

**IN THE SUPREME COURT  
OF OHIO**

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

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**APPELLEE/CROSS-APPELLANT ACCEL INC.'S REPLY BRIEF  
on its CROSS-APPEAL  
(Fourth Brief)**

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**APPELLEE/CROSS-APPELLANT ACCEL INC.'S REPLY BRIEF**  
**on its CROSS-APPEAL**  
**(Fourth Brief)**

**I. INTRODUCTION.**

There are two main issues in this case: (1) whether the items Accel Inc. (“Accel”) purchases and incorporates into the gift sets it makes are exempt from use tax because Accel is engaged in a “manufacturing operation” or “assembling” rather than “packaging”; and (2) whether labor leased by Accel during the audit period is subject to use tax.

On the first issue, the Ohio Tax Commissioner (the “Commissioner”) argues that Accel is not engaged in a “manufacturing operation” or “assembling” because Accel is “packaging.” The Revised Code definitions of “manufacturing operation” and “assembling” each exclude “packaging.” So whether Accel is engaged in a “manufacturing operation” or “assembling,” rather than “packaging,” depends on the meaning of those words, which are statutorily defined. The Revised Code defines “packaging” as “placing in a package.” “Packages” include bags, baskets, etc. And this Court has explained that the primary function of a package is to contain a product for shipping and handling.

In addition to the Ohio Revised Code and Ohio case law, Accel cited *United States v. Dean*, 945 F.2d 1110 (C.D. Cal. 2013) to support the argument that it is engaged in a manufacturing operation or assembling. Prior to this case, *Dean* was (and remains) the only other case in the United States analyzing whether a taxpayer who makes gift sets is changing the state or form of the components such that it is manufacturing, not packaging.

The Commissioner attempts to downplay the significance of *Dean*, arguing that it is not even persuasive authority. The Ohio Board of Tax Appeals (the “BTA”) stated *Dean* was not persuasive,

either. But as explained below, *Dean* is persuasive authority that is helpful on determining whether Accel is engaged in a manufacturing operation or assembling, or merely packaging.

The Commissioner also relies heavily on the testimony of Dr. Robert Clarke. Dr. Clarke's testimony at the BTA hearing focused exclusively on industry and academic definitions of "packaging" and "packages." But again, the definitions of those words are already supplied by the Revised Code and by this Court. And Dr. Clarke's proffered definitions of those words would greatly expand the narrow definitions of "packaging" and "package" under the Revised Code for use tax purposes, a result not intended by the General Assembly. Because Dr. Clarke's testimony is not helpful to understand the facts, the BTA should have stricken it from the record.

For purposes of the Cross-Appeal on the leased labor, Accel argues the BTA erred in excluding certain exhibits containing material provided by one of its labor providers, Resource Staffing, Inc. ("Resource"). The exhibits were provided by a third party over which Accel had no control, and do not constitute inadmissible hearsay. On the labor supplied by the other supplier (Manpower) used by Accel, Accel argues the BTA erred in finding the transaction subject to use tax.

Accel also argues that the assessment is largely outside of the statute of limitations in R.C. 5703.58(B), which prohibits the assessment of use tax due prior to January 1, 2008. When a petition for reassessment is filed, use tax is not "due" until after the Final Determination. And because the Final Determination here was issued after the effective date of R.C. 5703.58(B), any use tax assessed in it against Accel and due prior to January 1, 2008 must be vacated.

Finally, Accel raised alternative grounds for exemption on the components it incorporates into its gift sets – that Accel is reselling the components and that Accel is engaged in making retail sales. The BTA expressly recognized, but did not entertain, them in its opinion because it found

Accel was assembling or engaged in a manufacturing operation, which was dispositive of the issue. If that finding is not upheld, these alternative grounds should be considered.

## II. CROSS-APPELLANT ACCEL INC.'S REPLY BRIEF.

### A. Cross-Appellant Accel Inc.'s Reply in Support of Proposition of Law No. 1:

**A Federal court case analyzing whether a gift set assembler is changing the state or form of components and thereby manufacturing rather than packaging for Federal tax purposes is persuasive on whether a gift set assembler is engaged in a manufacturing operation, assembling, or packaging for Ohio use tax purposes.**

In its Brief to the BTA, Accel cited *United States v. Dean*, 945 F. Supp.2d 1110 (C.D. Cal. 2013). Prior to this case, *Dean* was the only case in the United States that analyzed whether a gift set maker is engaged in manufacturing, or merely packaging. But the BTA stated that *Dean* is not persuasive, suggesting the BTA did not consider the District Court's analysis. See BTA Op. at 3. Although *Dean* interpreted the issue for purposes of the Federal domestic production deduction under Internal Revenue Code ("IRC") Section 199 (26 U.S.C. § 199), a review of the opinion makes clear that the District Court looked only at whether a taxpayer in making gift sets changes the state or form of the components such that it is manufacturing. As such, the *Dean* case is persuasive authority that the BTA should have found instructive and helpful in deciding the issues on appeal.

At issue in *Dean* was whether a taxpayer, in making gift sets,<sup>1</sup> was manufacturing or merely packaging. If the taxpayer was manufacturing rather than packaging, it would be entitled to a deduction. That is, IRC Section 199 permits a taxpayer to deduct an amount of the taxpayer's "domestic production gross receipts" derived from product that was "manufactured, produced,

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<sup>1</sup>As explained in Accel's Merit Brief, not only did the taxpayer in *Dean* make gift sets like Accel, but the testimony at the BTA hearing was that its operations were "strikingly similar" to Accel's. H.T. 205-06, 230-31.

grown, or extracted.” *Dean*, 945 F. Supp.2d at 1116-17. Treasury Regulation 1.199-3(e)(1) provides that “manufactured, produced, grown or extracted” includes “manufacturing, producing, growing, extracting, installing, developing, improving, and creating [qualifying production property] out of scrap, salvage, or junk material as well as from new or raw material by processing, manipulating, refining, or changing the form of article, or by combining or assembling two or more articles.”

The *Dean* court focused on whether the taxpayer in that case changed the form of the gift set’s component parts during its operations. 945 F. Supp.2d at 1117-18. Importantly, Treasury Regulation 1.199-3(e)(2) (similar to R.C. 5739.01(R) and (S)) states that “manufactured, produced, grown, or extracted” does not include packaging. The court in *Dean* rejected the IRS’ contention that the taxpayer in making gift sets simply provided a packaging service that added value to the final product, noting that the taxpayer’s “complex production process [is] more similar to purchasing various automobile parts from suppliers - such as the frame, engine, wheels, etc. - and assembling them to create the car itself, which is undoubtedly manufacturing.” 945 F. Supp. 2d at 1118. The court in *Dean* found the taxpayer changed the state or form of the components incorporated into the gift set to make something different, “distinct in form and purpose from the individual items inside.” *Id.* at 1117-18.

This Court has relied upon Federal authority as persuasive on similar issues under Ohio law. See, e.g., *State v. Bess*, 126 Ohio St.3d 350, 2010-Ohio-3292, ¶¶ 22, 27 (2010). The analysis employed by the court in *Dean* is virtually the same as the analysis under R.C. 5739.01(S). Both look to whether the taxpayer is changing the state or form of components by combining and assembling parts to create something new and different, and both carve out packaging. See also *Interlake, Inc. v. Kosydar*, 42 Ohio St.2d 457, 458-59 (1975). So *Dean* is persuasive.

B. Cross-Appellant Accel Inc.'s Reply in Support of Proposition of Law No. 2:

**A taxpayer who, in making gift sets, changes the state or form of individual components to create an entirely new product serving a different function than its components, is manufacturing using the traditional rationale behind the exemption.**

Although the BTA found that by making gift sets Accel was manufacturing or assembling, in dicta the BTA stated that Accel is not engaged in manufacturing as “traditionally understood” in the Ohio sales and use tax context. BTA. Op. at 3-4. As Accel previously explained in Accel’s Cross-Appeal, it is unclear what the BTA meant by this reference.

Regardless, exempting Accel’s purchases of gift set components from use tax fits the traditional rationale behind the sales and use tax exemption for manufacturing as recognized by this Court at least as early as 1944. In *Bailey v. Evatt*, 142 Ohio St. 616, 620-21 (1944), this Court noted the purpose behind the manufacturing exemption:

The primary purpose [of the sales and use tax exemption] statute here under consideration is to encourage the production of more valuable tangible personal property for sale, itself subject to sales tax, by exempting from the operation of such tax the purchases of property used and consumed by the producer in the production of such ultimate tangible personal property, and at the same time to avoid a species of double taxation.

*Id.* This rationale expressed by the Court over seventy years ago is applicable to Accel. Accel is purchasing items and incorporating them into gift sets that, when sold at a store, will be subject to sales tax. See R.C. 5739.02(C). To tax those items now would result in a second tax on them when the completed product (with the components Accel adds incorporated into it) is sold at a store. This would discourage the production of tangible personal property for sale. See 142 Ohio St. at 620-21. So exempting Accel’s operations fits the traditional rationale behind one of the exemptions at issue.

C. Cross-Appellant Accel Inc.'s Reply in Support of Proposition of Law No. 3:

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

As is set forth in Accel's Second Merit Brief, the BTA erred as a matter of fact and law in failing to admit into the record Accel's Hearing Exhibit X and Accel's Hearing Exhibit Y ("Exhibits X and Y"), which included a "First Amendment to Agreement for Employee Leasing, dated October 6, 2006" (Exhibit X), and a summary of Resource's employees provided to Accel (Exhibit Y). Exhibits X and Y both contained information highly favorable to Accel's tax exemption claims. Even without admitting Exhibits X and Y into evidence, the BTA properly found that Accel's use of Resource employees met the permanent assignment criteria for receiving a tax exemption under R.C. 5739.01(JJ)(3). If within the scope of the evidence relied upon by the BTA, there is sufficient competent evidence of probative value to support its decision, the decision is neither against the weight of the evidence nor unlawful merely because incompetent evidence has also been received. *Day Lay Egg Farm v. Union Cty. Bd. of Revision*, 62 Ohio App.3d 555, 562, (3<sup>rd</sup> Dist. 1988). Here, the BTA should not have excluded Exhibits X and Y from consideration in this matter, even though the BTA ultimately reached the correct decision on the issue of whether or not Resource employees were permanently assigned to Accel.

In his Third Merit Brief, the Commissioner argues that Exhibits X and Y should have been excluded from the evidentiary hearing either under the Rules of Evidence or under the BTA's own administrative rules. The Commissioner admits that Exhibits X and Y pertained to "key issues" – i.e., whether Resource contracted with Accel to provide permanently assigned employees and whether the employees were, in fact, permanently assigned. Comm'r Third Br. at 37. Nevertheless, the

Commissioner also admits that "...the Tax Commissioner did not intend to use this evidence at the hearing," even though it was subpoenaed by him. *Id.* The reason why the Commissioner did not plan to use Exhibits X and Y at the hearing is obvious since they further bolster Accel's position that the Resource employees were permanently assigned.

Exhibits X and Y were brought to Accel's attention by Resource's production of them to the Commissioner in response to the Commissioner's subpoena. Resource has claimed that it did not receive the subpoena until only ten (10) days before the hearing. See Accel Supp. at 39-40 (April 4, 2014 email from Daniel Fausey to Steven Dimengo, attached to "Appellant's Response in Opposition to Appellee's Motion to Strike Testimony and Documents" ("Accel's Response") as Exhibit "C"). Exhibits X and Y and other records were produced by Resource to the Commissioner four (4) days before the hearing. See Accel Supp. at 44-45 (April 10, 2014 email from Dimengo to Fausey, attached to Accel's Response as part of Exhibit "D"). Since the Commissioner chose not to use Exhibits X and Y, Accel had no choice but to introduce this newly discovered evidence at the hearing.

The Commissioner's position in his Third Merit Brief seeks to sanction Accel for using documents received by the Commissioner from a third-party in response to a subpoena. The Commissioner suggests that Accel should have produced Exhibits X and Y to the Commissioner in discovery, but wrongly presumes that they were in Accel's possession before they were produced by Resource. The section of the BTA Rules cited by the Commissioner to advocate sanctions, Ohio Adm. Code 5717-1-15, provides that failure to comply with the BTA's case management schedules may result in sanctions, including but not limited to, "(3) The prohibition against introducing designated matters into evidence." Ohio Adm. Code 5717-1-15(A)(3). The Rule goes on to say that "The repetitious nature of the disobedient party or advising attorney will be considered in determining the appropriate sanctions to

be imposed.” Ohio Adm. Code 5717-1-15(B). This Section is inapplicable to Accel since Exhibits X and Y were produced by a third party in response to the Commissioner’s subpoena, and Accel had no custody or control over those records. And Accel was not involved in ongoing discovery violations in this case, as contemplated by Ohio Adm. Code 5717-1-15(B), and was not deserving of a discovery sanction. Due to the highly probative nature of Exhibits X and Y, Accel should not have been penalized by the BTA in not admitting them into evidence. Nor should the Commissioner have been rewarded in trying to keep these records from consideration when they came to light as a result of his own subpoena.

The Commissioner also wrongly argues that Exhibits X and Y should have been excluded as inadmissible hearsay under the Ohio Rules of Evidence. The BTA has not adopted the Ohio Rules of Evidence in its rules, either by reference or otherwise. *Day Lay Egg Farm*, 62 Ohio App.3d at 559. The Commissioner admits in his Third Merit Brief that the BTA and other administrative agencies are not bound by the strict Rules of Evidence. Comm’r Third Br. at 38 (citing *Haley v. Ohio St. Dental Bd.*, 7 Ohio App.3d 1 (1982) and *Provident Sav. Bank & Trust Co. v. Tax Comm’n*, 10 O.O. 469 (1931)). However, he then incorrectly argues that the same hearsay standards set forth in the Rules of Evidence are applicable based in a case in which declarants in a document were not present to testify at a hearing. *Id.*, citing *David H. Peterson, dba Creative Images v. Tracy*, BTA No. 1991-K-367, 1993 WL 242257 at \*4-5. In the present case, Mr. Lluberes of Resource was able to authoritatively testify at the hearing as to the contents of both Exhibits X and Y, and the contents were not inadmissible hearsay.

Mr. Lluberes testified from personal knowledge about the contract language of Exhibit X, the purpose of Exhibit X, and Resource’s document management system used to maintain it in the ordinary course of business. H.T. 316-19. In so doing, Mr. Lluberes properly laid a foundation for the business records exception to hearsay as a records custodian or another qualified witness. See *State v. Davis*, 62

Ohio St.3d 326, 342 (1991) (under the business records exception, a witness need not have personal knowledge of the creation of a particular record, but must have personal knowledge of the record-keeping system and that the records were kept in the regular course of business). Exhibit X is also not hearsay because contract language possesses “independent legal significance.” See e.g., *Kelly v. May Assoc. Fed. Credit Union*, 2008-Ohio-1507, ¶ 22 (Ct. App. 9<sup>th</sup> Dist.); *Jones v. City of Warren*, 2003-Ohio-2236, ¶ 16 (Ct. App. 11<sup>th</sup> Dist.); *Stout v. M. Aron Corp.*, 1993 WL 169102, at \*8 (Ohio App. 10<sup>th</sup> Dist.); *Wade v. Communications Workers of America*, 1985 WL 10178, at \*4 (Ohio App. 10<sup>th</sup> Dist.) (“some utterances do not constitute assertions but, instead, constitute . . . the uttering of words which have independent legal significance under substantive law, such as words constituting the offer and acceptance of a contract”). Moreover, Exhibit X does not contain a statement of an out of court declarant, as alleged by the Commissioner, since Accel was a contracting party to Exhibit X and is a party to this tax appeal.

Contrary to the Commissioner’s assertions, Mr. Lluberis was also properly qualified to testify about Exhibit Y under the business records exception to hearsay since he oversaw the accounting department at Resource, instructed Resource’s accounting department to compile Exhibit Y, and testified that Exhibit Y accurately summarized every Resource employee who worked at Accel from 2005 until 2011. H.T. 322, 324-25. The Commissioner was already provided with the underlying invoices that identify the Resource employees at Accel that were summarized in Exhibit Y, and the invoices are in the record. H.T. 275-76, 323-24, 357. Exhibit Y is therefore also admissible under the summary exception to hearsay in Rule of Evidence 1006, if the Rules of Evidence are applied to this matter. *Avery Dennison Corp. v. Con-Way Transp. Services, Inc.*, 2006-Ohio 6106, ¶ 53 (Ct. App. 11<sup>th</sup> Dist.).

Exhibits X and Y should have been admitted by the BTA as part of the record because: (1) they were provided to the Commissioner at least four (4) days before the hearing; (2) they are not subject to

evidentiary rules that would exclude them; (3) excluding them unduly prejudices Accel due to their highly probative value; (4) they are not inadmissible hearsay; (5) the Commissioner is not prejudiced by admitting them; (6) they were produced by a third party over which Accel had no control, pursuant to a subpoena issued by the Commissioner, and the third party asserted it did not receive the subpoena; and (7) Accel played no part in any alleged delay in the production of them. The BTA erred in excluding Exhibits X and Y under these circumstances.

D. Cross-Appellant Accel Inc.'s Reply in Support of Proposition of Law No. 4:

**Where a taxpayer shows that its lease of labor is permanently assigned under a contract of at least one year, the lease of the labor is exempt from use tax under R.C. 5739.01(JJ)(3).**

The BTA erred in finding Accel's lease of labor from Manpower (one of Accel's labor suppliers during the audit period) was subject to use tax where the only evidence in the record is that the labor was permanently assigned under a contract of at least one year. Ohio law excludes from use tax the assignment of labor under a contract of at least one year that specifies that each employee covered by the contract is assigned on a permanent basis. R.C. 5739.01(JJ)(3). To support that Manpower permanently assigned its labor, Accel presented the Affidavit of its co-CEO, David Abraham. BTA Hearing Ex. V; Accel Supp. 16-17. Mr. Abraham's Affidavit averred that Accel and Manpower contemplated a long term relationship of at least one year, or longer. *Id.* at ¶ 3. Mr. Abraham further averred that the Manpower employees were indefinitely (i.e., permanently) assigned:

the employees were assigned indefinitely; there was no set or definitive end date for the employee's assignment to Accel, although the assigned employees were considered "at will." In fact, when requesting employees from Manpower, Accel would request those employees remain at Accel indefinitely because those employees would be trained to work at Accel and would be exposed to Accel's manufacturing processes, which it considers confidential.

*Id.* at ¶ 4; see also *H.R. Options, Inc. v. Zaino*, 100 Ohio St.3d 373, 2004-Ohio-1, ¶ 21. Indeed, Accel obtained employees from Manpower as indicated by the same reasons Accel obtained permanent employees from Resource; as Accel's CFO Dan Harms testified, Accel needed people who were trained to perform manufacturing activities for Accel to create the most productive environment. H.T. 288-89.

So Accel set forth evidence to show that it qualified for the exemption in R.C. 5739.01(JJ)(3) and that the Commissioner's finding otherwise was unreasonable, and the Commissioner did nothing to rebut it. Accel produced evidence that it specifically requested the employees be permanently assigned, and provided valid business reasons for permanent assignment (to protect confidential information, to avoid retraining employees, and to create the most productive workforce). BTA Hearing Ex. V, ¶ 4; H.T. 288-89. Although there may have been some employee turnover from Manpower as evidenced by the Manpower invoices in the record, natural turnover of at-will employees does not mean lack of permanence. See *Excel Temporaries, Inc. v. Tracy*, BTA No. 1997-T-257, 1998 WL 77 5284, \*5.

The Commissioner argues that because there is no written agreement between Accel and Manpower, Accel cannot qualify for the exemption. The Commissioner claims that R.C. 5739.01(JJ)(3) "expressly" requires a written agreement. This is incorrect, as the word "written" does not appear in that Section. So the Commissioner references the Statute of Frauds, which states that a contract that cannot be performed in one year must be in writing, citing R.C. 1335.05.

In *Excel Temporaries*, the BTA rejected the Commissioner's argument that Section 5739.01(JJ)(3) required a written agreement between the parties on the basis of the Statute of Frauds, noting that the "Statute of Frauds is not a rule of law but a rule of evidence." 1998 WL 775284, \*3 (citing *Minns v. Morse*, 15 Ohio 568 (1846)). And only a party to the verbal contract, not a stranger to it, can raise the defense of the Statute of Frauds. 1998 WL 775284, \*3; *Lefferson v. Dallas*, 20 Ohio St. 68, 74

(1870); *Leibovitz v. Cent. Nat'l Bank*, 75 Ohio App. 25, 29-30 (8<sup>th</sup> Dist. 1944); see also *Houser v. Ohio Hist. Society*, 62 Ohio St.2d 77, 79 (1980) (noting that the Statute of Frauds is an affirmative defense that can be waived by the defendant). So the Commissioner, who was not a party to Accel's agreement with Manpower, cannot raise the Statute of Frauds under R.C. 5739.01(JJ)(3).

And the Commissioner's own Information Release contemplates that parties may not have a written agreement and still qualify for the exception in 5739.01(JJ)(3). ST 1993-08, Example C2 (Rev'd Feb. 2007). As such, the Commissioner is estopped from arguing a lack of written agreement between Accel and Manpower. See *Ormet Corp. v. Lindley*, 69 Ohio St.2d 263, 265-66 (1982) (noting that while estoppel generally does not apply against the state with regard to a taxing statute, the Court has recognized an exception where a taxpayer relied on the Commissioner's own statements). So Accel's lack of a written agreement with Manpower is not fatal to the exemption.

E. Cross-Appellant Accel Inc.'s Reply in Support of Proposition of Law No. 5:

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

The BTA erred by admitting testimony from the Commissioner's expert, Dr. Robert Clarke, with respect to whether Accel is "packaging" or changing the state or form of components. Dr. Clarke's testimony at the BTA hearing focused only on whether Accel is "packaging" under academic and industry definitions. But those definitions have no bearing on this case because the Revised Code defines the terms "packaging" and "package" in R.C. 5739.02(B)(15), and because this Court has already identified the key function of a package in *Cole Nat'l Corp. v. Collins*, 46 Ohio St.2d 336, 338 (1976) and *Newfield Publ., Inc. v. Tracy*, 87 Ohio St.3d 150, 153 (1989).

Dr. Clarke's testimony should not have been admitted because it did not assist the BTA to understand the evidence or to determine a fact in issue. See *Miller v. Bike Athletic Co.*, 80 Ohio St.3d 607, 611, 1998-Ohio-178. There is no dispute as to what Accel does. Instead, Accel and the Commissioner disagree over whether Accel's operations fit the definition "packaging" on the one hand, or "manufacturing operation" or "assembling" on the other. But Dr. Clarke cannot testify on Ohio's legal definitions of "package" and "packaging." See Comm'r Third Br. at 44 (citing cases). Dr. Clarke also testified that he was not aware of the statutory definitions of those terms. H.T. 521-27. Regardless, testimony on whether Accel fits industry or academic definitions of "packaging" and "package," definitions that differ from and are far broader than those in the Revised Code and provided by this Court, is irrelevant because it does not logically advance the question of whether Accel is "packaging" under Ohio use tax law. See *Terry v. Caputo*, 115 Ohio St.3d 351, 2007-Ohio-5023, ¶ 26.

The Revised Code definitions of "manufacturing operation" and "assembly" expressly exclude "packaging." R.C. 5739.01(R) and (S). "Packaging" means "placing in a package." R.C. 5739.02(B)(15). "Packages" include "bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings, and other similar devices and containers, but does not include motor vehicles . . ." *Id.* And this Court has stated that "[f]acilitating shipping and handling of products is the exact function and purpose of a package." *Newfield Publ., Inc.*, 87 Ohio St.3d at 153.

Dr. Clarke supplied overly broad industry and academic definitions of "package" and "packaging." As Dr. Clarke admitted under these broad definitions, "virtually every market, every product created" could constitute packaging or a package, even a car. H.T. 363, 543-44. But by definition under Ohio law, a car does not constitute a package. R.C. 5739.02(B)(15). Dr. Clarke also testified that under industry and academic definitions packages can serve multiple functions, including containment,

protection, communication, utility, or convenience. H.T. 472. Dr. Clarke testified that a marketing function is a packaging function, and that Accel's gift set components serve the function of "communicating the ambience of the gift set . . . could I take all of these and put them in a smaller pack and efficiently ship it . . . ? Sure. But that denigrates the gift appeal." H.T. 366, 490, 492, 494-95. Yet this Court has already said that an object that restrains movement but primarily serves a marketing, or communication, function is not a package. *Cole Nat'l Corp.*, 46 Ohio St.2d at 338.

Dr. Clarke's testimony is also not helpful to the legislative meaning of the word "packaging." When words have a technical meaning through legislative definitions such as "packaging" and "package" here, the words are to be construed in accordance with the definitions. R.C. 1.42;<sup>2</sup> *Montgomery Cty. Bd. of Comm'rs v. Publ. Util. Comm'n*, 28 Ohio St.3d 171, 175 (1986); see also *Tenn. Protection & Advocacy, Inc. v. Wells*, 371 F.3d 342, 349-50 (6<sup>th</sup> Cir. 2004) ("it is well settled law that when a statutory definition contradicts the everyday meaning of a word, the statutory language controls."). And because those terms are already defined, the Court must apply the plain language as written and refrain from adding words. *Risner v. Ohio Dep't of Natural Resources, Ohio Div. of Wildlife*, 144 Ohio St.3d 278, 2015-Ohio-3731, ¶ 12. So the Court must apply the definition of packaging - "placing in a package" - to mean just what it says, and look at Accel's operations through that very limited definition rather than Dr. Clarke's. R.C. 5739.02(B)(15); *Newfield Publ., Inc.*, 87 Ohio St.3d at 153 ("we will not require more qualifications for an exemption than the General Assembly does."). Indeed, had the General Assembly intended for the broad definitions used by Dr. Clarke, it would have said so. See 28 Ohio St.3d at 175.

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<sup>2</sup>The Commissioner cites Justice Kennedy's dissenting opinion in *Apple Group, Inc. v. Granger Twp. Bd. of Zoning Appeals*, 144 Ohio St.3d 188, 2015-Ohio-2343, ¶ 37 for the proposition that expert testimony can be used to give meaning to words in a statute. But there was no legislative definition of the phrase at issue in *Apple Group, Inc.* *Id.* Here there are legislative definitions of "package" and "packaging," so the case is easily distinguishable.

The Commissioner also claims that “packaging” as used in R.C. 5739.01(R) and (S) means something different than “packaging” as defined in R.C. 5739.02(B)(15). Although all of the statutes are part of the same statutory scheme, the Commissioner argues that “packaging” must mean something different in each place. This is not the case, as Section 5739.02(B)(15) supplies the only definition of “packaging” in Chapters 5739 (regarding sales tax) and 5741 (regarding use tax). Importantly, the definitions in Section 5739.02(B)(15) are not expressly limited to that Section. If the General Assembly intended that to be the case, it would have said so. But it did not. *State ex rel. Lee v. Karnes*, 103 Ohio St.3d 559, 2004-Ohio-5718, ¶ 27; see also *Kraynak v. Youngstown Sch. Dist. Bd. of Edu.*, 118 Ohio St.3d 400, 2008-Ohio-2618, ¶ 15 (interpreting a statute based not only on what it says, but also what it does not say); Ohio Adm. Code 5703-9-21(B)(1) (referencing 5739.02(B)(15) in defining “manufacturing operation.”). So the definition of “packaging” in R.C. 5739.02(B)(15) can be used for all of Chapters 5739 and 5741.

Dr. Clarke’s testimony is also not helpful in analyzing whether a “change in state or form” occurs during Accel’s operations. The Commissioner claims that Accel “simply receives the gift baskets whole,” and that Dr. Clarke provided testimony to this effect. Comm’r Third Br. at 46. This is simply wrong, and ignores an entire day of detailed testimony on how Accel receives the gift set components (including hygiene items) in bulk packages, separates them and incorporates particular components into each gift set after working with its customer to design the gift set, develops a detailed fill and assembly specification and line balance report for each gift set, precisely incorporates and places the components in accordance with the specification, makes the gift set, and generally how Accel creates a new product. See, e.g., H.T. 23-24, 28-29, 37, 57-87, 89-93, 109, 165-67, 172; BTA Hearing Exs. E, S, T; BTA Op. at 3-4. And although the Commissioner cites pages of the Hearing Transcript at which Dr. Clarke

allegedly states that the gift sets arrive whole, Dr. Clarke said nothing of the sort. Nor could Dr. Clarke have, because he testified he did not even observe Accel's operations. H.T. 550-51.

Put simply, Dr. Clarke's testimony is not helpful or relevant to the determinations at issue in this case, and it should have been excluded.

F. Cross-Appellant Accel Inc.'s Reply in Support to Proposition of Law No. 6:

**When a Final Determination is issued such that use tax under it becomes due after the effective date of R.C. 5703.58(B), which prohibits the making or issuing of an assessment for consumer's use tax if the tax was due before January 1, 2008, portions of the Final Determination assessing use tax prior to January 1, 2008 are void.**

A Final Determination is a species of tax assessment. See R.C. 5717.04 (stating that final determinations by the Commissioner are of "preliminary, amended, or final tax assessments."). Under Ohio law, an "assessment" means notice of underpayment or nonpayment of tax. R.C. 5703.50(D). The Commissioner issues an assessment when the Commissioner gives written notice of it to the taxpayer. See Carstab Corp. Limbach, 40 Ohio St.3d 89, 90 (1988). So to issue an assessment means to give the taxpayer notice of the amount of tax due. And the Final Determination here gives Accel notice of the amount of tax due; until then, it was subject to change or cancellation. R.C. 5703.60(A). As such, the Commissioner's Final Determination was a type of assessment made and issued against Accel that covered a period prior to January 1, 2008.

Under R.C. 5703.58(B), which was made effective on September 29, 2011, the Commissioner is prohibited from making or issuing an assessment for consumer's use tax, or a penalty or interest on that tax, "due" before January 1, 2008. Section 5703.58(B) expressly references use tax that is due. When a taxpayer such as Accel files a petition for reassessment, the underlying assessment does not become final and the use tax does not become "due" until made in the Commissioner's Final Determination. R.C.

5739.13(B). The Commissioner made his Final Determination on Accel on June 26, 2012, after the effective date of R.C. 5703.58(B). H.T. 281; BTA Hearing Ex. A. Because any assessed use tax is not due until after the Commissioner issued his Final Determination, the use tax at issue was not due (and Accel did not have notice of what was due - the tax up to that point was not “due and payable” - See R.C. 5739.13(B)) until after the effective date of R.C. 5703.58(B). Irrespective of how the Court decides the other issues in this case, it should vacate any use tax prior to January 1, 2008 under R.C. 5703.58(B).

G. Cross-Appellant Accel Inc.’s Reply in Support of Proposition of Law No. 7:

**If the Court reverses the BTA’s determination on issues dispositive to claimed use tax exemptions, the Court must remand the matter to the BTA for consideration of alternative exemption claims raised before, but not considered by, the BTA.**

Before the Commissioner in its Petition for Reassessment, in its Notice of Appeal to the BTA (and at the BTA hearing), and in its Notice of Cross-Appeal to this Court, Accel raised alternative grounds for exemption on its purchases of bags, baskets, glues, ribbons, etc. that it incorporates into gift sets. See H.T. 8; BTA Op. at 3-4; Accel BTA Notice App. ¶¶ 5, 7; Accel Sup. Ct. Notice Cross-App. ¶¶ 7-8; Accel BTA Post-Hearing Br. at 18; Accel Reply to Comm’r Post-Hearing Br. at 12-13. But the BTA made no findings on these alternative grounds.

The first alternative ground for exemption is that Accel is reselling the gift set components in the same form in which they are received. R.C. 5739.01(E) exempts from use tax sales “in which the purpose of the consumer is to resell the thing transferred or benefit of the service provided, by person engaging in business, in the form in which the same is, or is to be, received by the person.” *Standards Testing Laboratories Inc. v. Zaino*, 100 Ohio St.3d 240, 2003-Ohio-5804, ¶¶ 14-20. The argument in this regard is that if it is found that Accel is not changing the state or form of the individual components of the gift sets, Accel is simply reselling them to its customer in the same form in which they are received,

and therefore they are exempt under R.C. 5739.01(E). The Commissioner claims Accel does not change the state or form of the gift set components; the Commissioner goes so far as to incorrectly claim that Accel's gift sets arrive at Accel whole. Comm'r Third Br. at 46. Accel disagrees with the Commissioner's claim and Accel argues the components do change their state or form through manufacturing and assembly. But if the BTA's finding is reversed and it is determined the gift sets arrive whole, then Accel is simply reselling the components in the same form in which they are received.

The Commissioner attempts to argue that Accel somehow waived this argument by not raising it before the BTA. But Accel expressly raised the issue in its Petition for Reassessment, Notice of Appeal to the BTA, and Notice of Cross-Appeal to this Court. Pet. Reassess. at 9; BTA Notice App. ¶ 7; Sup. Ct. Notice Cross-App. ¶ 7. And the BTA **expressly stated** "having so found [that Accel is assembling], we will not further address Accel's argument regarding the resale exemption in R.C. 5739.01(E)." BTA Op. at 4. So Accel did not waive the argument, and the BTA did not make any findings on it presumably because the BTA found that Accel changed the state or form of the components and as such, could not have been reselling the components in the same form in which they were received. BTA Op. at 3-4.

With regard to Accel's other alternative claim, R.C. 5739.02(B)(15) provides that purchases of packages and packaging equipment are exempt if Accel is primarily engaged in "making retail sales." "Making retail sales" means "the effecting of transactions wherein one party is obligated to pay the price and the other party is obligated to provide a service or to transfer title to or possession of the item sold." R.C. 5739.01(O). And Accel presented evidence that it does just that - it transfers title to or possession of the completed gift sets to its customers in exchange for payment. H.T. 64, 92-93. So Accel alternatively argued that it was making retail sales and its purchases of packages and packaging equipment were nonetheless exempt under R.C. 5739.02(B)(15).

The Commissioner again attempts to argue that Accel waived this issue. But Accel raised this issue in its Petition for Reassessment, in its Notice of Appeal to the BTA, and its Notice of Cross-Appeal to this Court. Pet. Reassess. at 7; BTA Notice App. ¶ 5; Sup. Ct. Notice Cross-App. ¶ 8. And the BTA **expressly recognized** in its opinion that “[i]f not exempt under R.C. 5739.02(B)(42), Accel argues that it alternatively qualifies for exemption under R.C. 5739.02(B)(15) which exempts sales to those engaged in retail sales.” BTA Op. at 3. But again the BTA did not decide this issue (presumably because it was moot). So Accel did not waive it.

Because the BTA did not apply the law to the facts on these issues, this Court should remand to the BTA for determinations on them only if the Court does not affirm the BTA’s decision that Accel is manufacturing or assembling.<sup>3</sup> *Foto Fair Int’l, Inc. v. Lindley*, 2 Ohio St.3d 34, 36-37 (1982) (stating remand is appropriate where the BTA makes no determinations on issues raised in a notice of appeal); R.C. 5717.04; *Superior Metal Prod., Inc. v. Admin.*, 41 Ohio St.2d 143, 146 (1975). Otherwise, there is no need for the BTA (or this Court) to determine them, as the BTA’s findings are dispositive on Accel’s exemption claims regarding the items Accel incorporates into gift sets and the equipment used to make the gift sets.

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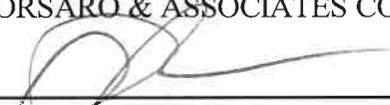
<sup>3</sup>The Commissioner also attacks Accel’s Notice of Appeal by stating that Accel’s Notice of Appeal assigned error to the BTA’s “failure to find” on the issues of resale and retail sale, not that the BTA “failed to consider” them. Yet Accel’s Notice of Cross-Appeal did assign error to the BTA’s failure to consider these issues. Sup. Ct. Notice Cross-App. ¶¶ 7-8. And the BTA’s Opinion is clear that it did not consider or make any findings on the issues, leaving no confusion on Accel’s assignments of error. See BTA Op. at 3-4. The Commissioner’s argument also ignores the liberal interpretation given to notices of appeal by this Court. *Maritime Mfrs., Inc. v. Hi-Skipper Marina*, 70 Ohio St.2d 257, 258-59 (1982).

**III. CONCLUSION.**

Accel respectfully requests this Honorable Court to find that (a) the *Dean* case is persuasive authority, (b) Accel is engaged in manufacturing as traditionally understood under Ohio law, (c) Accel's hearing Exhibits X and Y are admissible, (d) Accel's lease of labor from Manpower is exempt from use tax, (e) Dr. Clarke's testimony should have been stricken, and (f) R.C. 5703.58(B) prohibits the Commissioner from assessing use tax in the Final Determination against Accel for periods prior to January 1, 2008. And only if the Court reverses the BTA's determination that Accel is manufacturing or assembling, the Court should remand the matter to the BTA for determinations on the alternative grounds for exemption that Accel raised.

Respectfully submitted,  
COR SARO & ASSOCIATES CO., LPA

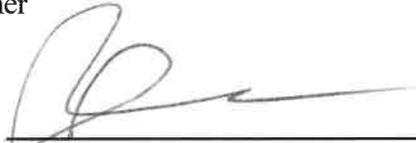
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**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that a true copy of the foregoing *Appellee/Cross-Appellant Accel Inc. 's Reply Brief on its Cross-Appeal (Fourth Brief)* was served on March 9, 2016 via regular U.S. Mail, postage prepaid, upon the following:

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