax law. *See, e.g.*, R.C. 5739.02; *Fichtel & Sachs*, 2006-Ohio-246 at ¶ 36, *General Mills, Inc. v. Limbach*, 35 Ohio St.3d 256 (1988); *Sauder Woodworking*, 38 Ohio St.3d at 177; *Scholz Homes*, 25 Ohio St.2d at 72; *Express Packaging, Inc., v. Limbach*, BTA No. 89-K-22, 1992 WL 236077 (Sept. 18, 1992). This

Court's precedent is directly on point is controlling, and therefore outweighs any persuasive value of the California District Court's opinion.

Proposition of Law No. 5:

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

A. The employment services exclusion requires, as a threshold, a contract for employment services that meets the statutory elements set forth at R.C. 5739.01(JJ)(3), including "permanent" assignment. The Accel/Resource Staffing contract does not contain the statutory elements necessary to claim an exclusion from taxation.

Accel cannot demonstrate that its leased employees were "permanently placed" and therefore are excluded from sales tax.

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

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

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

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

R.C. 5739.01(JJ)(3); *H.R. Options*, 2004-Ohio-1 at ¶ 18. These statutory requirements are the bare minimum that parties must express in their contracts for employment services. *Id.*

As this Court has explained, "[t]he word 'specify,' * * * means 'to mention specifically; to state in full and explicit terms; to point out; to tell or state precisely or in detail; to particularize; or to distinguish by words one thing from another.' * * * And * * * 'specify' is

[also] defined as ‘to mention or name in a specific or explicit manner; to tell or state precisely or in detail.’” *Queen City Valves v. Peck*, 161 Ohio St. 579, 583, (1954) (quoting Black’s Law Dictionary (4 Ed.), and 39A Words and Phrases, Specify, 469; and Webster’s New International Dictionary (2 Ed.)).

Accel admits that the contract in this record doesn’t “specify” or even suggest a term on “permanence.” So, Accel proposes that this Court overlook that fact for two reasons. First, Accel claims that the “intent” of the parties was for permanent assignment and that intent should control. Second, Accel contends that this Court should find that the BTA erred in not admitting a subsequent amendment to the contract, produced on the date of hearing, and offered by the labor provider, who agreed to indemnify Accel from sales tax. Accel is wrong on both fronts.

But only if the contract *specifies* that employees are permanently assigned, is it appropriate to conduct an inquiry into the actual facts and circumstances of the employment relationship. *H.R. Options*, 2004-Ohio-1 at ¶ 21, 22.

Inquiry into the facts and circumstances of an employment relationship occurs *only after* the statutorily required threshold provisions are met. See, e.g., *Bay Mechanical*, 2012-Ohio-4312 at ¶ 19; *H.R. Options*, 2004-Ohio-1 at ¶ 18. This is to ensure that the actual performance of the contract is consistent with the statute’s requirements. *Id.* In other words, a statutorily compliant underlying employment services contract must exist, with which to compare the subsequent actual performance. Without a statutorily compliant underlying contract, there is no basis upon which to make any comparisons.

The Court’s test is therefore designed to prevent taxpayers from claiming exclusion from tax by creative tax planning, and to test whether parties are truly entitled to tax exemption.

Accel seeks to ignore the statutory requirements, and suggests that a contract need not even specify permanence to support a claim of tax exclusion.

Accel asks this Court to flip the inquiry on its head, and to allow the intent of the parties and the facts of the assignment to supply missing contractual terms. This Court has never, as Accel asks it do here, allowed the “intent” of the parties to substitute for the actual terms of the contract. Nor has this Court looked past the contract into the actual facts of employees’ assignments, except to *confirm* that the parties are actually carrying out the terms of the agreement. And, indeed, this Court has rejected previous attempts to inject “intent” into the analysis. *H.R. Options*, 2004-Ohio-1 at ¶ 20.

Accel does nothing to rebut this premise. Instead, Accel merely continues to argue that it always intended to have permanent employees. Even so, the only evidence in this regard was not documentary or contractual, but merely more of the same, self-serving testimony. It was error for the BTA to consider the parties’ intentions, and that error is reversible.

Accel cites *Bay Mechanical* for the proposition that no “magic words” are necessary in a contract to demonstrate permanence of employees under R.C. 5739.01(JJ). But Accel has the standard backwards. Indeed, what this Court actually holds is that the contractual language must be *specific* with regard to permanence or at least indefiniteness: “When the Tax Commissioner’s agents examine an employment contract, they must be able to determine at that time whether an employee has been assigned on a permanent basis.” *H.R. Options*, 2004-Ohio-1 at ¶ 22. What the *Bay Mechanical* Court meant by “no magic words” is that when a contract does specify permanence, the “magic words” of “permanent employment” are not enough – the actual facts and circumstances of each employee’s engagement must be examined to ensure that it is consistent with the permanent term in the contract. It doesn’t work the other way around, as

Accel suggests. If the contract fails to state or suggest permanence, then it fails the express terms of R.C. 5739.01(JJ) and no further inquiry into the facts of the employment is warranted.

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

The contract between Accel and Resource Staffing does not meet both of the elements set forth in R.C. 5739.01(JJ)(3) to be eligible for the employment services exclusion. The contract does not *specify* that any employees are permanently assigned to Accel. ST at 185-192.

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

Thus, the language in the contract is not “consistent with the requirements set forth at (JJ)(3).” *Bay Mechanical*, 2012-Ohio-4312 at ¶ 19; *H.R. Options* at ¶ 22. The contract fails to comply with the statute’s requirement of specificity. Therefore, the threshold elements for exclusion have not been met, and no further facts and circumstances inquiry is triggered. R.C. 5739.01(JJ)(3); *Bay Mechanical* at ¶ 19; *H.R. Options* at ¶ 22; Employment Service, Revised February, 2007, Ohio Department of Taxation Information Release, Example C-4. Accel’s employment service purchases are statutorily subject to tax.

Accel tries to “fix” this lack of permanence by suggesting that the BTA erred and should have admitted an “addendum” (Exhibit X”) to the employment contract that first surfaced the day of hearing and was produced by the provider of leased labor, who had “skin in the game.”

The Tax Commissioner objected to Exhibit X at hearing. HT 302-03, 315, 317-20. And the Board properly struck it from the record, as explained in Counter Prop. Law 3, below. BTA Order at 4. But even if the addendum were admitted, the employment would still not be “permanent.” The facts indicate that employees were actually temporary, as explained below.

Moreover, Accel’s purported “addendum” to the employment services contract recites that “The Parties wish to add the following language in order for services to be excepted from Ohio Sales and Use Tax pursuant to R.C. 5739.01(JJ)(3).” These are just the kind of “magic words” that this Court has said will not serve to exclude leased labor from tax. Instead, the facts and circumstances of the employment relationship would still have to be evaluated to determine whether “permanence” of employment was real, or just stated to avoid taxation. “[I]n *H.R. Options*, we directed that official to look at two types of evidence when auditing a claim of exemption: (1) the employment-services contract itself, to see whether it is consistent with the requirements set forth at (JJ)(3), and (2) the facts and circumstances of the assignment, in order to ascertain whether in actual practice the assignment of the particular employees was “indefinite” in character, or whether the assignments were seasonal, substitutional, or designed to meet short-term workload conditions.” *Bay Mechanical*, 2012-Ohio-4312, ¶ 19.

3. *As established by the evidence in the record, Accel’s laborers were temporary and not “permanent” within the meaning of R.C. 5739.01(JJ)(3).*

Even if this Court sets aside the plain language of R.C. 5739.01(JJ)(3) (which requires a specified term of permanent assignment in a contract) and the clear language of the employment services contract (which lacks the necessary permanent assignment term), Accel’s purchases of employment services are taxable, because the evidence in this case demonstrates that the lease labor was “temporary” and not “permanent.”

An employee is temporary when he is “provided either as a substitute for a current employee who is on leave or to meet seasonal or short-term workload conditions.” *Bay Mechanical*, 2012-Ohio-4312 at ¶ 18. At hearing, the Tax Commissioner proved that these employees were temporary through the following evidence:

- The labor was highly seasonal and temporary. ST 12-13.
- During a month in the “busy” season, Accel had 128 laborers on payroll, but, in the slow season, that number decreased to 56. ST at 12-13.
- Only 52% of the employees who appeared on Accel’s payroll in June appeared on the payroll four months later (29 of 56). ST at 13.
- Employees changed frequently and often were employed for short periods. ST at 251.
- The amount spent on labor fluctuated with the seasons. ST at 251. Roughly 72% of the money spent on labor by Accel was during the five months from July to November. *Id.*
- Accel spent up to seven times more on leased labor during the busy retail holiday season than it did during other times of the year. ST at 256.
- Accel testified that its use of temporary labor was seasonal, rather than permanent. HT 76, 94-96.
- Accel testified that its labor need varied from project to project, and from month to month. *Id.* at 94-95.
- Accel calculated how many temporary employees were required to meet the workload needs of each specific project and would then obtain the requisite temporary labor to supplement Accel’s core group of employees. *Id.* at 94-96.
- Meeting seasonal demand is a typical function of contract packagers who serve the retail industry. HT 472-73.
- Accel’s busy season is the retail Christmas season, and retail is an inherently seasonal business, requiring the most temporary labor. HT 472-73; HT 253-57.
- Accel’s contract provides only “General Laborers.” ST at 192.
- No term of employment was provided in the contract for any employees.

Accel’s only answer to this evidence is that Resource had a “unique” business model, in which employees were attempted to be retained and replaced at Accel, whenever possible. But far from unique, this is perfectly ordinary in temporary labor assignment. Moreover, this arrangement is not reflected in the contract or any other documentary evidence. The only

evidence on this point was the testimony of biased, self-interested, and non-credible witnesses, that contradicted documents in the record.

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

Mr. Lluevers' testimony was biased, not credible, and should have been completely disregarded by the BTA:

- Mr. Lluevers admitted at hearing that he has "skin in the game," because his company had agreed to indemnify Accel if the employees were found to be taxable. HT at 333.
- Mr. Lluevers admitted that his company had its own assessments pending with the Tax Commissioner against it for exactly the same arrangements as it had with Accel for different employers. HT 336-337.
- Mr. Lluevers appeared at the BTA hearing with his own counsel (Mr. Steven Dimengo), who refused to enter an appearance on the record, but repeatedly passed notes to counsel for Accel to ask Mr. Lluevers during questioning until instructed to stop by the Board. HT 299-300; 340-341.

Mr. Lluevers's testimony was entirely self-serving, concerned only with protecting himself from liability, and was worthy of no weight whatsoever.

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

- The contract between Accel and Resource Staffing that expressly provided that “employees will be under [Accel’s] direction and control during their assignment to Client Company, and that Client Company can direct and control the employees to fulfill its business needs.” ST at 185.
- The lack of testimony or documents establishing that any so-called “supervisors” from Resource Staffing had any hand in the training, placement, responsibilities, or any other day-to-day control or supervision of the employees on the various lines.
- The contract between Resource and Accel provided for only “General Laborers,” but not “Supervisors.”

Further, the BTA’s finding in this regard was based solely on a few lines of testimony from Mr. Luevers. Nowhere in this testimony did Mr. Luevers explain how Resource Staffing “supervised” the employees at all. BTA Decision and Order at 5. Moreover, his testimony was only that Resource Staffing wished to have supervisor on hand to “control of the *quality* of the employees’ work.” HT at 288 (emphasis added). Such testimony fails to establish that the employees were not also, and more directly, under the supervision and control of Accel.

Proposition of Law No. 6:

The BTA should not allow a witness to testify as an expert when she has fudged her qualifications on her resume and lacks the requisite skill, experience, and training to testify.

The BTA gave limited value to Accel’s proffered expert witness, Mrs. Ptak’s testimony. BTA Decision and Order at 2. Still, as the Tax Commissioner set forth in his merit brief, the BTA should have gone further and should have stricken her testimony and report entirely.

The Tax Commissioner demonstrated that Mrs. Ptak misrepresented her own credentials, *in her own expert report* including:

- Listing a college degree that she doesn’t have. Mrs. Ptak says she holds a Master’s Degree in Manufacturing and Materials Management from Rochester Institute of Technology (“RIT”). Accel’s Exhibit G. But, in reality, Mrs. Ptak holds a Masters in Business Administration. HT 142.

- Mrs. Ptak said she was a “Professor” at Pacific Lutheran University. Accel’s Exhibit G. But she was not a “Professor,” either by actual job title or by the professional meaning of that word in academia. In reality, Mrs. Ptak she was “an invited distinguished executive in residence.” HT 139-40. Accel claims she was a professor “in every sense of the word.” Accel Merit Brief at 36. She is not a professor in the “actual” sense of the word or the “academic” sense of the word. HT 139-40; 359-60.
- Mrs. Ptak claimed to be the “author” of books for which she merely wrote the foreword or was a “co-author.” Accel’s Exhibit G.

All of these misrepresentations were designed to enhance Mrs. Ptak’s credibility. But they did the opposite. These misrepresentations show a witness that is willing to engage in exaggeration, misrepresentation, and who is willing to stretch the meaning of words. This appeal turns on the definition of a few key terms, such as “manufacturer.” When an expert witness is willing to bend and stretch the meaning of terms, as Mrs. Ptak did in her summary of qualifications, it indicates a total lack of reliability when it comes to her expert testimony.

Accel, in its reply, tries to rehabilitate Mrs. Ptak, but that’s not possible. In order to “fix” her misstatements, Accel must engage in the same excuse-making and “explaining” that Mrs. Ptak herself attempted on the witness stand. But Accel can’t explain away these material misrepresentations. Instead, a completely fictitious degree, professorship, and authorship of manufacturing books would be the only statement of Mrs. Ptak’s education and experience in the record, had counsel for the Tax Commissioner not done his own research, and had he not engaged in a voir dire of her credentials.

Mrs. Ptak’s “drive by” four-page expert report reinforces that Mrs. Ptak was nothing more than a hired mouthpiece. Mrs. Ptak’s study of this case consisted of merely: (1) a memo provided by legal counsel; (2) an excerpt of the final determination in this case; (3) a single definition of manufacturing from a supply-side organization (APICS’s) dictionary; (4) a cryptic and explained reference to the “Supply Chain Council (SCOR) Model;” and (5) a supervised tour

of Accel's facility. HT at 191-93, Ex. G a 5. There is no serious searching, rigorous, and academic inquiry as to whether a change in state or form of a finished good is taking place at Accel. As Dr. Clarke testified, he would not feel "comfortable as an academic" producing a report based upon such little information. HT at 559. Thus, this Court should hold that the Board erred in allowing Mrs. Ptak's report and testimony into the record.

Furthermore, Mrs. Ptak's experience and work does not qualify her to provide expert testimony on the issue of whether Accel's process results in a change in state or form of the finished goods. Mrs. Ptak did not demonstrate, through testimony or her expert report, that she contains specialized knowledge, skill, experience, training, or education regarding the physical transformation in state or form of raw materials. *See* Evid.R. 702; R.C. 5739.01(S). Nearly all of Mrs. Ptak's experience is in supply chain logistics—the pursuit of efficiency in the sourcing, purchase, transportation, storage, and use of component parts.

Mrs. Ptak does not have a degree in Engineering and she did not testify to her experience with the processes at issue in this case – the processes that transforms the state or form of raw materials into finished goods through design, testing, prototyping, and production.

Instead, all of her experience is with "supply chain" logistics – for ordering and storage of inventory – processes that largely occur prior to or alongside the transformative manufacturing or processing. HT at 371-372; 422. Her main experience and credentialing is with APICS, a self-described "supply chain" professional organization and "not" a manufacturing organization. HT at 422; Ex. B at Appx. C, 528. While supply chain concerns the movement of manufacturing inputs, or "true raw materials," it does not deal with the transformation of those "supply side" materials into finished goods. *Id.*; HT at 423-424.

Moreover, Mrs. Ptak was unqualified to discuss packaging and therefore could not discern whether Accel's operations were properly characterized as packaging operations. HT at 179-80.

For the reasons explained above, the testimony and report of Ptak are neither reliable nor probative, under this Court's precedent. *See, Our Place, Inc. v. Ohio Liquor Control Comm.*, 63 Ohio St.3d 570, 571 (1992). Accordingly, it was error for the BTA to admit it.

CROSS-APPELLEE TAX COMMISSIONER'S MERIT RESPONSE

Counter Proposition of Law No. 1:

A decision from a federal trial court in a different district, and relating to a federal statute that is dissimilar to Ohio's laws and that applies a different set of facts has no precedential value in Ohio, particularly when this Court has already issued controlling decisions on the actual Ohio law issues involved.

The Tax Commissioner has set forth why the *Dean* decision is of no value to this case in Prop. Law 4, Sec. B, above.

Counter Proposition of Law No. 2:

For sales tax purposes, a packaging operation does not qualify as a manufacturing operation simply because it borrows from manufacturing processes and concepts, such as line work and package design.

It is unclear why Accel has set this forth as a separate proposition of law, as it is already encompassed and considered in the Tax Commissioner's Third Proposition of Law, to which Accel responded. Accel's attempt at assigning this issue as its own proposition of law may be just an attempt to get a "second bite of the apple," by re-framing the same issue so that it can reply in writing a second time. The Tax Commissioner has already responded to this argument in his Third Proposition of Law.

Counter Proposition of Law No. 3:

The BTA may exclude proffered evidence for violations of its own rules, for hearsay, and for unfair surprise or undue burden on the opposing party.

Although its proposition of law is phrased in general terms, Accel's real gripe is that the BTA relied on its own rules of practice and the hearsay rule to prohibit the introduction of two documents. The Board was right to do so.

The flaws in these exhibits are manifold. The "addendum" (Exhibit X") to the employment contract and the "summary" (Exhibit Y) first surfaced one business day before hearing and were produced by the provider of leased labor, who had a vested interest in the outcome of the litigation. HT at 333 (this is the same witness whose business agreed to indemnify Accel for tax and was currently under audit for the same transactions with different clients). At hearing, the Tax Commissioner objected that the documents were inadmissible hearsay, lacked credibility and foundation, and were not disclosed in compliance with the Board's own rules or the rules of Civil Procedure. Id. at 302-03, 315-32. The BTA agreed that the documents were not produced in compliance with the Board's rules regarding discovery and disclosure of exhibits and evidence and that the exhibits were hearsay. BTA Decision at 4.

The BTA possesses the authority to prohibit the introduction of evidence as a sanction for failure to comply with its rules regarding discovery and disclosure of exhibits and evidence. Under BTA Rule 5717-1-14,² the Board can impose sanctions for violations of any other Board rule. And those sanctions include "[t]he prohibition against introducing matters into evidence in support of certain specifications of error or other parts of the notice of appeal; [and] [t]he prohibition against introducing designated matters into evidence."

² Now amended and renumbered 5717-1-15 – the amendments are not material to this appeal.

This Court has repeatedly affirmed the BTA's discretionary authority to sanction parties for non-compliance with Board rules. See, e.g., *LTC Properties, Inc. v. Licking Cty. Bd. of Revision*, 2012-Ohio-3930, ¶ 15 (BTA did not abuse discretion by denying request for continuance, because party violated BTA rules including failure to disclose witnesses and evidence timely); *HK New Plan Exch. Prop. Owner II, L.L.C. v. Hamilton Cty. Bd. of Revision*, 2009-Ohio-3546, ¶ 19 (the BTA's "decisions to [impose sanctions for abuse of discovery] or to refrain from doing so are also discretionary.").

The Board did not abuse its discretion in excluding the exhibits. Accel did not provide the documents to the Tax Commissioner in discovery. Ohio Adm.Code 5717-1-11(A)(1) (stating that discovery should be commenced promptly according to the schedule in rules 5717-1-06 and 5715-1-07). Nor were these documents timely disclosed to the Tax Commissioner under the Board's rules regarding the timing for exchange of evidence. See, e.g., Ohio Adm.Code 5717-1-06(A)(3) and 5717-1-15(I). Each of these failures is an appropriate independent basis to prohibit introduction of these documents into evidence, as is routine practice at the BTA. See *Winn v. Licking Cty. Bd. of Revision*, BTA No. 2011-130, 2013 WL 6833250, fn. 1 (Oct. 15, 2013) (exhibits not timely disclosed were not received into evidence); *Brunswick City School Dist. Bd. of Edn. v. Medina Cty. Bd. of Revision*, BTA No. 2010-A-3091, 2011-A-4190, 2012 WL 6846168, at *1 (Dec. 11, 2012)(" this board maintains the authority to curtail any abuse of the discovery process").

Curiously, Accel claims its failings are all excusable because the Tax Commissioner himself subpoenaed the records, and because they were provided one business day prior to the hearing (after business hours on the Thursday before the Monday-morning hearing).

It is of no consequence that the Tax Commissioner subpoenaed these records himself, because the Tax Commissioner did not intend to use this evidence at hearing; Accel did. If Accel wanted to use the evidence, it should have timely subpoenaed Resource itself (or, better yet, kept a copy of the contract that Accel itself purportedly signed). Still, Accel goes further and complains that the Tax Commissioner should have requested a hearing continuance to cure the late production of these documents. This argument is amazing – Accel asserts that the Tax Commissioner should have sought an extension so that Accel could cure the evidentiary and production defects in its own evidence.

Accel next advances the similarly amazing argument that BTA Rule 5717-1-15 only obligates *parties* to provide copies of exhibits that they intend to use at hearing, and that Resource could offer the documents into evidence, because it is not a party. But, of course, the Tax Commissioner did not call Resource as a witness, Accel did. And only parties to an appeal may make arguments and offer evidence. Resource could not offer the documents as evidence.

The BTA was correct to exclude the evidence on hearsay grounds as well. Although the hearsay rule is relaxed before administrative agencies, hearsay rules cannot be completely disregarded: “an administrative body, is not and should not be inhibited by the strict rules as to the admissibility of evidence which prevail in courts, yet such freedom from inhibition may not be distorted into a complete disregard for the essential rules of evidence by which rights are asserted or defended.” *Chesapeake & O. Ry. Co. v. Pub. Utilities Comm’n*, 163 Ohio St. 252, 263 (1955) (hearsay evidence was not competent or sufficient to support PUCO decision).

And, when the hearsay evidence pertains to key issues, the BTA rightly excludes this evidence. *E. Ohio Distrib. Co. v. Bd. of Liquor Control of Ohio*, 98 N.E.2d 330, 332 (10th Dist.

1950); *Almondtree Apartments of Columbus, Ltd. v. Bd. of Revision of Franklin Cty.*, No. 87AP-1216, 1988 WL 70505, at *3 (10th Dist. June 28, 1988).

As the BTA itself has explained:

We note that it has been repeatedly recognized that administrative agencies, such as the Board of Tax Appeals, are not bound by the strict Rules of Evidence. *Haley v. Ohio St. Dental Bd.*, 7 Ohio App.3d 1 (1982); *Provident Sav. Bank & Trust Co. v. Tax Commission*, 10 O.O. 469 (1931). However, the relaxation of the Rules of Evidence does not mean that an administrative agency is unlimited in the evidence upon which may properly rely. *Chesapeake & Ohio Ry. Co. v. Pub. Util. Comm.*, 163 Ohio St. 252 (1955); *Eastern Ohio Distributing Co. v. Bd. of Liquor Control*, 59 Ohio Law Abs. 188 (1950); *Almondtree Apartments of Columbus, Ltd. v. Bd. of Revision*, B.T.A. Case No. 87AP-1216 (Jun. 28, 1988) unreported. *5.

David H. Peterson, dba Creative Images v. Tracy, BTA No. 1991-K-367, 1993 WL 242257

(June 25, 1993) at *4-5. The Board went on to explain the reasons for the rule:

[The declarants] were not present at hearing and were not available to answer questions under oath which may have been posed by either opposing counsel or this Board. * * * the Tax Commissioner should not be denied an opportunity to ask questions of individuals whose statements pertain to key issues presented in an appeal.

Id. Hearsay statements are generally inadmissible. Evid. 802. “Hearsay” is defined as a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Evid.R. 801(C). A “statement” is an oral or written assertion. Evid.R. 801(A). (Emphasis added.) A “declarant” is a person who makes the statement. Evid.R. 801(B).

Mr. Lluberes brought multiple documents with him to the hearing and Accel attempted to introduce these documents into evidence. HT at 302-03. The first document, marked as Appellant’s Exhibit X, was purportedly an amendment to a leased labor agreement between Accel and Resource Staffing, signed by Accel’s H.R. Director Laurie Junk. Appellant’s Exhibit

X. Accel's counsel questioned Mr. Lluberer on Exhibit X to demonstrate that a change to the contract between Accel and Resource Staffing took place. HT at 319-321.

The second document, marked as Exhibit Y, is a summary of Resource Staffing's employees assigned to Accel, purportedly created by the accounting department at Resource Staffing. HT 322-23. Mr. Lluberer asserted on the stand that Exhibit Y accurately listed all 647 Resource Staffing employees assigned to Accel between 2005 and 2011. HT at 325. In addition, Accel elicited testimony from Mr. Lluberer, based on Exhibit Y, intending to support Accel's proposition that Resource Staffing employees were assigned to Accel on a long-term basis. HT at 326. Both documents were generated at Resource Staffing's Florida office. HT at 302. These documents are statements made by out-of-court declarants, and were offered to prove the truth of their contents. As such, they are inadmissible hearsay.

Although the hearsay rule is subject to many exceptions, no exception applies in this case. See Evid.R. 803-05. In particular, Accel cannot claim the business records exception. For the business records exception: "(1) the record must be one recorded regularly in a regularly conducted [business] activity, (2) a person with knowledge of the act or event recorded made the record, (3) the record was recorded at or near the time of the act, and (4) the party seeking to introduce the record must lay a foundation through testimony of the record custodian or some other qualified witness." Evid.R. 803(6); *State Farm Mut. Auto. Ins. Co. v. Anders*, 2012-Ohio-824 (10th Dist. 2012) (citing *State v. Davis*, 2008-Ohio-2, ¶ 17). Neither Exhibit X nor Exhibit Y meets the requirements for the business records exception.

Exhibit X fails the fourth prong of the business records exception. The business records exception requires authentication by a witness who is either a records custodian or a qualified witness. See Evid.R. 803(6); 901(A). A "qualified witness" is someone with "enough

familiarity with the record-keeping system of the business in question to explain how the record came into existence in the ordinary course of business.” *State v. Hood*, 2012-Ohio-6208, ¶ 40.

Mr. Lluberres provided no foundation for the creation or preservation of the document, nor his personal knowledge of the document. The document was signed by Ms. Junk of Accel, not Mr. Lluberres. *Id.* Mr. Lluberres was not the records custodian of the document. He has no knowledge of the creation, maintenance, or purpose of the document; he could only speculate. *Id.* Therefore, a foundation for the document was not established by a testifying records custodian or qualified witness and the business records exception cannot apply.

Exhibit Y fails to meet the first and fourth prongs of the business records exception. Exhibit Y is a document prepared by the accounting department at Resource “at the direction of Mr. Lluberres.” HT at 322. It was prepared in response to subpoena and was not a regularly kept record of Resource’s business. *Id.* Furthermore, the document was prepared by the accounting department but was introduced into evidence through the testimony of Mr. Lluberres, who did not have personal knowledge of the underlying facts or data presented in the exhibit, and therefore could not provide a foundation for its introduction. *Id.* Because the document was not a record regularly kept in the course of business activity, and because a foundation for the document has not been established by a testifying records custodian or qualified witness, Exhibit Y is inadmissible as hearsay and not subject to the business records exception.

In addition, Exhibit Y fails under the summary document exception to the hearsay rule. Summary documents may be admitted in hearings in place of voluminous writings, but only when the originals are available for inspection by the opposing side. Evid.R. 1006. In this case, the underlying documents from which the summary was generated were never made available to the Tax Commissioner, or even ever identified (although Accel belatedly tries to do so now,

before this Court). Therefore the summary document exception to the hearsay rule is not available to Accel.

Moreover, the BTA knew that Resource had significant incentive to provide testimony and documentation favorable to Accel—Resource is currently under audit by the Department of Taxation in its own right based on the same contracts at issue in this case, and Resource is also contractually obligated to indemnify Accel in the event tax is due on the employment services. HT 333-34. Thus, the BTA appropriately viewed these documents as incompetent, unreliable hearsay, and appropriately excluded them from evidence. For all of those reasons, the Board properly refused to admit Accel’s Exhibits X and Y.

Counter Proposition of Law No. 4:

The BTA correctly determined that the evidence in this appeal conclusively established that Accel’s lease of labor from Manpower was taxable. The Tax Commissioner’s findings are upheld by the BTA unless the challenger affirmatively proves that the Tax Commissioner’s findings were unreasonable or unlawful.

In order to be entitled to the exclusion for permanent leased labor, R.C. 5739.01(JJ)(3) expressly requires a written agreement. The statute requires “a contract of at least one year between the service provider and the purchaser that specifies that each employee covered under the contract is assigned to the purchaser on a permanent basis.” R.C. 5739.01(JJ)(3). And of course, a written agreement is the only valid expression of a contract for more than one year. Indeed, under Ohio’s Statute of Frauds (R.C. Chap. 1335), a contract for more than a year must be in writing. R.C. 1335.05. Thus, Accel and Manpower don’t even have an enforceable agreement at all under Ohio law.

Furthermore, as this Court explained in *H.R. Options* “When the Tax Commissioner’s agents examine an employment contract, they must be able to determine at that time whether an employee has been assigned on a permanent basis.” *H.R. Options*, 2004-Ohio-1 at ¶ 22.

Naturally, the Tax Commissioner's agents need a written agreement to make a neutral evaluation of the employment relationship of the parties. *See, e.g., Arga Co. v. Limbach*, 36 Ohio St.3d 220, 222 (1988). Accordingly, Accel's relationship with Manpower cannot be properly evaluated without a written agreement, as a matter of law.

In a case that predates this Court's holdings in both *H.R. Options* and *Bay Mechanical*, the BTA held that an employment contract need not be in writing. *Excel Temporaries, Inc., v. Tracy*, BTA No. 1997-T-257, 1998 WL 775284 (Oct. 30, 1998) at *4. The Tax Commissioner submits that the BTA was incorrect, for the reasons expressed above.

In any event, Accel cannot avail itself of the limited exception to a written contract in *Excel Temporaries*. In *Excel Temporaries*, the BTA held that "[w]here a taxpayer relies upon an oral contract to claim an exception under R.C. 5739.01(JJ)(3) it is still necessary for that taxpayer to come forward with more than the mere assertion that personnel were assigned permanently." *Id.* In Accel's case, "strong corroboration" of the contract is absent. The only "evidence" referred to by Accel is the self-serving affidavit of Accel's CEO – an affidavit that was already in the records, because it had been submitted to the Tax Commissioner. *See*, ST at 196-197. Nor did Accel offer any new evidence to the BTA.

Accel could not merely rest on the record in this case. Instead, Accel has to come forth with some positive evidence at the BTA to demonstrate error in the Tax Commissioner's findings. As this Court has explained, "the onus is on the taxpayer to show that the language of the statute 'clearly express[es] the exemption' in relation to the facts of the claim." *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102, 104 (1990). Further, "before the BTA, '[t]he Tax Commissioner's findings are presumptively valid, absent a demonstration that those findings are clearly unreasonable or unlawful.'" *Bay Mechanical*, 2012-Ohio-4312 at ¶ 16 (internal citations

omitted). In light of Accel's failure to provide any new evidence, the BTA was duty-bound to affirm the findings of the Commissioner with regard to Manpower. Moreover, even if there was an "oral" contract, it would not meet the statutory requirement of a contract for one year or more. R.C. 5739.01(JJ)(3). Indeed, there is merely an affidavit that states that the parties "contemplated" an agreement of more than a year, not that they "had" an agreement. ST at 196.

And despite Accel's claims, the Tax Commissioner did introduce comprehensive evidence that Manpower's provision of labor was for temporary employment, through the same testimony and documents produced regarding Resource Staffing. See, Prop. Law 5, Sec. A.3. Accordingly, the BTA properly determined that the labor provided by Manpower was taxable.

Counter Proposition of Law No. 5:

The BTA appropriately allowed qualified expert witness testimony on the academic and industry definitions of the term "packaging," a term that is undefined in the relevant statutes.

At hearing, the Tax Commissioner objected to the credibility and qualifications of Accel's proffered expert witness. In a tit-for-tat move, Accel has raised an issue with the Tax Commissioner's own expert witness, but not on his qualification or credibility. Instead, Accel rests its challenge solely on the notion that the Tax Commissioner's expert was not "aware" of the definition of "packaging" in the Revised Code. See Accel Merit Brief at 19-20, 46-48. But Accel's attempt is wrongheaded. Accel misunderstands the role of expert witnesses and cites no case, statute, or rule, for the untenable legal proposition that it advances (it cannot, because there is no support for Accel's position in the law, as explained below).

Accel seems to believe that the sole function of an expert witness is to testify as to the meaning of a statute under Ohio law. On this basis, Accel claims that Dr. Clarke's testimony should have been stricken. Accel Merit Brief at 19-20, 45-48.

Accel's position is legally untenable. An expert witness does not say what the law is. Instead, it is up to the Board, as the trier of fact, to state the law, and to determine the weight to be given to Dr. Clarke's expert testimony and to his conclusions relative to the law. *Schnipke v. Safe-Turf Installation Group, LLC*, 2010-Ohio-4173, (3rd Dist. 2010); *Knowlton v. Schultz*, 2008-Ohio-5984, (1st Dist. 2008). As such, Dr. Clarke was provided as an expert with regard to packaging and manufacturing, and his job was to relate the facts as he understood them with his particular experience and expertise, and it was up to the Board to find the correct legal understanding of the statutes and to apply Dr. Clarke's testimony thereto, as it saw fit.

Indeed, it would not have been appropriate for Dr. Clarke to provide the Board with the legal definition of the word "packaging." See, e.g., *Kraynak v. Youngstown City School Dist. Bd. of Edn.*, 2008-Ohio-2618 ¶ 20-21; *Roy, et al. v. Gray, et al.*, 2011-Ohio-357, ¶ 16 (1st Dist 2011); *State ex rel. Simmons v. Geauga Cty. Dept. of Emergency Serv.*, 131 Ohio App.3d 482, 493 (11th Dist. 1998); *Sikorski v. Link Elec. & Safety Control Co.*, 117 Ohio App.3d 822, 831 (1997). (expert testimony on the meaning of statutes is an improper use of expert testimony).

Instead, it is within the sole province of the Board (and this Court on appeal) to provide the construction and interpretation of the applicable law. *Am. Energy Corp.*, 174 Ohio App.3d at ¶ 91; *Wagenheim*, 19 Ohio App.3d at 19. It is the duty of the tribunal to know the law and to apply it to the facts observed by the expert.

As explained above, Accel provides an imaginary standard for the "relevance" of an expert witness' testimony. See Prop. Law 3, Sec. B.3, above. Expert testimony is not adjudged as "relevant," because the expert provided a "legal definition," as Accel claims. Instead, as this Court has explained, expert testimony is "relevant" when "it logically advances a material aspect of the proposing party's case." *Terry*, 2007-Ohio-5023, ¶ 26 (internal quotations omitted).

And, “to be admissible, the expert testimony must assist the trier of fact in determining a fact issue or understanding the evidence.” *Miller*, 80 Ohio St.3d at 611. Relevant expert testimony is “favored” when the expert is qualified. *Nemeth*, 82 Ohio St. 3d at 207.

Not only is Accel’s position legally untenable, it also starts with two false premises: (1) Accel incorrectly posits that there is a statutory definition for “packaging” for sales and use tax law found exclusively in R.C. 5739.02(B)(15); and (2) Accel incorrectly avers that Dr. Clarke was not aware of that standard. Both premises are demonstratively false.

As set forth exhaustively in Prop. Law 3 above, there is no single definition of “packaging” found in the sales and use tax statutes. The definitional section of the sales tax law, R.C. 5739.01, has no direct definition of “package.” In contrast, there are 26 instances of the word “package,” whether used as a verb or noun, in R.C. Chapter 5739. Additionally, this Court has, on numerous occasions, elaborated on the meaning of the word, and qualities and functions of packaging for purposes of Ohio tax law.

But for Accel, “the definition of “packaging under Ohio law,” is exclusively the definition in R.C. 5739.02(B)(15) that “ ‘[p]ackaging’ means placing in a package.” HT at 522-525. Although Accel omits to mention the remaining part of that definition, “ ‘[p]ackages’ includes bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings.” *Id.* As explained in Prop. Law 3 above, the definition in R.C. 5739.02(B)(15) applies to that statute alone, not the whole of the sales and use tax chapters of the Revised Code.

Even if Accel was right that R.C. 5739.02(B)(15) is the only possible definition of packaging, Dr. Clarke’s testimony would still be relevant, because his observations were applicable to the definition in R.C. 5739.02(B)(15) in a way that was relevant to the BTA, as finder of fact, in weighing the evidence and applying it to the law.

On more than one occasion Dr. Clarke testified that the operations at Accel included placing items in a package and that Accel's packaging materials included "wrapping" and "containers" such as shrink wrap, bubble wrap, baskets, and shipping cases. HT at 545-548; HT 472. Dr. Clarke's written report expresses the opinion that Accel's cosmetics set wrapping "is a common packaging function." Ex. B at 13.

Also, relevant to the issue of whether there was a "change in state or form" of the finished goods, Dr. Clarke testified that no change in state or form of the finished goods occurred as a result of Accel's packaging operations, because Accel simply receives the gift baskets whole as a kit for assembly, and merely wraps them for the packaging functions of shipping and shelf display. HT at 452, 465-466, 475-477, 491-492, 495, 545-548; Ex. B at 13-15, 16-20.

Second, as Dr. Clarke confirmed in both his report and in his testimony, he *did* consider the relevant statute – R.C. 5739.02 - (of which (B)(15) is a subpart) in connection with his expert report. HT at 461. Dr. Clarke also testified that he had reviewed cases that interpret and apply R.C. 5739.01 and 5739.02 and the relevant definitions of "packaging." HT 460-62. Counsel for Accel knew that Dr. Clarke considered and was provided with copies of R.C. 5739.01 and 5739.02, because, prior to the BTA hearing, counsel for the Tax Commissioner disclosed to Accel copies of all documents that had been shared with Dr. Clarke, including copies of R.C. 5739.02 and 5739.01. See, TC's BTA Post-Hearing Brief at Ex. A. Thus, counsel's contention that Dr. Clarke had not considered the Ohio definition is simply wrong.

Accel's tit-for-tat attack on Dr. Clarke is based solely on the cross-examination of Dr. Clarke, in which Accel's counsel attempted to ambush Dr. Clarke by asking him to name the legal definition of packaging in Ohio. HT 521-527. Counsel for the Tax Commissioner objected to opposing counsel's failure to clarify which definition he was referencing. *Id.* at 522. When

Dr. Clarke asked for clarification as to which definition Accel's counsel meant, Accel's counsel refused. *Id.* When Dr. Clarke asked Accel's counsel to narrow the scope of the statutory world he was referencing, counsel would not. *Id.* Had Accel's counsel actually stated which definition it was referring to, Dr. Clarke would certainly have been able to explain how that definition related to the facts he observed. HT at 561-565.

On redirect, the Tax Commissioner established that Dr. Clarke had read the applicable statutes, the legal precedent, and that those meanings were consistent with his professional understanding of the word "packaging." *Id.* In reality, the questioning by Accel of Dr. Clarke on this point was merely an attempt to get a "sound bite" for its brief.

Counter Proposition of Law No. 6:

The Tax Commissioner correctly issued an assessment against Accel before January 1, 2008. Moreover, and in any event, the Tax Commissioner's assessment was issued prior to the effective date of R.C. 5703.58.

Accel claims that the Tax Commissioner improperly assessed Accel for tax years prior to January 1, 2008, citing to R.C. 5703.58(B) which provides, in part: "The commissioner shall not make or issue an assessment against a consumer for any tax due under Chapter 5741. of the Revised Code, or for any penalty, interest, or additional charge on such tax, if the tax was due before January 1, 2008."

Accel's argument never gets off the ground, because this part in the statute was added by an amendment and was effective on September 29, 2011, a date *after* the Tax Commissioner issued the assessment in this case. See, 2011 Am. Sub. H.B. 153, Section 101.01. (Adding the entire text of Subdivision (B) and renumbering former Subdivision (B) to Subdivision (C)).

The Tax Commissioner assessed Accel on January 18, 2011 (see ST at 51), and R.C. 5703.58(B) wasn't effective September 29, 2011. Therefore, as the BTA correctly observed,

because the Tax Commissioner assessed Accel prior to the effective date of R.C. 5703.58(B), it does not apply to this assessment. BTA Decision at 5. In order to avoid this fatal flaw, Accel argues that the assessment wasn't "issued" until the Tax Commissioner sent "written notice" of his Final Determination to Accel on June 26, 2012. See Accel Merit Brief at 48-49.

Accel is simply wrong. The assessment was issued on January 18, 2011, as is established in the Statutory Transcript at 51. Indeed, Accel filed a "Petition for Reassessment" based upon its receipt of this assessment on March 18, 2011, signed by Accel's CEO and attaching a copy of the Notice of Assessment that it received. See ST at 49-223.

Accel cites *Carstab* in support, but that decision actually strongly supports the Tax Commissioner. *Carstab Corp. v. Limbach*, 40 Ohio St.3d 89 (1988). First, *Carstab* involved the Commissioner's "making and issuing" of tax *assessments*, rather than his issuing of *final determinations*. *Id.* at 90. Thus, Accel's position that the final determination was "written notice" is actually directly contravened by the *Carstab* opinion, wherein the assessment was considered the "written notice." *Id.* Specifically, this Court defined "issues" as follows: "the commissioner 'issues' notice of the assessment when she 'gives' notice to the assessee." *Carstab*, 40 Ohio St.3d at 90. The Court then held that the Commissioner's mailing of the assessments to the taxpayer assessee by certified mail constituted "issuing" the assessments on the date of mailing. *Id.*

Still, Accel goes a step further and argues that an "assessment" is not an "assessment," but instead a "final determination" is an "assessment." Accel Merit Brief at 49. Accel's argument is foreclosed by the plain language of R.C. 5703.58, which says "assessment," not "final determination." And, in the use tax context, the General Assembly knows the difference between the Tax Commissioner issuing an "assessment" (R.C. 5741.13) and the Tax

Commissioner issuing a “final determination” (R.C. 5703.60). The assessment statute, R.C. 5741.13 confirms what is meant by “making” or “issuing” of the “assessment.” Further, R.C. 5703.60, which relates to final determinations uses both the terms “assessment” and “final determination,” sometimes even in the same sentence. See, e.g., R.C. 5703.60(D). This Court should presume that the General Assembly intended to use the words it actually did use in the statute, and not some other word.

Counter Proposition of Law No. 7:

When a party fails to present any evidence and meaningfully argue an issue before the Board of Tax Appeals, waiver applies, and that party is barred from raising such claims on appeal to this Court.

At the end of its Merit Brief, Accel gratuitously asserts that this Court should remand the case for the BTA to consider Accel’s “alternate grounds” for tax exemption (not in a proposition of law or assignment of error). This Court should not remand, for several reasons.

First, Accel abandoned any “alternative” arguments. Although Accel assigned “alternative grounds” as error in its appeal to the BTA, it failed to argue them in briefing or to introduce evidence relevant to them thereafter. Accel’s BTA Merit Brief contains no mention of these alternative grounds (other than the one issue discussed below). And, Accel introduced no evidence at the BTA in support of these alternative grounds. Nor is there any legal argument that would tie these alternative grounds to any facts in the record. See, e.g., *Haljo, Inc., et al. v. Limbach*, BTA No. 1989-B-945, 1992 WL 236075 (Sept. 18, 1992) at *8.

Similarly, Accel stated alternative grounds on appeal to this Court, but its 50-page merit brief is devoid of any legal or factual discussion of these issues. Accordingly, Accel is not entitled to a remand to have the BTA consider arguments that it abandoned when it had the chance. *Bicknell v. Evatt*, 140 Ohio St. 492, 493 (1942); *State v. Greer*, 39 Ohio St.3d 236, 248

(1988) (a proposition of law that “was neither briefed nor argued before the court of appeals * * * is accordingly waived and our consideration thereof is barred by the doctrine of res judicata.”)

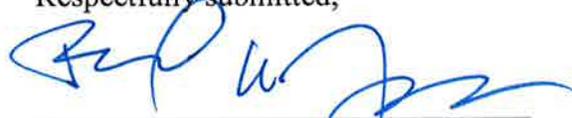
Second, its “remand request” was not raised in its notice of appeal to this Court pursuant to R.C. 5717.04. Accel did assign as error that the BTA “failed to find” that Accel was entitled to the resale exemption in R.C. 5739.01(E) in its Notice of Appeal to this Court. See Accel Notice of Appeal at 6. But Accel did not assign error with the BTA’s “failure to consider” the argument. Accel *did not* argue that the BTA committed error by failing to *consider* the issue and that Accel was entitled to a remand on that basis. Accordingly, Accel assigned no error that will justify a remand to the BTA and this Court should simply dispose of the matter. See, R.C. 5717.04; *Queen City Vales*, 161 Ohio St. 579.

Furthermore, the only “alternative” argument that Accel even mentioned at the BTA is foreclosed by well-settled authority. In a few paragraphs in its BTA brief, Accel argued that that Accel “resold” the benefits of its leased labor, through the packaged gift sets. But this Court has already decided this very issue and concluded that resale exemption does not apply to leased labor. *Bellemar Parts Industries, Inc. v. Tracy*, 88 Ohio St.3d 351 (2000). When a consumer contracts for temporary employees to add to its work force, the benefit of the service is the labor of the employees, not the product of their work. Thus, this Court can summarily reject Accel’s “alternate” argument without the need for a remand.

CONCLUSION

For those reasons, the Tax Commissioner requests that this Court reverse the BTA and affirm the Final Determination of the Tax Commissioner.

Respectfully submitted,



DANIEL W. FAUSEY (0079928)*

Assistant Attorney General

**Counsel of Record*

30 East Broad Street, 25th Floor

Columbus, Ohio 43215-3428

Telephone: (614) 995-9032

Facsimile: (866) 521-9935

daniel.fausey@ohioattorneygeneral.gov

Counsel for Appellant/Cross-Appellee

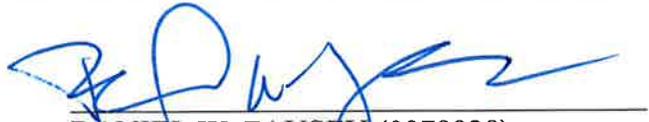
Joseph W. Testa, Tax Commissioner of Ohio

CERTIFICATE OF SERVICE

I hereby certify that the foregoing *Merit Brief of Appellant/Cross-Appellee Joseph W. Testa, Tax Commissioner of Ohio* was served upon the following by email and regular U. S. Mail on this 18 day of February, 2016:

Scott R. Poe, Esq.
Joseph G. Corsaro, Esq.
Corsaro & Associates Co., LPA
28039 Clemens Road
Westlake, Ohio 44145

*Counsel for Appellee/Cross-Appellant
Accel, Inc.*



DANIEL W. FAUSEY (0079928)
Assistant Attorney General