Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 28 2021

Mia Shoes, Inc.
9985 NW 19th Street
Miami, FL 33172

Re: Commercial Activity Tax
Assessment No. 100000932725
Reporting Period: 07/1/2017 – 9/30/2017

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5751.09 concerning the following commercial activity tax (CAT) amounts:

Tax	Interest	Penalty	Total
$118,332.30	$1,581.01	$23,666.46	$143,579.77

I. BACKGROUND

Mia Shoes. Inc. ("Mia Shoes" or petitioner") is a wholesaler of shoes who is headquartered in Miami, Florida. The Department of Taxation assessed the petitioner for failing to file its 2017 third quarter CAT return. As a result, the petitioner was assessed estimated tax for the 2017 third quarter pursuant to R.C. 5751.06(A). In addition, the petitioner was assessed a late payment penalty pursuant to R.C. 5751.06(A) and an additional tax penalty pursuant to R.C. 5751.06(B)(1). The petitioner was subject to two previous audits for reporting periods 7/01/2006 – 03/31/2013 and 04/01/2013 – 12/31/2015 where the Department determined the petitioner had economic presence in Ohio and assessed the petitioner for failing to report taxable gross receipts.

The petitioner submitted a prior petition for reassessment with identical objections to the Department that was appealed to the Ohio Board of Tax Appeals. In *Mia Shoes, Inc. v. McClain*, the Board held that the sale of the petitioner's goods to its customers in Ohio resulted in taxable gross receipt that should be sitused to Ohio under R.C. 5751.033(E). *Mia Shoes, Inc. v. McClain*, BTA No. 2016-282, 2019 WL 4013504 (Aug. 8, 2019).

The petitioner objects to the assessment and requests an abatement of the penalties and interest amounts assessed. The petitioner requested a hearing which was conducted via telephone on September 4, 2020. Therefore, this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

II. PETITIONER'S CONTENTIONS

First, the petitioner contends that the factor presence test in R.C. 5751.01(I) is unconstitutional under the United States Constitution. Specifically, the petitioner contends that the application of R.C. 5751.01(I) is facially unconstitutional under the due process clause of the United States Constitution and that the application of R.C. 5751.01(I) is unconstitutional as applied to the facts of the petitioner's

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case. Second, the petitioner contends that the gross receipts otherwise subject to the CAT must be reduced because title to the tangible personal property sold by the petitioner to its customers passed to such customers outside of Ohio. Thus, the petitioner alleges that the sale of its tangible personal property took place outside of Ohio and should not be sitused to Ohio for purposes of the CAT. Third, the petitioner requests an abatement of the penalties assessed.

III. AUTHORITY

The CAT is imposed on the privilege of doing business in Ohio and is measured by gross receipts, and is imposed on persons receiving the gross receipts, not on the purchaser. R.C. 5751.02(A). "Gross receipts" is defined in R.C. 5751.01(F) as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration." Under this broad definition, the full identifiable value of a transaction is generally a gross receipt, absent a specified statutory exclusion.

Once a person determines the gross receipts it realized, it must then "situs" those gross receipts to the appropriate location pursuant to R.C. 5751.033. If a gross receipt is sitused to Ohio pursuant to R.C. 5751.033, it is a "taxable gross receipt" ("TGR") that is subject to the CAT. R.C. 5751.01(G).

A. SITUSING GROSS RECEIPTS FROM TANGIBLE PERSONAL PROPERTY – R.C. 5151.033(E)

R. C. 5751.01(G) indicates that TGR means gross receipts sitused to this state under R.C. 5751.033. Division (E) of R.C. 5751.033 governs the situsing of taxable gross receipts from the sale of tangible personal property which states:

> Gross receipts from the sale of tangible personal property shall be sitused to this state if the property is received in this state by the purchaser. In the case of delivery of tangible personal property by common carrier or by other means of transportation, the place at which such property is ultimately received after all transportation has been completed shall be considered the place where the purchaser receives the property. For purposes of this section, the phrase "delivery of tangible personal property by common carrier or by other means of transportation" includes the situation in which a purchaser accepts the property in this state and then transports the property directly or by other means to a location outside this state. Direct delivery in this state, other than for purposes of transportation, to a person or firm designated by a purchaser constitutes delivery to the purchaser in this state, and direct delivery outside this state to a person or firm designated by a purchaser does not constitute delivery to the purchaser in this state, regardless of where title passes or other conditions of sale.

The Supreme Court of Ohio has previously reviewed a substantially similar situsing statute, R.C. 5733.05(B)(2)(c), and found that it provided "ample nexus" for corporation franchise tax. *House of Seagram, Inc. v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827 (1971). The court concluded that pursuant to R.C. 5733.05, "sales of tangible personal property to an Ohio buyer, delivered by the seller to a common carrier outside Ohio and ultimately received in Ohio after all transportation has been completed, are deemed business done in Ohio * * * regardless of whether the buyer or the seller has designated the common carrier." *House of Seagram* at 101, 271 N.E.2d 827. Thereafter, the Supreme Court of Ohio confronted the opposite argument in *Dupps Co. v. Lindley*, 62 Ohio St.2d 305, 405

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N.E.2d 716, 717 (1980). Dupps was an Ohio-based manufacturer that argued that goods received by its customers at its facility in Ohio, and then transported outside Ohio, should be sitused outside Ohio. The court agreed, holding that "[s]ince the equipment herein was 'ultimately received' outside of Ohio, such sales should not have been" sitused to Ohio. *Id.* at 308.

The Board of Tax Appeals recently decided *Mia Shoes, Inc. v. McClain*, involving the petitioner, a manufacturer and wholesaler of footwear. *Mia Shoes, supra*, BTA No. 2016-282. Some of Mia Shoes' sales were sales to customers that owned or used distribution centers within Ohio. *Id.* at 1. Upon audit, the Department picked up receipts from sales to Ohio distribution centers as taxable gross receipts for CAT. *Id.* Mia contended that most of its sales shipped to these Ohio distribution centers were later shipped outside of Ohio by Mia's customers. *Id.* Specifically, Mia argued that the goods shipped to Ohio distribution centers should be apportioned to Ohio based upon the percentage of Mia's customers' retail locations that were located within Ohio during the audit period. *Id.* at 3. The Board, however, affirmed the assessment and explained that, "the evidence shows that Mia Shoes shipped its goods to Ohio, knew it was shipping goods to Ohio, and lost visibility of the goods once they were delivered to the customers in Ohio. The sale of these goods resulted in the taxable gross receipts upon which the CAT was assessed, and Mia Shoes did not affirmatively prove that the goods were then ultimately received elsewhere within the meaning of the statute." *Id.*

B. Importance of Supporting Business Records & Documentation

A taxpayer must provide the Tax Commissioner with credible evidence supporting its request for exclusions, refunds, and reductions to assessments, and mere speculation is not sufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa* (July 19, 2017), BTA No. 2026-350, citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. The Tenth Appellate District of the Ohio Court of Appeals affirmed *Greenscapes* on February 7, 2019. See *Greenscapes Home and Garden Products, Inc. v. Testa* (2019), No. 17AP-593.

IV. Analysis

A. The Petitioner has not Demonstrated that Sales to its Customers are Ultimately Received outside of Ohio

The petitioner contends that its products that are sold and shipped to its customers' warehouse facilities in Ohio and then subsequently transported by its customers outside of Ohio should not be sitused to Ohio in accordance with R.C. 5751.033(E). However, the petitioner has misconstrued R.C. 5751.033(E) to mean that the receipts must be sitused to the ultimate purchaser's location; that is, where the tangible personal property finally comes to a rest. While the petitioner contends that title to all tangible personal property sold by the petitioner switched from the petitioner to the purchaser outside of Ohio, the petitioner has failed to furnish any business records including customer sales contracts or bills of lading to support its contention. Regardless, R.C. 5751.033(E) looks to the location where the purchaser received the property – not where title passes, or possession of the goods is relinquished by the seller for purpose of transportation. Nevertheless, the petitioner does acknowledge that the merchandise that generated Ohio-sitused gross receipts was shipped by common carrier to its customers' Ohio warehouse facilities. Once the merchandise arrives at the customers' Ohio warehouse facilities, the customer takes physical possession of the merchandise at their own Ohio warehouses or stores. The petitioner also acknowledges that after the merchandise is delivered to the Ohio warehouse facilities, the petitioner has no way of knowing where the products are subsequently shipped by the

customer because the petitioner is not involved in where its customers ultimately resell the merchandise. Accordingly, since the petitioner only has knowledge based on its own records as to which Ohio warehouse facility or stores its products are shipped, the sole issue in this case is where the Ohio customers received the property pursuant to that sale. Therefore, because the property was received by the petitioner's customers within Ohio, the petitioner's sale and delivery concluded within Ohio.

It should also be noted that in the previous audits, when available, the Department's audit staff used the petitioner's own summary business records and federal income tax returns to determine the petitioner's Ohio-sitused gross receipts. In this case, the petitioner contends that this assessment should be reduced to reflect that certain sales are not properly sitused to Ohio under R.C. 5751.033(E). However, this is an estimated assessment because the petitioner declined to file a CAT return and remit any CAT liability owed for the period in question.

As noted above, in *Mia Shoes, Inc. v. McClain,* the Board of Tax Appeals recently ruled on the same situsing issue of tangible personal property under R.C. 5751.033(E). *Mia Shoes*, *supra*, BTA No. 2016-282. In *Mia Shoes*, the Board held that the sales of goods that were taken to customers' Ohio distribution centers were properly sitused to Ohio for CAT because Mia knew it was shipping its goods to Ohio, and Mia "lost visibility of the goods once they were delivered to Ohio." *Id.* at 3. In this case, the petitioner puts forth the same facts and arguments as the previous *Mia Shoes* appeal. Based on the Board's previous ruling in *Mia Shoes*, the sale of the petitioner's goods to its customers in Ohio resulted in taxable gross receipts that should be sitused to Ohio under R.C. 5751.033(E).

B. THE TAX COMMISSION LACKS JURISDICTION TO DETERMINE THE CONSTITUTIONALITY OF A STATUTE

The petitioner also raised multiple constitutional objections in its petition for reassessment. However, it is well-established that the Tax Commissioner lacks jurisdiction to determine the constitutionality of a statute. *Cleveland Gear Co. v. Limbach*, 35 Ohio St.3d 229, 231, 520 N.E.2d 188 (1988). Nevertheless, the legislative enactments of the Ohio General Assembly are entitled to a strong presumption of constitutionality. *N. Ohio Patrolmen's Benevolent Assn. v. Parma*, 61 Ohio St.2d 375, 377, 402 N.E.2d 519 (1980). The Ohio Supreme Court further adheres to the presumption that the Tax Commissioner's application of state tax laws is constitutional. *See State ex rel. Ohio Congress of Parents & Teachers v. State Bd. of Edn.*, 111 Ohio St.3d 568, 2006-Ohio-5512, 857 N.E.2d 1148, *Swetland v. Kinney*, 69 Ohio St.2d 567, 433 N.E.2d 217 (1982). Since the petitioner's objections are constitutional in nature, the Tax Commissioner cannot decide on those challenges.

C. PENALTY ABATEMENT

Finally, the petitioner requests an abatement of the penalties assessed. The Tax Commissioner may abate penalties imposed for the failure to file a return and the failure to pay the full amount of tax due. R.C. 5751.06(F). The evidence and circumstances support a partial reduction of the penalties.

V. CONCLUSION

Based on Board of Tax Appeals' previous ruling in *Mia Shoes, Inc. v McClain*, the sale of the petitioner's goods to its customers in Ohio resulted in taxable gross receipt that should be sitused to Ohio under R.C. 5751.033(E). While the petitioner contends that this assessment should be reduced to

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reflect that certain sales are not properly sitused to Ohio under R.C. 5751.033(E), the petitioner has failed to file a CAT return and pay any CAT liability for the period in question. Therefore, based on the relevant authority and the evidence currently available to the Tax Commissioner, the tax and interest amounts assessed are accurate.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$118,332.30	$1,581.01	$11,833.23	$131,746.54

Current records indicate that no payments have been made on this assessment, leaving the adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

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FINAL DETERMINATION

Date: JUL 28 2021

R.J. Reynolds Tobacco Company
c/o RAI Services Company
ATTN: Patrick Messick, Assistant Secretary
401 North Main Street
Winston-Salem, NC 27102

Re: Assessment No. 100000903395
Commercial Activity Tax: 01/01/2013 – 12/31/2015

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5751.09 concerning the following commercial activity tax (CAT) assessment:

Tax	Interest	Penalty	Total
$681,429.00	$70,177.00	$102,214.00	$853,820.00

I. BACKGROUND

Reynolds American, Inc. (RAI) is a holding company and the ultimate parent of the following entities that are doing business in Ohio: R J Reynolds Tobacco Company (RJRT), American Snuff Company, LLC (ASC), Santa Fe Natural Tobacco Company (SFNTC), R J Reynolds Vapor Company (RJ Vapor), Niconovum USA, Inc., and Lorillard, Inc. RAI acquired Lorillard, Inc. during 2014. RJRT distributes its cigarettes primarily through a combination of direct wholesale deliveries from a local distribution center and public warehouses located throughout the United States. RJRT has a manufacturing facility located in Winston-Salem, NC. ASC has manufacturing facilities located in Memphis, TN, Clarksville, TN, Winston-Salem, NC, and Bowling Green, KY. SFNTC has a manufacturing facility located in Oxford, NC and a distribution center in Reno, NV.

RAI is a holding company and the ultimate parent, pursuant to RAI's federal return. RJRT registered for the CAT as an 80% consolidated elected taxpayer on November 15, 2005. RJRT is 100% owned by RAI. However, RAI was not owned greater than 80% by any one investor or company. Therefore, RAI is the common owner pursuant to R.C. 5751.011(A). Upon audit, the audit staff prepared the assessment with RAI as the parent of the consolidated elected group and added Lorillard to the consolidated group for the periods in which RAI owned the company.

The audit staff received federal returns, trial balances, and state apportionment schedules, and reconciled the state apportionment schedules to the federal returns for the audit period. The audit staff determined that there were differences between the taxable gross receipts as reported on the CAT returns and the sales of tangible personal property as shown on the state apportionment schedules provided. The audit staff reconciled the state apportionment schedules to the federal returns for the audit period but was unable to reconcile them to the CAT returns. The audit staff was able to determine taxable gross receipts for Ohio's CAT by adjusting the reported taxable gross receipts.

The petitioner objects to the assessment and requests an abatement of the penalties assessed. A

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telephone hearing was conducted in accordance with the petitioner's request, and this matter is now decided based upon the evidence currently available to the Tax Commissioner and the evidence supplied with the petition.

II. Petitioner's Contentions

The petitioner contends that the audit staff should not have disallowed its exclusion for term discounts for wholesalers. Second, the petitioner objects to the audit staff's disallowance of RJRT's exclusion from taxable gross receipts of its promotion allowances for wholesalers. Third, the petitioner contends that the audit staff improperly disallowed RJRT's exclusion for discounts for tax stamps, freight, and other allowances. Fourth, the petitioner objects to its retail discounts that the audit staff would not allow as an exclusion to taxable gross receipts. Fifth, the petitioner contends that the audit staff included certain miscellaneous revenue and negative expense accounts in RJRT's taxable gross receipts that have no connection to Ohio. Finally, the petitioner requests that the Department grant full abatement of penalties assessed.

III. Analysis of the Facts & Circumstances Presented

The CAT is imposed on the privilege of doing business in Ohio and is measured by gross receipts, and is imposed on persons receiving the gross receipts, not on the purchaser. R.C. 5751.02(A). "Gross receipts" is defined in R.C. 5751.01(F) as "the total amount realized by a person, without deduction for the cost of goods sold or other expenses incurred, that contributes to the production of gross income of the person, including the fair market value of any property and any services received, and any debt transferred or forgiven as consideration." Under this broad definition, the full identifiable value of a transaction is generally a gross receipt, absent a specified statutory exclusion.

Once a person determines the amount of gross receipts that it realized over a tax period, it must then "situs" those gross receipts to the appropriate location pursuant to section 5751.033 of the Revised Code. That section provides, in pertinent part, situsing requirements for gross receipts from the sale of tangible personal property and for gross receipts from the sale of services. R.C. 5751.033(E) and (I), respectively.

For purposes of the CAT, "cash discounts" can be excluded from the taxpayer's "gross receipts" pursuant to R.C 5751.01(F)(2)(bb). Division (F)(2)(bb) states that "gross receipts" excludes "[c]ash discounts allowed and taken." Former Ohio Admin Code 5703-29-14(A)(1) and (2)(a)-(c), applicable to the tax years at issue herein, provided:

> For purposes of this rule, 'cash discounts' include the following, provided they are only based on making timely payments or volume purchases: (a) 'X per cent, y-day' discounts, where the purchaser may take a percentage cash discount on the invoice price if payment is made within a specified period of time of the invoice date; otherwise the entire invoice price is due by the net date; (b) Incentive-based rebates received by a purchaser, but not the purchaser's customer; and (c) Discounts allowed and taken by a purchaser, but not the purchaser's customer. [Emphasis added.]

As seen in Ohio Adm.Code 5703-29-14, in effect during the periods at issue, only discounts "based on making timely payments or volume purchases" are eligible as cash discounts from taxable gross receipts for Ohio's CAT. Cash discounts provide an incentive a seller gives to a buyer in return for

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paying a bill owed before the scheduled due date. Ohio Adm.Code 5703-29-14. A seller will generally reduce the amount that the buyer owes by a small percentage or a set amount. A typical cash discount would normally have the seller offer a 2% discount on an invoice due within 30 days if the buyer were to pay within the first 10 days of receiving the invoice. Ohio Adm.Code 5703-29-14(B)(1). The buyer is given an incentive to render payment early to receive a discount so that the seller may receive remunerations early and have cash-in-hand.

A. TREATMENT OF TERM DISCOUNTS FOR WHOLESALERS

Upon audit, the Department's audit staff disallowed term discounts for wholesalers. Term Discounts at issue herein include the following accounts: 41000100 Products Terms Discounts; 41000104 OTP Payment Terms Discounts; 41000118 ATP Trade Discounts. Former Ohio Admin Code 5703-29-14(A)(1) and (2)(a)-(c), applicable to the tax years at issue herein, provided that cash discounts are only allowed to the extent the discounts are based upon making timely payments or volume purchases. The petitioner did not show which wholesaler term discounts were based upon making timely payments or volume purchases.

The petitioner is claiming an exclusion for term discounts. Taxpayers claiming an exemption or exclusion from taxation must affirmatively establish their right thereto. *Dayton Sash & Door Co. v. Glander*, 36 Ohio St.2d 120, 304, 304 N.E.2d 388 (1973). Ohio law in this regard is well-established in that exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. *Natl. Tube Co. v. Glander,* 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus; *Cincinnati College v. State,* 19 Ohio 110, 115 (1850). Thus, in determining whether the petitioner is entitled to the exclusions which it seeks, the facts must be determined under a strict, narrow reading of the relevant definitions. In addition, the petitioner must provide the Tax Commissioner with concrete evidence supporting its request for exclusions and refunds, and mere speculation is insufficient. See, *Greenscapes Home and Garden Products, Inc. v. Testa,* BTA No. 2016-350, (July 19, 2017), citing *Lakota Local School Dist. Bd. of Edn. v. Butler Cty. Bd. of Revision*, 108 Ohio St.3d 310, 2006-Ohio-1059, ¶15. In all doubtful cases, exemptions must be denied. *A. Schulman, Inc. v. Levin*, 116 Ohio St.3d 105, 2007-Ohio-5585, 876 N.E.2d 928, ¶ 7.

In the case at hand, the petitioner has failed to show that the term discounts for which it claims an exclusion are based upon making timely payments or volume purchases. As explained above, such claims for exclusion must be affirmatively established by the taxpayer with concrete evidence. The petitioner has not met its burden of proof on this.

B. PROMOTION ALLOWANCES FOR WHOLESALERS AND DISCOUNTS FOR TAX, FREIGHT AND OTHER ALLOWANCES

The Department disallowed RJRT's exclusions from gross receipts for promotion allowances for wholesalers. The accounts at issue here are #41350010 Promotion Pricing - a temporary price adjustment related to the buy-in period allowed subsequent to price increases, and #41310010 Allowances - discounts for tax stamping, promotion, freight, and other allowances.

Information in the file indicates that the discounts that the petitioner took for these accounts were estimated allowances, and not actual amounts. In addition, the petitioner failed to provide detail of the accounts at issue and an explanation on what entities benefitted from the promotion pricing. It cannot be the purchaser's purchaser that obtained these discounts. Former Ohio Admin Code 5703-29-

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14(A)(1) and (2)(a)-(c) provides that it must be the purchaser, itself, receiving the discount, and not the purchaser's customer, in order for the exclusion to be available. It is unclear which entities benefitted from these discounts, and it appears that often it was not the purchaser itself which benefitted. Without an explanation of which entities benefitted from this discount, it cannot be determined if these amounts would qualify as cash discounts under Ohio Admin Code 5703-29-14(A)(1) and (2)(a)-(c). As stated above, taxpayers claiming an exclusion from taxation must affirmatively establish their right thereto. See *Dayton Sash & Door Co., supra.*

Further, the audit staff has reviewed the reduction taken for promotional allowances and shown that the petitioner has excluded from Ohio CAT gross receipts its estimated promotional allowances for all 50 states, and not just a portion of promotional allowances apportioned to Ohio. Thus, the exclusion for promotional allowances taken by the petitioner, as it is for all 50 states in the USA and not only Ohio transactions, in addition to being an estimate, is very much overstated.

C. RETAIL DISCOUNTS

The petitioner contends that amounts for trade discounts, couponing, retail discounts and retail sales should not have been added to the assessment as taxable gross receipts by the audit staff, arguing that the petitioner never excluded the amounts in these accounts from its gross sales on its CAT returns. This contention is not well taken. Information in the file shows that these retail discounts were taken as an exclusion from taxable gross receipts by the petitioner. The petitioner is incorrect, as the audit staff has thoroughly reviewed all computations involved in this contention and has been able to show that the petitioner did take these retail discounts in the CAT returns at issue.

After the hearing, the audit staff did an extensive review of all computations used in the CAT returns at issue and determined that the petitioner did take the retail discounts as a reduction from gross receipts for the periods at issue. The audit staff did a line-by-line review of all CAT returns at issue to establish this. Thus, the petitioner's contention that the audit staff cannot add the retail discounts into CAT taxable gross receipts for the periods at issue, arguing that it never took these discounts as an exclusion from taxable gross receipts fails, as the audit staff has shown that the petitioner did take these discounts as a reduction from gross receipts.

As explained above, under Ohio Adm.Code 5703-29-14, in effect during the periods at issue, only discounts "based on making timely payments or volume purchases" are eligible as cash discounts from taxable gross receipts for Ohio's CAT. Information in the file shows that the accounts for retail discounts claimed by the petitioner are accounts not solely based upon volume or timely payments. Further, many of these amounts were not meant for the purchaser, but for the purchaser's customer.

D. OTHER MISCELLANEOUS ACCOUNTS SITUSED TO OHIO

The petitioner contends that the audit staff included in the assessment certain miscellaneous revenue and negative expense accounts in which the gross receipts at issue have no connection with Ohio and should not be sitused to Ohio. This contention is well taken. The assessment shall be adjusted to remove these receipts from the assessment. Preassessment interest and penalty will also be reduced to reflect the smaller amount of CAT assessed due to granting this contention.

V. PENALTY ABATEMENT

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The petitioner requests an abatement of the penalty imposed. Here, a 15% penalty was imposed in accordance with R.C. 5751.06(B)(1). The Tax Commissioner may abate penalties imposed under R.C. 5751.06. See R.C. 5751.06(F). However, the record reflects that the petitioner did not supply much of the information requested by the audit staff and was both uncooperative and unresponsive to such an extent that the audit staff needed to perform an on-site field audit to obtain the information sought. Therefore, no penalty abatement shall be granted.

VI. Conclusion

Regarding certain miscellaneous revenue and negative expense accounts in which the gross receipts at issue have no connection with Ohio, the taxable gross receipts associated with these accounts shall be removed from the assessment. With regard to its other contentions, the petitioner has failed to submit evidence or arguments sufficient to refute the accuracy of the Department's assessment.

Construing its contentions seeking exclusions from CAT narrowly, other than its situsing contention for certain miscellaneous revenue and negative expense accounts, the petitioner has provided insufficient evidence to show it should be granted the exclusions sought. As explained above, other than the contention involving certain miscellaneous revenue and negative expense accounts, the remainder of the assessment appears correct, and based on the relevant authority and the evidence currently available to the Tax Commissioner, the tax and interest amounts assessed are accurate.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$679,752.00	$69,998.00	$101,963.00	$851,713.00

Current records indicate that no payments have been made on the assessment, leaving the adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any post assessment interest will be added to the assessment as provided by law.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within (60) days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, PO Box 16158, Columbus, OH 43216-6158.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

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FINAL DETERMINATION

Date: JUL 2 1 2021

Thompson Hine LLP
127 Public Sq. Suite 3900
Cleveland, OH 44114-1291

Re: Refund Claim Nos.: 115263023741, 115263063040, 115263064262, and 115263069058
Commercial Activity Tax – Multiple Periods

This is the final determination of the Tax Commissioner with regard to the following applications for refund pursuant to R.C. 5751.08:

Tax Period	Refund Claim
04/01/2012 – 06/30/2012	$36,487.00
07/01/2012 – 09/30/2012	$42,683.00
10/01/2012 – 12/31/2012	$54,572.00
01/01/2013 – 03/31/2013	$30,347.00
04/01/2013 – 06/30/2013	$41,310.00
07/01/2013 – 09/30/2013	$39,959.00
10/01/2013 – 12/31/2013	$49,786.00
01/01/2014 – 03/31/2014	$34,658.00
04/01/2014 – 06/30/2014	$42,105.00
07/01/2014 – 09/30/2014	$43,033.00
10/01/2014 – 12/31/2014	$55,740.00
01/01/2015 – 03/31/2015	$31,693.00
04/01/2015 – 06/30/2015	$39,452.00
07/01/2015 – 09/30/2015	$38,016.00
10/01/2015 – 12/31/2015	$50,957.00

Thompson Hine LLP ("the claimant") is a full-service law firm headquartered in Cleveland, Ohio. The firm employs roughly 400 attorneys that primarily work out of one of eight offices located in five states, including an office located within Washington D.C.

The claimant originally submitted sixteen claims for refund. Upon initial review, the Commissioner denied all sixteen claims. The claim for first calendar quarter of 2012 was denied as a result of being submitted beyond the four-year period for refund claims prescribed by R.C. 5751.08(A). The other fifteen claims were denied because the information available to the commissioner did not adequately support the claimed refunds.

The claimant did not contest the denial of the refund claimed for the first calendar quarter of 2012. The claimant requested a hearing regarding the denial of the remaining fifteen claims. A hearing was held remotely by the agreement of both parties on April 26, 2021. The matters being similar for all periods at

issue, the claims were consolidated for purposes of the hearing and are consolidated for purposes of this determination.

During the pendency of the administrative review and hearing, the claimant submitted voluminous documentation, evidence, and analysis in support of the claimed refunds. Additional materials were submitted in advance of the hearing. The claimant also provided a post-hearing memo and clarifying information and documentation as requested by the hearing officer.

Based on the additional document submissions and supporting information, the claimant has provided sufficient evidence that its original returns were not prepared in accordance with the CAT situsing statute, R.C. 5751.033. Additionally, the claimant has sufficiently demonstrated that its proposed situsing method, the basis for its claimed refunds, more accurately reflects the requirements of R.C. 5751.033 and the administrative code section related to situsing gross receipts from services, Ohio Adm.Code 5703-29-17.

The claimant submitted updated claim amounts during the hearing after identifying additional taxable gross receipts that were previously overlooked. The Commissioner finds that the evidence provided supports the updated claim amounts.

Accordingly, the refund claims are modified and approved as follows:

Tax Period	Refund Claim
04/01/2012 – 06/30/2012	$33,934.00
07/01/2012 – 09/30/2012	$40,326.00
10/01/2012 – 12/31/2012	$51,292.00
01/01/2013 – 03/31/2013	$27,834.00
04/01/2013 – 06/30/2013	$37,814.00
07/01/2013 – 09/30/2013	$36,762.00
10/01/2013 – 12/31/2013	$46,236.00
01/01/2014 – 03/31/2014	$32,079.00
04/01/2014 – 06/30/2014	$38,680.00
07/01/2014 – 09/30/2014	$39,886.00
10/01/2014 – 12/31/2014	$52,093.00
01/01/2015 – 03/31/2015	$28,587.00
04/01/2015 – 06/30/2015	$36,176.00
07/01/2015 – 09/30/2015	$35,237.00
10/01/2015 – 12/31/2015	$46,908.00

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 8 2021

Underwood Towing, Inc.
ATTN: Office Manager
2260 Tod Avenue, SW
Warren, OH 44485

Re: Assessment No.: 100001327225
Motor Fuel Tax: International Fuel Tax Agreement (IFTA)
Period: January 1, 2016 through December 31, 2016

The Department of Taxation issued the following IFTA assessment:

Assessment No.	Period	Tax	Interest	Penalty	Total
100001327225	2016	$2,429.58	$393.72	$364.42	$3,187.72

The petitioner timely filed a petition for reassessment pursuant to R.C. 5728.10.

I. FACTUAL BACKGROUND

The petitioner is a haul for hire carrier operating from Warren, Ohio. The petitioner primarily operates within Ohio, but also has mileage travelled in Illinois, Indiana, Maryland, Michigan, New York, Pennsylvania, Virginia, and West Virginia.

II. PROCEDURAL BACKGROUND & PETITIONER'S CONTENTIONS

The Department of Taxation conducted an audit of the petitioner's IFTA account pursuant to the IFTA Audit and Procedures Manuals. The second quarter 2016 for Unit #144 was selected as a sample for the audit period, as it is representative of a typical quarter for the licensee.

Upon review, the Department found that the petitioner had an unacceptable mileage record keeping system; specifically, there was not a state-by-state breakdown of miles by jurisdiction, and odometer miles were not listed in the driver logs. Additionally, the petitioner was only able to provide April driver logs for the second quarter 2016 audit sample period. As a result of the unacceptable mileage record keeping system, the Department reduced miles per gallon reported by the petitioner by 20%.

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In its petition, the petitioner writes: "We believe the liability is excessively punitive considering the minor record keeping errors. We made the necessary changes to correct the problems. We respectfully request your consideration and review of this matter." It also writes: "We contend that the numbers reported and MPG's were as accurated [sic] as possible resulting in accurate reports. We acknowledge that we were unaware of the need to retain those records and did not have them formally available for audit purposes."

III. AUTHORITY & ANALYSIS

A. AUDIT AND ASSESSMENT

R.C. 5728.07 requires individuals liable for Ohio motor fuel tax to maintain "detailed distance and fuel records for each commercial car and commercial tractor owned, leased, rented, or otherwise operated by such person." Such records "shall be preserved for a period of four years from the date the return required to be filed under section 5728.08 of the Revised Code was due or filed, whichever is later." *Id. See also* Ohio Adm.Code 5703-13-03.

The IFTA Procedures Manual has specific requirements for Distance Records. *See* IFTA Procedures Manual, Section P540. The Department's audit report details the shortfalls of the petitioner's mileage records, which include:

- Inadequate mileage logs,
- A lack of global positioning system (GPS) logs,
- Inaccuracies between reported mileage and summary mileage report , and
- The petitioner was only able to provide driver logs for April 2016 for the second quarter 2016 sample period.

Due to these record keeping issues, the Department created an estimated assessment using the best available information. Specifically, the Department appropriately reduced the miles per gallon figure used in the audit and assessment calculations by 20%. Pursuant to the IFTA Audit Manual effective as of January 1, 2017, in effect during the time period of this audit, a 20% reduction in the miles per gallon adjustment is allowed in cases such as this in which records are impaired or missing. This led to the assessed figures above.

The petitioner has not, to date, provided the missing records, nor has it provided any evidence that the numbers used in the assessment are an unreasonable estimate or contrary to Ohio law or the IFTA Agreement. *See* R.C. 5728.05.

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IV. CONCLUSION

The petitioner did not maintain adequate distance records, as required by R.C. 5728.07. Accordingly, the Department issued this assessment using the best available information. The petitioner has not provided any evidence to challenge the accuracy of the estimated assessment or the methodology used, or to allow for a better estimate of its IFTA liability.

Accordingly, the assessment is affirmed.

Current records indicate that this assessment has been paid in full. **Post-assessment interest will be added to the assessment as provided by law.** Payment shall be made payable to Ohio Treasurer of State. Any payment made on this final determination should be mailed to: Ohio Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-1090.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 28 2021

Travis L. & Brittanie N. Bahan
18600 Yoakum Rd.,
Mount Victory, OH 43340

Re: Assessment No. 02201826040231
Individual Income Tax – 2014

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5747.13 concerning the following individual income tax assessment:

Tax	Interest	Penalty	Total
$2,692.86	$323.96	$647.92	$3,664.74

The Ohio Department of Taxation assessed Travis and Brittanie Bahan (hereinafter "the petitioners") after making adjustments to their Ohio individual income tax return for the tax period in question. When the petitioners initially filed their Ohio individual income tax return, they requested a refund in the amount of $8.00.[1] Specifically, the Department disallowed the Small Business Investor Deduction ("SBD")[2] claimed on the petitioners' 2014 individual income tax return which resulted in the assessment currently considered. The petitioners object to the denial of the SBD and request that the Tax Commissioner accept the return as filed. The petitioners did not request a hearing; therefore, this matter is decided based upon the information available to the Tax Commissioner and the evidence supplied with the petition.

During the administrative appeal period, the petitioners submitted information to support the accuracy of the original return that they filed, including a copy of the petitioners' K-1s, and schedules and documentation supporting the apportionment and allocation of their income for the tax period in question. Upon further review and verifying the documentation provided by the petitioners, the petitioners' request is well-taken. Thus, the petitioners have presented sufficient evidence to support their contention.

Accordingly, the assessment is cancelled, and the refund claimed on the originally filed return is granted, plus applicable statutory interest.

Current records indicate that no payments have been applied to this assessment, leaving a refund of $8.00 to the petitioners. This overpayment will be refunded to the petitioners. If the petitioners have an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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[1] Ohio Adm. Code 5703-7-02(A)(1) states that "[a]n application for refund under R.C. 5747.11 of the Revised Code shall include * * * [a]n annual return, or amended annual return, filed pursuant to Chapter 5747 of the Revised Code to the extent that the facts and figures contained on such return result in an overpayment."

[2] Authorized by former R.C. 5747.01(A)(31) which was effective for tax year 2014.

JUL 2 8 2021

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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FINAL DETERMINATION

Date: JUL 28 2021

Travis L. & Brittanie N. Bahan
18600 Yoakum Rd.,
Mount Victory, OH 43340

Re: Assessment No. 02201826144227
Individual Income Tax – 2015

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5747.13 concerning the following individual income tax assessment:

Tax	Interest	Penalty	Total
$758.79	$68.28	$136.56	$963.63

The Ohio Department of Taxation assessed Travis and Brittanie Bahan (hereinafter "the petitioners") after making adjustments to their Ohio individual income tax return for the tax period in question. When the petitioners initially filed their Ohio individual income tax return, they requested a refund in the amount of $10.00.[1] Specifically, the Department disallowed the Business Income Deduction ("BID")[2] claimed on the petitioners' 2015 individual income tax return which resulted in the assessment currently considered. The petitioners object to the denial of the BID and request that the Tax Commissioner accept the return as filed. The petitioners did not request a hearing; therefore, this matter is decided based upon the information available to the Tax Commissioner and the evidence supplied with the petition.

During the administrative appeal period, the petitioners submitted information to support the accuracy of the original return that they filed, including a copy of the petitioners' K-1s, and schedules and documentation supporting the apportionment and allocation of their income for the tax period in question. Upon further review and verifying the documentation provided by the petitioners, the petitioners' request is well-taken. Thus, the petitioners have presented sufficient evidence to support their contention.

Accordingly, the assessment is cancelled, and the refund claimed on the originally filed return is granted, plus applicable statutory interest.

Current records indicate that no payments have been applied to this assessment, leaving a refund of $10.00 to the petitioners. This overpayment will be refunded to the petitioners. If the petitioners have an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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[1] Ohio Adm. Code 5703-7-02(A)(1) states that "[a]n application for refund under R.C. 5747.11 of the Revised Code shall include * * * [a]n annual return, or amended annual return, filed pursuant to Chapter 5747 of the Revised Code to the extent that the facts and figures contained on such return result in an overpayment."

[2] Authorized by former R.C. 5747.01(A)(31) which was effective for tax years 2015.

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

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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FINAL DETERMINATION

Date: JUL 28 2021

Travis L. & Brittanie N. Bahan
18600 Yoakum Rd.,
Mount Victory, OH 43340

Re: Assessment No. 02201826344264
Individual Income Tax – 2016

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5747.13 concerning the following individual income tax assessment:

Tax	Interest	Penalty	Total
$5,823.00	$332.47	$664.94	$6,820.41

The Ohio Department of Taxation assessed Travis and Brittanie Bahan (hereinafter "the petitioners") after making adjustments to their Ohio individual income tax return for the tax period in question. When the petitioners initially filed their Ohio individual income tax return, they requested a refund in the amount of $8.00.[1] Specifically, the Department disallowed the Business Income Deduction ("BID")[2] claimed on the petitioners' 2016 individual income tax return which resulted in the assessment currently considered. The petitioners object to the denial of the BID and request that the Tax Commissioner accept the return as filed. The petitioners did not request a hearing; therefore, this matter is decided based upon the information available to the Tax Commissioner and the evidence supplied with the petition.

During the administrative appeal period, the petitioners submitted information to support the accuracy of the original return that they filed, including a copy of the petitioners K-1s, and schedules and documentation supporting the apportionment and allocation of their income for the tax period in question. Upon further review and verifying the documentation provided by the petitioners, the petitioners' request is well-taken. Thus, the petitioners have presented sufficient evidence to support their contention.

Accordingly, the assessment is cancelled, and the refund claimed on the originally filed return is granted, plus applicable statutory interest.

Current records indicate that no payments have been applied to this assessment, leaving a refund of $8.00 to the petitioners. This overpayment will be refunded to the petitioners. If the petitioners have an existing liability with the Ohio Department of Taxation, the approved refund amount may be reduced to offset the liability.

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[1] Ohio Adm. Code 5703-7-02(A)(1) states that "[a]n application for refund under R.C. 5747.11 of the Revised Code shall include * * * [a]n annual return, or amended annual return, filed pursuant to Chapter 5747 of the Revised Code to the extent that the facts and figures contained on such return result in an overpayment."

[2] Authorized by former R.C. 5747.01(A)(31) which was effective for tax years 2016.

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

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 28 2021

Travis L. & Brittanie N. Bahan
18600 Yoakum Rd.,
Mount Victory, OH 43340

Re: Assessment No. 02201826444283
Individual Income Tax – 2017

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5747.13 concerning the following individual income tax assessment:

Tax	Interest	Penalty	Total
$6,608.00	$377.29	$754.58	$7,739.87

The Ohio Department of Taxation assessed Travis and Brittanie Bahan (hereinafter "the petitioners") after making adjustments to their Ohio individual income tax return for the tax period in question. Specifically, the Department disallowed the Business Income Deduction ("BID")[1] claimed on the petitioners' 2017 individual income tax return which resulted in the assessment currently considered. The petitioners object to the denial of the BID. The petitioners did not request a hearing; therefore, this matter is decided based upon the information available to the Tax Commissioner and the evidence supplied with the petition.

During the administrative appeal period, the petitioners submitted information to support the accuracy of the original return that they filed, including a copy of the petitioners' K-1s, and schedules and documentation supporting the apportionment and allocation of their income for the tax period in question. Upon further review and in light of the information provided during the appeal period, the assessment will be adjusted.

The Tax Commissioner may abate a penalty when a taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). Here, the petitioners assert that the failure to comply was due to reasonable cause. The evidence and circumstances presented support a partial abatement of the penalty assessed.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$1,107.00	$20.33	$377.29	$1,504.62

[1] Authorized by former R.C. 5747.01(A)(31) which was effective for tax years 2017.

JUL 2 8 2021

Current records indicate that no payments have been applied on this assessment, leaving the adjusted balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Victor and Maria Bota
15850 Falmouth Oval
Middleburg Heights, Ohio 44130

Re: Assessment No. 02201902472874
Individual Income Tax – 2014

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5747.13 concerning the following individual income tax assessment:

Tax	Interest	Penalties	Less Payments	Total
$7,061.00	$957.58	$2,974.31	$2,462.00	$8,530.89

I. Background

The Department assessed Victor and Maria Bota ("the petitioners") for failing to timely file an amended individual income tax return to reflect a change in the petitioners' federal adjusted gross income under R.C. 5747.10. This information was reported to the Department by the Internal Revenue Service ("IRS") under authorization of Section 6103(d) of the Internal Revenue Code.

Specifically, the Department received information from the IRS that the petitioners' 2014 federal adjusted gross income ("FAGI") was adjusted as a result of an IRS audit. The Department issued the assessment currently considered based upon the adjustments made pursuant to the IRS audit. The petitioners filed a timely petition for reassessment but did not pay the full amount assessed or file an amended Ohio income tax return for the tax year in question.

II. Relevant Authority

Ohio's income tax is levied on individuals, trusts, and estates residing in Ohio or earning or receiving income in Ohio, or otherwise having nexus with or in Ohio. R.C. 5747.01, R.C. 5747.02. For Ohio income tax purposes, the starting point is FAGI which is then adjusted pursuant to R.C. 5747.01 et seq. to reach Ohio Adjusted Gross Income. Every taxpayer who is liable for income earned or received in Ohio is required to file an annual income tax return. R.C. 5747.08.

Former R.C. 5747.10, in effect for the period in question, mandated that "if any of the facts, figures, computations, or attachments required in a taxpayer's annual return * * * must be altered as the result of an adjustment to the taxpayer's federal income tax return, * * * the taxpayer shall file an amended return with the tax commissioner in such form as the commissioner requires. The amended return shall be filed not later than sixty days after the adjustment has been agreed to or finally determined for federal income tax purposes or any federal income tax deficiency or refund, or the abatement or credit resulting therefrom, has been assessed or paid, whichever occurs first."

JUL 30 2021

Important to this matter is R.C. 5747.13(E) which states "If the party assessed files a petition for reassessment under division (B) of this section, the person, on or before the last day the petition may be filed, shall pay the assessed amount, including assessed interest and assessed penalties, if any of the following conditions exists: * * * (3) The person fails to file a tax return, and the basis for this failure is not either of the following: (a) An assertion that the person has no nexus with this state; (b) The computations required under division (A) of section 5747.01 of the Revised Code or the application of credits allowed under this chapter has the result that the person's tax liability is less than one dollar and one cent."

Ohio's Court of Appeals for the Eleventh District examined former R.C. 5747.10 and found that IRS adjustments to taxpayers' federal adjusted gross income which directly affected their Ohio income tax liability, which in turn, triggered the requirement to file an amended return pursuant to R.C. 5747.10. *Gibson v. Limbach*, 11th Dist. Trumball, 74 Ohio App.3d 498, 501, 599 N.E.2d 715, 717 (1991).

III. Analysis of the Facts & Circumstances

In the present case, the IRS adjusted the petitioners' FAGI based on an audit finally determined on or before February 2, 2017. Pursuant to former R.C. 5747.10, the petitioners had sixty days from the date the adjusted FAGI was finalized, to file an amended Ohio return. Department records indicate that the petitioners filed an amended Ohio return on February 11, 2019, beyond the 60-day requirement under R.C. 5747.10. Therefore, pursuant to R.C. 5747.13, the Tax Commissioner lacks jurisdiction to consider the objections raised in the petitioners' petition for reassessment.

Therefore, the matter is dismissed.

Current records indicate that a payment of $2,462.00 has been applied on this assessment, leaving a balance due of $8,530.89. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer". Payments should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-1090.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 14 2021

John P. Civantos
3090 Munroe Dr.
Miami, Florida 33133

Re: Income Tax Refund: 1928806736
Tax Year: 2018

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim:

Tax Year	Refund Claimed
2018	$2,508.00

John P. Civantos ("the claimant"), filed a 2018 IT-1040 reporting an overpayment of $2,508.00 and requested a refund of that amount.[1] The Department adjusted the PTE credit reported by the claimant to $52.00 because it could not verify the full claimed amount in the pass-through entity's return. In response to the refund variance notice, the claimant contends he is entitled to the original refund amount and seeks an administrative review of the denied refund claim. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Tax Commissioner pursuant to R.C. 5703.70.

R.C. 5747.08(I) entitles investors in a PTE to a refundable credit equal to the investor's proportionate share of the tax paid by the PTE on behalf of the investor.

The claimant submitted evidence in support of his contested refund amount. Upon review of Department records and the evidence submitted by the claimant, the claimant has shown he is entitled to the $2,508.00 PTE credit amount claimed in his 2018 IT-1040. Based on the evidence now available to the Tax Commissioner, the claimant's contention is well taken.

Accordingly, a refund of $2,456.00 is granted plus applicable statutory interest.

[1] Ohio Adm.Code 5703-7-02(A)(1) states that "[a]n application for refund under R.C. 5747.11 of the Revised Code shall include * * * [a]n annual return, or amended annual return, filed pursuant to Chapter 5747 of the Revised Code to the extent that the facts and figures contained on such return result in an overpayment."

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 2 1 2021

Robert A. & Joan C. Epstein
400 Arlington St.,
Birmingham, MI 48009

Re: Assessment No. 02201823283642
Individual Income Tax – 2013

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5747.13 concerning the following individual income tax assessment:

Tax	Interest	Penalty	Total
$76,684.53	$10,968.88	$21,937.76	$109,591.17

The Department assessed Joan and Robert Epstein (hereinafter "the petitioners") for failing to report additional federal adjusted gross income (FAGI) on their 2013 Ohio individual income tax return. This assessment was calculated using the petitioners' FAGI as reported to Ohio by the Internal Revenue Service under authorization of Section 6103(d) of the Internal Revenue Code. The petitioners object to the assessment. The petitioners did not request a hearing; therefore, this matter is decided based upon the evidence available to the Tax Commissioner and the evidence supplied with the petition.

Based upon further review of the documentation, the petitioners' nonresident credit reported on their amended return is correct as filed.

Accordingly, the assessment is cancelled.

Current records indicate that no payments have been made on this assessment, leaving no balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000251

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Robert & Linda Glickman
32390 Pinebrook Ln.
Cleveland, OH 44124

Re: Assessment No. 02201800918624
Individual Income Tax - 2014

This is the final determination of the Tax Commissioner regarding a petition for reassessment pursuant to R.C. 5747.13 concerning the following individual income tax assessment:

Tax	Interest	Penalty	Total
$2,035.68	$187.67	$375.34	$2,598.69

The Ohio Department of Taxation assessed the petitioners after adjusting the individual income tax return they filed for the 2014 tax year. Specifically, the Department disallowed the petitioners' Ohio Schedule A, line 40a, refund or reimbursement for itemized deductions. Former R.C. 5747.01(A)(12)(a), applicable for the period at issue, stated in relevant part to: "[d]educt any amount included in federal adjusted gross income solely because the amount represents a reimbursement or refund of expenses that in any year the taxpayer had deducted as an itemized [federal] deduction * * *." The petitioners contend that the amount at issue was included in federal adjusted gross income and that it had previously been deducted as a federal itemized deduction in a prior year. Thus, the petitioners request a cancellation of the assessment. The Department has been able to verify this contention, and the petitioners' request is well taken.

Accordingly, the assessment is cancelled.

Current records indicate that no payments have been made on this assessment, leaving no balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

Office of the Tax Commissioner
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FINAL DETERMINATION

Date: JUL 30 2021

Robert & Christine Keever
3721 Spring Mill Way
Maineville, Ohio 45039

Re: Assessment No. 02201902266458
Individual Income Tax-Year 2016

This is also the final determination of the Tax Commissioner regarding the following individual income tax assessment:

Tax	Interest	Penalty	Total
$4,754.00	$335.75	$671.50	$5,761.25

I. BACKGROUND:

The Ohio Department of Taxation assessed Robert & Christine Keever ("the petitioners") after adjusting their individual income tax return for tax year 2016. The petitioners listed Mrs. Keever as a resident of Virginia on their 2016 return. Upon initial review, the Department adjusted the petitioners' return due to insufficient evidence to prove Mrs. Keever was domiciled in Virginia. The petitioners objected to the assessment and submitted additional evidence supporting their contention that Mrs. Keever was domiciled in Virginia. The petitioners requested a hearing which was conducted by phone on June 15, 2021.

II. APPLICABLE STATUTORY LAW:

For Ohio income tax purposes, the starting tax base is Ohio adjusted gross income, which is federal adjusted gross income as adjusted pursuant to R.C. 5747.01(A). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income.[1] Division (I) of R.C. 5747.01 defines a "resident" as an individual who is domiciled in this state, subject to R.C. 5747.24. Under R.C. 5747.01(J), a "nonresident" is an individual who is not a resident.

The tests set forth in divisions (B), (C) and (D) of former R.C. 5747.24, applicable for the period in question, examine the number of Ohio contact periods to arrive at a presumption of whether the individual is an Ohio resident for that taxable year. Division (A)(1) of R.C. 5747.24 indicates that a person has a contact period if the person is away overnight from their abode located outside Ohio and while away spends at least some portion, however minimal, of each of two consecutive days in Ohio. R.C. 5747.24(E) indicates that the individual is presumed to have a contact period for any period that the individual does not prove was not a contact period.

[1] R.C. 5747.05(B) allows residents to claim a credit equal to the lesser of (1) the amount of tax otherwise due on such portion of the adjusted gross income of a resident taxpayer that is taxed by other states or (2) the actual amount of income tax paid to other states.

Former division (B)(1) of R.C. 5747.24, applicable for the tax period at issue, indicates that an individual is presumed not to be domiciled in Ohio if each of the following criteria is met:

> (i) The individual has less than 212 contact periods in Ohio during the taxable year,
> (ii) The individual has at least one abode outside this state during the entire taxable year, and
> (iii) The individual files an affidavit of non-Ohio domicile on or before the fifteenth day of the fourth month following the close of the taxable year.

If the individual timely files the Affidavit of Non-Ohio Residency/Domicile as required, and the affidavit does not contain any false statements, the presumption that the individual was not domiciled in this state is irrebuttable.

R.C. 5703.35 allows the Tax Commissioner to extend the deadline to file the Affidavit of Non-Ohio Residency/Domicile ("Affidavit") by 45 days from the April 15 date set forth in R.C. 5747.24(B)(1). In the present case, the petitioners were required to file the Affidavit for tax year 2016 by May 30, 2017. However, the petitioners failed to show they submitted this affidavit, so the petitioners are not entitled to an irrebuttable presumption of non-domicile under former R.C. 5747.24(B).

If an individual fails to timely file the Affidavit or makes a false statement, the burden shifts to the individual to prove that they were not domiciled in Ohio during the taxable year. Former R.C. 5724.24(C) & (D). Former Division (C) of R.C. 5747.24, applicable for the tax period at issue, states: "An individual who during a taxable year has fewer than two hundred thirteen contact periods in this state, which need not be consecutive, and who is not irrebuttably presumed under division (B) of this section to be not domiciled in this state with respect to that taxable year, is presumed to be domiciled in this state for the entire taxable year, except as provided in division (B)(2) of this section. An individual can rebut this presumption for any portion of the taxable year only with a preponderance of the evidence to the contrary." The Ohio Supreme Court has explained the meaning of preponderance of the evidence: "[A] preponderance of evidence means the greater weight of evidence. * * * The greater weight may be infinitesimal, and it is only necessary that it be sufficient to destroy the equilibrium." *Travelers' Ins. Co. of Hartford, Conn., v. Gath*, 118 Ohio St. 257, 160 N.E. 710 (1928).

III. COMMON-LAW DOMICILE:

The Ohio Supreme Court has held that rebutting the presumption of domicile in Ohio involves proving the substantive elements of domicile under the common law. *Cunningham v. Testa*, 144 Ohio St.3d 40, 2015-Ohio-2744, 40 N.E.3d 1096, ¶ 19 (2015). In addition, R.C. 5747.24(B) distinguishes verification of domicile from verification of contact periods and abode: it does not conflate them. *Id.* The Ohio Revised Code does not define "domicile," but the definition of domicile has been set forth in previous Ohio decisions, including *Cunningham*.

The Ohio Supreme Court has held that the "domicile of a person [is] where he has his true, fixed, permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." *Sturgeon v. Korte*, 34 Ohio St. 525, 535 (1878), citing Story, Conflict of Laws, Section 41. The Court in *Cunningham* reiterated that domicile is "the technically pre-eminent headquarters that every person is compelled to have in order that certain rights and duties that have been attached to it by the law may be determined." *Cunningham*, 2015-Ohio-2744, ¶ 12, citing *Schill v. Cincinnati Ins. Co.*,

141 Ohio St.3d 382, 2014-Ohio-4527, 24 N.E.3d 1138, ¶ 24, quoting *Williamson v. Osenton*, 232 U.S. 619, 625, 34 S.Ct. 442, 58 L.Ed. 758 (1914). Generally, domicile is defined as "a legal relationship between a person and a particular place which contemplates two factors: first, residence, at least for some period of time and, second, the intent to reside in that place permanently or at least indefinitely." *Id.*, quoting *Shill,* ¶ 24. Therefore, Ohio Courts have held that "a person can have multiple residences, but can have only one domicile." *Schill*, ¶ 25, citing *Grant v. Jones*, 39 Ohio St. 506, 515 (1883).

At common law, "the issue of domicile is one of intent determined by the facts of the individual case," including "the acts and declarations of the person" and the totality of "accompanying circumstances." *Davis v. Limbach*, BTA No. 89–C–267, 1992 WL 275694, *4 (Sept. 25, 1992), citing *State ex rel. Kaplan v. Kuhn*, 8 Ohio N.P. 197, 202, 11 Ohio Dec. 321 (1901). The Ohio Supreme Court has also held that "the law ascribes a domicile to every person, and no person can be without one." *Sturgeon v. Korte*, 34 Ohio St. 525, 534 (1878). Therefore, the trier of fact must look at the facts of the individual case, specifically the acts and declarations. Evidence determining domicile consist of formal acts and declarations, such as where an individual files federal income tax returns, votes, registers their vehicles, or the location of their spouse and children. *Cleveland v. Surella*, 61 Ohio App.3d 302, 305-306, 572 N.E.2d 763 (8th Dist. 1989).

Once domicile is established, it continues until the individual demonstrates intent to abandon it. Accordingly, "abandonment of one's domicile is effected only when a person chooses a new domicile, establishes actual residence in the place chosen and shows a clear intent to establish a new principal and permanent residence." *E. Cleveland v. Landingham*, 97 Ohio App.3d 385, 391, 646 N.E.2d 897 (1994). For a change in domicile to be established, "the person must have a physical presence in the new residence and intend to stay there." *Schill, supra* at ¶ 26. Moreover, [t]he essential fact that raises a change of abode to a change of domicile is the absence of any intention to live elsewhere * * *." *Id.* quoting, *Williamson v. Osenton*, 232 U.S. 619, 624, 34 S.Ct. 442, 58 L.Ed. 758 (1947).

IV. FACTS & CIRCUMSTANCES:

The petitioners contend that Mrs. Keever was domiciled in Virginia for tax year 2016. The petitioners did not file an Affidavit of Non-Ohio Residency/Domicile for Taxable Year 2016 for Mrs. Keever. Therefore, Mrs. Keever is presumed to be domiciled in Ohio for the entirety of 2016. R.C. 5747.24(B)(1). Because Mrs. Keever did not file the Affidavit and had fewer contact periods with Ohio than contemplated by the statute, the petitioners must rebut the presumption of Ohio domicile with a preponderance of evidence to the contrary. R.C. 5747.24(C).

The petitioners submitted a letter from an apartment complex in Richmond, Virginia stating Mrs. Keever resided at the complex from September 2015 until May 2017. The petitioners also submitted Mrs. Keever's 2016 Virginia individual income tax return and utility bills for the apartment in Virginia. Following the June 15 phone hearing, the petitioners submitted an employment agreement indicating that Mrs. Keever accepted a position in Virginia.

Although the petitioners contend that they affirmatively established a domicile in Virginia, their actions and availments during 2016 show that they maintained significant connections with Ohio and continued to enjoy the rights and privileges afforded to Ohio residents. The intent to abandon one's domicile is shown by evidentiary factors including where the individual files federal income tax returns, where the individual votes, registers their vehicle, and maintains a driver's license. *Davis*, at *5-7.

Physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. In this case, the evidence currently available to the Tax Commissioner indicates the petitioners maintained significant connections to Ohio throughout 2016. Mrs. Keever filed a 2016 Virginia Individual Income Tax Return and listed an Ohio address. Evidence available to the Tax Commissioner also shows the petitioners were registered to vote in Ohio during 2016. The petitioners maintained and renewed Ohio driver's licenses during 2016 and subsequent years. The petitioners also had multiple vehicles registered in Ohio.

Records available to the Tax Commissioner from the Warren County Auditor indicate the petitioners owned a home located at 3721 Spring Mill Way, Maineville, Ohio 45039 in 2016.[2] The petitioners have owned the Maineville home since 1987 and reside there currently. The petitioners did not utilize the Owner-Occupied credit during 2016. However, the petitioners did not utilize the Owner-Occupied credit for several other years they resided in their Ohio residence. Therefore, the fact that the petitioners did not claim the Owner-Occupied credit in 2016 is not indicative of their domicile in 2016. Additionally, Mr. Keever resided in the Maineville home for portions of 2016.

V. CONCLUSION:

The totality of the evidence available to the Tax Commissioner shows the petitioners' actions and availments during 2016 are consistent with those of individuals maintaining an Ohio domicile. Even though the petitioners assert they were not domiciled in Ohio for the tax period in question, they failed to provide sufficient evidence to show they took affirmative steps to establish a new domicile in Virginia. Therefore, the petitioners have failed to rebut the presumption they were domiciled in Ohio for the entirety of 2016 as required by R.C. 5747.24(D). Consequently, the petitioners' contention that Mrs. Keever was domiciled in Virginia is not well taken.

R.C. 5747.05(B) provides residents with a credit for income taxed by or paid to other states.[3] Records indicate that Mrs. Keever reported taxable income of $118,559.00 and paid $6,300.00 of individual income tax to the state of Virginia. Therefore, the petitioners are entitled to a resident credit for taxes paid to Virginia.

The Tax Commissioner may abate a penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.05(B). In this case, the evidence and circumstances support a full abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$522.00	$335.75	$0.00	$857.75

[2] Matt Nolan, Warren County Auditor. https://www.wcauditor.org/Property_Search/summary.aspx?account_nbr=940093 (accessed on June 14, 2021).

[3] The resident credit under R.C. 5747.05(B) is granted in order to comport with the dormant Commerce Clause and avoid an individual's income being subjected to taxation by multiple states, which is often referred to as "double taxation." The U.S. Supreme Court has repeatedly held that a State may not "impose a tax which discriminates against interstate commerce either by providing a direct commercial advantage to local business, or by subjecting interstate commerce to the burden of 'multiple taxation.'" *Comptroller of Treasury of Maryland v. Wynne*, 135 S.Ct. 1787, 1790, 191 L.Ed.2d 813 (2015), citing *Northwestern States Portland Cement Co.* v. *Minnesota*, 358 U.S. 450, 458, 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959).

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Current records indicate that no payments have been made on this assessment, leaving the full balance due. However, due to processing and posting time lags, other payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to the "Treasurer - State of Ohio." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 30 2021

Jimmy and Mandy Wills
8806 US Route 40
New Carlisle, Ohio 45344

Re: Multiple Assessments
Individual Income Tax – Multiple Periods

This is the final determination of the Tax Commissioner regarding multiple petitions for reassessment pursuant to R.C. 5747.13 concerning the following individual income tax assessments:

Assessment	Year	Tax	Interest	Penalties	Total
02201902479057	2014	$334.40	$42.58	$85.16	$462.14
02201902479056	2015	$2,963.00	$309.68	$619.36	$3,892.04

I. Background

The Department assessed Jimmy and Mandy Wills ("the petitioners") for failing to timely file amended individual income tax returns to reflect a change in the petitioners' federal adjusted gross income under R.C. 5747.10. This information was reported to the Department by the Internal Revenue Service ("IRS") under authorization of Section 6103(d) of the Internal Revenue Code.

The Department received information from the IRS that the petitioners' federal adjusted gross income ("FAGI") for tax years 2014 and 2015 was adjusted as a result of an IRS audit. The Department issued the assessments currently considered based upon the adjustments made pursuant to the IRS audit. The petitioners filed a timely petition for reassessment but did not pay the amounts assessed or file an amended Ohio income tax return for the tax year in question.

II. Relevant Authority

Ohio's income tax is levied on individuals, trusts, and estates residing in Ohio or earning or receiving income in Ohio, or otherwise having nexus with or in Ohio. R.C. 5747.01, R.C. 5747.02. For Ohio income tax purposes, the starting point is FAGI which is then adjusted pursuant to R.C. 5747.01 et seq. to reach Ohio Adjusted Gross Income. Every taxpayer who is liable for income earned or received in Ohio is required to file an annual income tax return. R.C. 5747.08.

Former R.C. 5747.10, in effect for the period in question, mandated that "if any of the facts, figures, computations, or attachments required in a taxpayer's annual return * * * must be altered as the result of an adjustment to the taxpayer's federal income tax return, * * * the taxpayer shall file an amended return with the tax commissioner in such form as the commissioner requires. The amended return shall be filed not later than sixty days after the adjustment has been agreed to or finally determined for federal income

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tax purposes or any federal income tax deficiency or refund, or the abatement or credit resulting therefrom, has been assessed or paid, whichever occurs first."

Important to this matter is R.C. 5747.13(E) which states "If the party assessed files a petition for reassessment under division (B) of this section, the person, on or before the last day the petition may be filed, shall pay the assessed amount, including assessed interest and assessed penalties, if any of the following conditions exists: * * * (3) The person fails to file a tax return, and the basis for this failure is not either of the following: (a) An assertion that the person has no nexus with this state; (b) The computations required under division (A) of section 5747.01 of the Revised Code or the application of credits allowed under this chapter has the result that the person's tax liability is less than one dollar and one cent."

Ohio's Court of Appeals for the Eleventh District examined former R.C. 5747.10 and found that IRS adjustments to taxpayers' federal adjusted gross income which directly affected their Ohio income tax liability, which in turn, triggered the requirement to file an amended return pursuant to R.C. 5747.10. *Gibson v. Limbach*, 11th Dist. Trumball, 74 Ohio App.3d 498, 501, 599 N.E.2d 715, 717 (1991).

III. Analysis of the Facts & Circumstances

In the present case, the IRS adjusted the petitioners' FAGI based on an audit finally determined on or around March 28, 2018. Pursuant to former R.C. 5747.10, the petitioners had sixty days from March 28, 2018, the date the adjusted FAGI was finalized, to file amended Ohio returns for both tax years. However, Department records indicate that, as of the date of this Final Determination, the petitioners have not filed amended Ohio returns for either tax year, as required by former R.C. 5747.10. Department records also show that the petitioners have not made any payments towards these assessments. Therefore, pursuant to R.C. 5747.13, the Tax Commissioner lacks jurisdiction to consider the objections raised in petitioners' petition for reassessment.

Therefore, the matter is dismissed.

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Cinda L. & Audley J. Woodward
851 Acorn Drive
Sugarcreek Township, Ohio 45440

Re: Assessment Nos. 02201804538985; 02201804538986
Individual Income Tax – 2015 & 2016

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals dated July 7, 2021, in Case No. 2020-150. In that order, the Board of Tax Appeals remanded the matter to the Tax Commissioner for further proceedings.

In resolution of this matter, assessment numbers 02201804538985 and 02201804538986 have been adjusted and are paid in full.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation
Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

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FINAL DETERMINATION

Date: JUL 28 2021

Beverage Marketing USA, Inc.
222 Bloomingdale Rd., Ste. 116
White Plains, NY 10605

Re: Assessment No. 14201614645406
Pass-Through Entity Tax – Multiple Periods

This is the final determination of the Tax Commissioner regarding petition for reassessment filed pursuant to R.C. 5747.13 concerning the following pass-through entity tax assessment:

Taxable Year Ending	Tax	Interest	Penalty	Total
December 31, 2010	$26,112.00	$4,226.00	$0.00	$30,338.00
December 31, 2011	$179,576.00	$22,418.00	$26,936.00	$228,930.00
December 31, 2012	$180,828.00	$17,189.00	$27,124.00	$225,141.00

I. PROCEDURAL BACKGROUND

The Ohio Department of Taxation assessed the petitioner, Beverage Marketing USA, Inc. (hereinafter "BMU" or the "petitioner") after conducting a review of its pass-through entity composite income tax returns (form IT 4708) for the above periods. Specifically, the Department required several related member addbacks pursuant to R.C. 5733.40(A)(3) and adjusted the sales factor of the petitioner's apportionment ratio. In response to the assessment, the petitioner filed a petition for reassessment and requested a hearing on the matter. The hearing was conducted via telephone and time was provided for the petitioner to supply additional information to support its return as filed. This matter is now decided based upon the evidence and information currently available to the Tax Commissioner.

II. FACTUAL BACKGROUND

During the period in question, BMU provided data and marketing services, engaged in market research and analysis, and provided management consulting and advisory services for the food and beverage and packaged goods industries. During the period in question, the petitioner was headquartered in Woodbury, New York, and also had a facility in Cincinnati, Ohio. Until 2010, BMU was responsible for the sale of Arizona Iced Tea products, which were reported on line 1 of BMU's federal S Corporation return ("form 1120-S"). BMU historically reported an Ohio apportionment ratio of at least 2% when reporting sales of Arizona Iced Tea products. On September 8, 2010, the petitioner formed Arizona Beverages USA, LLC

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("ABU") to sell Arizona Iced Tea products. Under an intellectual property arrangement, ABU would pay BMU royalties for the use of the intangible property eld by BMU.[1]

Upon review of the composite income tax returns filed for the tax years at issue, the Department made various adjustments, including:

- Requiring add backs for certain expenses paid to BMU's related members,
- Exclusion of "rebates, incentives, and commissions" from the "everywhere sales" portion of the sales factor of BMU's apportionment ratio, and
- Inclusion of royalties in the "Ohio sales" portion of the sales factor of BMU's apportionment ratio for income from ABU related to trademarks used in Ohio.

These adjustments lead to the assessments at issue in this final determination.

III. THE PETITIONER'S CONTENTIONS

The petitioner objects to the assessment as issued and asks the entire amount assessed "be abated or non-asserted in full." However, in its petition for reassessment, the petitioner only specifically challenges three adjustments made for the tax years at issue. Specifically, the petitioner raises two issues directly in its petition for reassessment, and a third issue indirectly by incorporating ABU's petition for reassessment by reference.

The petitioner first contends that compensation paid to shareholders Wesley and Spencer Vultaggio should not be added back as a related member adjustment under R.C. 5733.40(A)(3). However, the petitioner's contention is not rooted in the text or interpretation of Ohio's related member adjustment statutes. Instead, the petitioner's contention is based entirely on the assertion that the Department previously did not require the addback related to compensation paid to these individuals in previous tax years.

The petitioner's second contention is that its rebates, incentives, and commissions were more akin to management fees generated pursuant to its ownership interest in ABU, and they are more appropriately included in its sales factors apportioned to other states than Ohio because they are the result of broad operational revenues—not subject or attributable to any one particular state. The petitioner contends that the exclusion of these amounts from BMU's everywhere sales apportionment based on R.C. 5733.05(B)(2)(c) is in error, and that the Department ignored the federal definition of gross income in determining "sales".

The petitioner's third and final contention, which was made via the petition for reassessment filed by ABU, is that requiring BMU to make related member adjustments for amounts paid to ABU results in double taxation. Put another way, since ABU included the receipts from BMU as income on its Ohio IT 4708, requiring BMU to include those same amounts on its Ohio IT 4708 for the same tax year will subject the income to Ohio taxation twice.

IV. AUTHORITY AND ANALYSIS OF THE FACTS & CIRCUMSTANCES PRESENTED

Ohio levies a tax on pass-through entities ("PTEs") to "complement and to reinforce" Ohio's income

[1] After this restructuring, BMU would report most of the income, but low Ohio apportionment, while ABU would report very low income, but relatively high Ohio apportionment. The result of these pass-through entities' Ohio filings was a distortion of income situsued outside of Ohio, and thus a lower tax due.

tax. R.C. 5747.40.[2] The tax base for pass-through entities filing the IT 4708 is the sum of distributive shares of its investors' income taxable to Ohio in accordance with R.C. 5747.20 to 5747.231. R.C. 5747.08(D). Additionally, pass-through entities must also make certain adjustments found in R.C. 5733.40 and 5747.01(A). *See e.g.,* R.C. 5733.40(A)(3) (applying the section to chapters 5733. and 5747). One such adjustment, commonly referred to as a "related member adjustment" is at issue in this petition and thus further described below.

A. RELATED MEMBER ADJUSTMENTS[3]

In calculating Ohio pass-through entity tax, PTEs are required to modify their net income by adding back "all amounts representing expenses… paid to or incurred with respect to direct or indirect transactions with one or more related members…." R.C. 5733.40(A)(3). This is commonly referred to as an Ohio "related member adjustment". Such "expenses" include compensation (e.g., salaries and wages) when paid to a related member. A "related member" includes an "individual stockholder, or a member of the stockholder's family enumerated in [I.R.C. §318],[4] if the stockholder and the members of the stockholder's family own, directly, indirectly, beneficially, or constructively, in the aggregate, at least" 50% of the PTE. *See* R.C. 5733.04(I)(12)(c), via R.C. 5733.042(A)(6) and 5733.40(P). *See also* former R.C. 5747.01(DD) (renumbered to R.C. 5747.01(CC) by Am. Sub. H. B. No. 197 of the 133rd Ohio General Assembly).

Based on this legal requirement, the Department added back compensation paid to Wesley and Spencer Vultaggio. Wesley and Spencer Vultaggio each "beneficially" own 16.216216%[5] of BMU as beneficiaries of the Wesley Vultaggio Trust and the Spencer Vultaggio Trust, respectively. Additionally, Domenick Vultaggio, Wesley's and Spencer's father, owns 35.135135%[6] of BMU. Thus, Spencer and Wesley are members of Domenick's family, and in the aggregate they own at least 50% of BMU, so BMU must add back any compensation paid to them.[7] Said differently, BMU paid an expense (the compensation) to related members (Wesley and Spencer Vultaggio), which must be added back as a related member adjustment pursuant to R.C. 5733.40(A)(3).

The petitioner does not raise any legal or substantive objections to these related member adjustments. Rather, BMU claims in its first contention that the Department did not require these related member adjustments on a previous audit and that the differential treatment from period to period is unreasonable. To the extent this contention asserts the Department is prevented or estopped from evaluating and auditing different periods based on the facts and circumstances of those periods, such arguments have been routinely rejected by Courts. The Supreme Court of Ohio has acknowledged "a narrow range of applicability of collateral estoppel in tax proceedings." *Olmsted Falls Bd. of Edn. v. Cuyahoga Cty. Bd. of Revision*, 122 Ohio St.3d 134, 2009 Ohio 2461, 909 N.E.2d 597, ¶ 17. Collateral estoppel "precludes the relitigation, in a second action, of an issue that has been actually and necessarily litigated and

[2] A PTE can comply with this tax by filing either the Pass-Through Entity and Trust Withholding Tax Return (IT 1140) or the Pass-Through Entity Composite Income Tax Return (IT 4708) and paying the corresponding tax due. For the periods in question, the petitioner elected to file the IT 4708.

[3] Because the petitioner's first and third contentions both relate to Ohio related member adjustments, contention three will be addressed before contention two in this Final Determination.

[4] Family members enumerated in I.R.C. §318 include a shareholder's spouse, children, grandchildren, and parents.

[5] For tax years 2011 and 2012. Their beneficial ownership was 13.005% for tax year 2010.

[6] For tax years 2011 and 2012. Domenick owned 28.1774% for tax year 2010.

[7] In the aggregate, the family owns Domenick's direct ~35% plus Wesley and Spencer's beneficial ~16% each, for a total of 67.567567% ownership in BMU for tax years 2011 and 2012. For tax year 2010, the aggregate ownership percentage in BMU was 54.1874%.

determined in a prior action." *Whitehead v. Gen. Tel. Co.*, 20 Ohio St.2d 108, 112, 254 N.E.2d 10 (1969). But the estoppel operates "only when there is an identity of issues and an identity of parties or their privies in both the first and the second suit." *Id.* at 113.

BMU and the Tax Commissioner have not litigated the legality or necessity of the related member adjustments in question. In fact, these related member adjustments are **required** by R.C. 5733.40(A)(3), which neither party disputes. Therefore, the Department is not prevented or estopped from making the legally required adjustments for the periods in question.

The petitioner also objects to related member adjustments made by the Department regarding expenses paid to ABU in its third contention. The petitioner's primary objection is that both it and ABU were filing the Ohio IT4708 and remitting pass-through entity tax for the periods in question. As such, some of the related member adjustments for BMU are *income* amounts reported by ABU. If the Department pursues both the related member adjustment and ABU's return as filed,[8] there could be instances of double taxation. However, the Department cancelled the assessment of ABU for the same periods via final determination on January 13, 2021. Thus, the petitioner's contentions regarding the potential for double taxation between ABU and BMU are now moot and cannot be well taken.

B. APPORTIONMENT FACTOR ADJUSTMENTS

In its second contention, the petitioner objects to the Department's adjustments to the sales factor of its apportionment ratio. Ohio uses three-factor apportionment to measure the extent of an entity's business activity within Ohio versus everywhere. R.C. 5733.05(B) via 5747.21(B). The entity's aggregate business income is multiplied by this apportionment factor to determine its taxable income.[9] *Id.* One of the three factors in the apportionment formula is the "sales factor", the numerator of which is the total sales by the entity in Ohio, and the denominator of which is the total sales by the entity everywhere during the tax year. R.C. 5733.05(B)(2)(c). The sales factor excludes "receipts and any related gains or losses from the sale or other disposal of excluded assets; dividends or distributions; and interest or other similar amounts received for the use of, or for the forbearance of the use of, money."[10] *Id.*

The Department, absent an explanation and corroborating evidence of what constitute "rebates, incentives, and commissions" determined the amount was not "core revenue" and removed these amounts from the petitioner's "sales everywhere" in calculating the sales factor of BMU's apportionment ratio.[11] The petitioner contends that the rebates, commissions, and incentives are essentially management fees that represent "core revenues" of BMU. It further contends that these amounts are not specifically excluded from the sales factor under R.C. 5733.05(B)(2)(c), and that they meet the federal definition of gross income under I.R.C. §61. It also contends that these amounts are for services performed outside of Ohio, and thus should not be included in the "Ohio" portion of the sales factor of BMU's apportionment ratio. In support of its position, BMU provided one-page acknowledgement and recitals documents between itself and ABU, and itself and Hornell Brewing Co ("HBC").

[8] The Department also assessed ABU for the same period.
[9] In addition to apportionable business income, a PTE is also taxed on its allocable nonbusiness income. *See* R.C. 5747.20.
[10] "Excluded assets" include "intangible property, other than trademarks, trade names, patents, copyrights, and similar intellectual property; or tangible personal property or real property where that property is a capital asset or an asset described in" I.R.C. §1231. R.C. 5733.05(B)(2)(c).
[11] The petitioner did not situs any of these amounts to Ohio, and thus there was nothing to remove from the "Ohio" portion of the sales factor of the apportionment ratio.

At the outset, the Department acknowledges that a business's management fees generally meet the federal definition of "gross income." However, the petitioner has not shown that the "rebates, incentives, and commissions" income is, in fact, a management fee. While the petitioner provided one-page contracts it has with ABU and HBC, nothing ties those contracts to the amounts in question. Additionally, the contracts provided do not show exactly how the income received by BMU is calculated or describe the specific services BMU provides. Thus, despite its contention to the contrary, the petitioner has not affirmatively established that the receipts at issue were for management services.

As a result, the Department is unable to determine that the rebates, incentives, and commissions are management fees, or any other kind of gross income derived from business. The Department cannot even determine with any degree of certainty that these amounts are not "excluded income" as contemplated by R.C. 5733.05(B)(2)(c).

Moreover, even if the petitioner had established the income was a management fee (or any form of gross income derived from business), it did not provide evidence sufficient to show how the receipts should be sourced. While the petitioner contends this income should be sitused outside Ohio, R.C. 5733.05(B)(2)(c)(ii) requires receipts from services to be sitused to Ohio "in the proportion to the purchaser's benefit, with respect to the sale, in this state to the purchaser's benefit, with respect to the sale, everywhere." *See id.* (via R.C. 5747.21(B)). The same provision likewise situses receipts from the "grant of the right to use trademarks…" to Ohio based on the amount of use of, or the right to use, the trademark in Ohio. *Id.*

In its petition, BMU states that its "business activities include the management of… trademarks, worldwide sales, and the related costs associated with those sales," its "employees manage and negotiate material contracts on behalf of companies utilizing its trademarks," and that it provides "technical support to the companies that utilize the trademarks" in exchange for the rebates, incentives, and commissions income. Since BMU provides these services related to its trademarks, and the trademarks are used in Ohio, R.C. 5733.05(B)(2)(c)(ii) requires *some* portion of the income be included in the "Ohio" portion of the petitioner's sales factor. However, without more information, the Department is unable to determine exactly what portion that should be.

For the above reasons, the petitioner's contentions regarding the adjustments to its apportionment ratio are not well taken.

C. PENALTY ABATEMENT

The Tax Commissioner may abate penalties when taxpayers demonstrate that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioner claims that its failure to comply was due to reasonable cause, and the evidence supports this claim. Thus, a full abatement of the penalties included on the assessments is warranted.

V. CONCLUSION

Based on the foregoing analysis, the petitioner's contentions in its petition for reassessment, which relate to related member adjustments for investor compensation and sales factor adjustments for "rebates, incentives, and commissions" made by the Department are not well taken. Additionally, BMU's contention relating to the ABU related member addback and double taxation is rendered moot by the

cancellation of the assessment against ABU. However, the petitioner's request for penalty abatement is well taken.

Accordingly, the assessment is adjusted as follows:

Taxable Year Ending	Tax	Interest	Penalty	Total
December 31, 2010	$26,112.00	$4,226.00	$0.00	$30,338.00
December 31, 2011	$179,576.00	$22,418.00	$0.00	$201,994.00
December 31, 2012	$180,828.00	$17,189.00	$0.00	$198,017.00

Current records indicate that no payments have been made to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer Robert Sprague." Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000123

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 1 2021

Defender Security Company
3750 Priority Way S. Dr.,
Suite #200
Indianapolis, IN 46240

Re: Pass-Through Entity
Assessment No. 14201512140160
Multiple Periods

This is the final determination of the Tax Commissioner with regard to petitions for reassessment filed pursuant to R.C. 5747.13 concerning the following pass-through entity (PTE) amounts:

PERIOD	TAX	ASSESSMENT INTEREST	ASSESSED PENALTY	TOTAL
01/01/201-12/31/2010	$35,264.00	$6,000.00	$1,763.00	$43,027.00
01/01/2011-12/31/2011	$27,494.00	$2,756.00	$1,375.00	$31,625.00
01/01/2012-12/31/2012	$42,010.00	$2,648.00	$0.00	$44,658.00
			Total Assessment	**$119,310.00**

The Department assessed the petitioner after performing an audit for the periods at issue. Specifically, the Department's audit staff identified that the petitioner incorrectly apportioned its product sales outside of Ohio. The audit resulted in adjustments to the petitioner's Ohio sales. The petitioner objects to the assessment. Upon further review, and in light of the Ohio Supreme Court's recent decision in *Defender Security Company v. McClain,* 162 Ohio St.3d 473, 2020-Ohio-4594, 165 N.E.3d 1236, the petitioner's contention is well taken.

Accordingly, the assessments are cancelled.

Current records indicate that no payments have been made on this assessment, leaving no balance due. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

Jeffrey A. McClain
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Buckeye Power, Inc.
ATTN: Kurt Helfrich, Chief Counsel
6677 Busch Boulevard
Columbus, OH 43229

Re: Case Nos. 19-00371,19-01169 and 20-12031
Public Utility Property Tax
Various Counties
Tax Years: 2018, 2019 and 2020

This is the final determination of the Tax Commissioner on petitions for reassessment pursuant to R.C. 5727.47 concerning three public utility property tax assessments. Two telephone hearings were held on these matters.

I. FACTUAL BACKGROUND

The petitioner describes its business in its tax year 2019 petition as follows:

> Buckeye is an Ohio nonprofit corporation described as a generation and transmission cooperative that provides electric generation and transmission service on a nonprofit cooperative basis to its 24 Ohio-based electric distribution cooperative members and to the Ohio customers of Midwest Energy & Communications ("Midwest Energy") (an electric distribution cooperative member of Buckeye which is based in Cassopolis, Michigan).' These 25 electric distribution cooperative members of Buckeye are hereafter referred to as "Buckeye's Members." Like Buckeye, Buckeye's Members are also Ohio nonprofit corporations (with the exception of Midwest Energy which is organized under Michigan law), and they collectively serve, on a nonprofit cooperative basis, approximately 400,000 members/consumers (representing approximately 1,000,000 residents) predominantly in Ohio. Buckeye's Members own and govern Buckeye through the Buckeye Board of Trustees (hereafter referred to as the "Buckeye Board"). The Buckeye Board is composed of 25 people (one person being appointed by each of the 25 Buckeye Members).
>
> * * *
>
> Buckeye owns (directly and indirectly) a portfolio of coal-fired, natural gas-fired, and renewable generation power plants. Buckeye's coal-fired generation assets include two units (approximately 1,210 megawatts at the Cardinal Station (discussed in more detail below), and an approximately 400 MW contractual entitlement to power and energy from the two coal-fired generation assets, the Kyger Creek Plant, and the Clifty Creek Plant, owned by the Ohio Valley Electric

> Corporation ("OVEC"), representing an 18 percent interest in OVEC.
> * * *
> Cardinal Station is a baseload coal-fired electric generating plant with three separate units known as Cardinal Unit 1, Cardinal Unit 2, and Cardinal Unit 3. Cardinal Station is located on the Ohio River in Brilliant, Ohio which is within the AEP Zone of PJM.
>
> Buckeye owns Cardinal Unit 2 and Cardinal Unit 3. AEP Generation Resources, Inc., a for-profit corporation and an affiliate of AEP, owns Cardinal Unit 1.

Cardinal Operating Company's website summarizes its operations as follows:

> Cardinal Power Plant has three coal-fired generating units of a capacity up to 1,230 MW. It's situated on the Ohio River in Brilliant, Ohio, about 50 miles west of Pittsburgh and 15 miles north of Wheeling, West Virginia.
>
> Cardinal Unit 1 is owned by AEP Generation Resources Inc., AEP's competitive generation affiliate. The unit was placed in commercial service in 1967. Unit 2 came on-line later that same year and is owned by Buckeye Power. Each unit has generating capacity of 590 megawatts (MW).
>
> Unit 3, also owned by Buckeye Power, began operation in 1977 and has generating capacity of 620 MW. Buckeye Power operates the facility on behalf of each owner.
>
> Over a decade, and culminating in 2012, Buckeye Power invested $1.2 billion in emissions-control equipment on units 2 and 3, making Cardinal Power Plant one of the cleanest power plants of its kind in the world.
>
> With about 300 employees, and scores of vendors and contractors supporting them, Cardinal Power Plant is a major economic force in the region. [1]

II. Procedural Background

On July 3, 2018, Buckeye Power Inc. filed an amended 2018 Rural Electric Company Annual Report, based upon an appraisal that it had prepared. Upon audit, the Department denied the petitioner's request to use the appraisal value for the Cardinal Units 2 & 3. The Department issued its Public Utility Property Preliminary Assessment on October 1, 2018. The petitioner timely filed its petition for reassessment.

Buckeye filed the Rural Electric Annual Report for tax year 2019 with the Department on March 29, 2019. The taxpayer noted on the Schedule C – Taxable Value Summary that "Buckeye Power Inc. obtained an independent appraisal of the production equipment of Cardinal Units 2 and 3." Upon audit, the Department denied the petitioner's request to use the appraisal value for the Cardinal Units 2 & 3. The Department corrected the Net Cost of Taxable Property on the Schedule C – Taxable Value Summary. The Department issued its Public Utility Property Preliminary Assessment on October 7, 2019. The petitioner timely filed a petition for reassessment.

[1] https://www.cardinalopco.com/cardinal-power-plant. Last accessed April 7, 2021.

Buckeye filed the Rural Electric Annual Report for tax year 2020 with the Department and again noted that its valuation reported was based upon the values in the independent appraisal that it obtained. The Department again denied the petitioner's request to use the appraisal value. The Department issued its Public Utility Property Preliminary Assessment on October 5, 2020 and the petitioner timely filed its petition.

III. PETITIONER'S CONTENTIONS

The petitioner's July 20, 2020 post-hearing memorandum explains the updated version of the petitioner's contentions. The petitioner also submitted a post-hearing memorandum on March 28, 2021 that includes arguments through its tax year 2020 filing. This latest memorandum updates its original contentions. These contentions are laid out below.

The petitioner contends that the statutory method of valuation of its Cardinal Plant Units 2 and 3 using true value computations yields an unreasonable and flawed result. The petitioner argues that the statutory method does not yield a reasonable result due to this computation not accounting for the large number of similar coal-burning power plants that have closed in recent years, and the petitioner seeks to use an alternate valuation.

The petitioner contends that the Department should allow it to value Units 2 and 3 at the Cardinal Plant at the 15% valuation floor, arguing that the Department allows AEP to value its Unit 1 at the Cardinal Plant at the 15% floor and that it, likewise, deserves the same treatment. The petitioner also contends that as it has sufficient cash flows from operations to justify the cost of its Cardinal Plant production equipment on its books and under Accounting Standards Codification 360, it is not required to take a write down and therefore the Department should allow it to use the 15% valuation floor for Cardinal production equipment without taking a write down.

The petitioner contends that the EVC appraisal that it has submitted should be followed, and the value of Units 2 and 3 should be written down to the 15% floor in the true value computations.

The petitioner contends that the Department "is prohibited by Article 1, Section 2 of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution from valuing Unit Two significantly higher than Unit One because the Units are similarly situated." The petitioner also contends that "The Department is prohibited by Article VI, Paragraph 2 of the U.S. Constitution (the "Supremacy Clause") from requiring a book write-down of Buckeye's Units Two and Three where such write-down is prohibited by federal law pursuant to USDA Regulation Sections 1767.12 and 1767.41."

IV. ANALYSIS

A. PUBLIC UTILITY DEFINITION

R.C. 5727.01(A) provides:

> "Public utility" means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, railroad company, combined company, or energy company.

The petitioner is a rural electric company, and as a rural electric company qualifies as a "public utility" under R.C. 5727.01(A).

B. THE PETITIONER'S CARDINAL PLANT ELECTRIC PRODUCTION EQUIPMENT ACQUIRED OR PLACED IN SERVICE AFTER OCTOBER 5, 1999 MUST BE VALUED PURSUANT TO R.C. 5727.11(D)(2)

R.C. 5727.11(A) provides, in pertinent part, as follows:

> Except as otherwise provided in this section, the true value of all taxable property . . . required by section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that the application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation.

R.C. 5727.11(D)(2) provides:

> The true value of the production equipment or energy conversion equipment of an electric company, rural electric company, or energy company purchased, transferred, or placed into service after October 5, 1999, is the purchase price of the equipment as capitalized on the company's books and records less composite annual allowances as prescribed by the tax commissioner.

R.C. 5727.11(A) provides the general rule for valuing public utility personal property: that the true value of all taxable property shall be based upon the cost as capitalized on the company's books less composite annual allowances as prescribed by the tax commissioner. This methodology must be followed, except if the Tax Commissioner finds that this method does not result in the determination of true value; then an alternate method of valuation may be used. R.C. 5727.11(A) also states that this general rule applies "except as provided otherwise in this section."

For rural electric and electric companies with electricity production equipment placed into service after October 5, 1999, R.C. 5727.11(D)(2) requires that such electric companies must value their electric production equipment using the property's cost as capitalized on the company's books and records less the Tax Commissioner's composite annual allowances.

Thus, while the general rule of valuing public utility personal property of R.C. 5727.11(A) requires that the true value of the property be based upon cost as capitalized on the company's books, the specific rule for electric generation utilities whose property either was purchased or was placed in service after October 5, 1999 is different. For electric generation companies such as the petitioner, R.C. 5727.11(D)(2) requires that the Cardinal Plant electric production equipment purchased after October 5, 1999 must be valued using capitalized cost on the books less composite annual allowances, and there is no allowance for an alternative method of valuation under any circumstances. Thus, pursuant to R.C. 5727.11(D)(2), the production equipment at issue purchased after October 5, 1999 must be valued using the cost on the petitioner's books less composite annual allowances, and no deviation is allowed from this valuation methodology. Pursuant to R.C. 5727.11(D)(2), the Tax Commissioner is prohibited from considering the alternate valuation methodology proposed for the equipment purchased after October 5, 1999.

Therefore, alternative valuations and appraisal valuations supplied by the petitioner cannot be considered for the electric generation property purchased or placed in service after October 5, 1999.

C. THE PETITIONER'S CARDINAL PLANT ELECTRIC PRODUCTION EQUIPMENT ACQUIRED OR PLACED IN SERVICE ON OR BEFORE OCTOBER 5, 1999 MUST BE VALUED PURSUANT TO R.C. 5727.11(D)(1)

The tax year 2020 Annual Report filed by Buckeye shows that greater than 80% of Buckeye's production equipment was placed into service on or before October 5, 1999. R.C. 5727.11(D)(1) provides:

> * * * [The] true value of the production equipment of an electric company and the true value of all taxable property of a rural electric company is the equipment's or property's cost as capitalized on the company's books and records less fifty per cent of that cost as an allowance for depreciation and obsolescence.

Again, as described above, the general rule of valuing public utility personal property of R.C. 5727.11(A) requires that the true value of the property be based upon cost as capitalized on the company's books, with an alternative valuation method allowed if the capitalized cost method does not determine true value. However, R.C. 5727.11(D)(1) requires that all rural electric company production equipment be valued as the true value being the cost on the company's books less a flat fifty percent allowance for depreciation and obsolescence. R.C. 5727.11(D)(2), as explained above, governs the valuation treatment for rural electric companies such as the petitioner with respect to equipment purchased or placed into service after October 5, 1999, and R.C. 5727.11(D)(2) overrides R.C. 5727.11(D)(1)'s valuation treatment of electric production equipment.

Reading R.C. 5727.11(A), R.C. 5727.11(D)(1), and R.C. 5727.11(D)(2) together, R.C. 5727.11(A) is the general rule for valuing general non-electricity producing public utility property, and this section provides that alternative methods of valuation may be allowed in some circumstances. In the case of Buckeye, both R.C. 5727.11(D)(1) and (D)(2) come into play in valuing Buckeye's electric production equipment. All of Buckeye's production equipment falls under either R.C. 5727.11(D)(1) or (D)(2). All of Buckeye's taxable property and equipment placed into service prior to or on October 5, 1999 is governed by R.C. 5727.11(D)(1), and Buckeye's post-October 5, 1999 production equipment is valued under R.C. 5727.11(D)(2). Its production equipment placed into service after October 5, 1999 is valued at "the purchase price of the equipment as capitalized on the company's books and records less composite annual allowances as prescribed by the tax commissioner." Regarding Buckeye's property and equipment acquired or placed in service on or before October 5, 1999, this equipment is valued at "property's cost as capitalized on the company's books and records less fifty per cent of that cost as an allowance for depreciation and obsolescence."

In the instant case, Buckeye has supplied an appraisal and has given many arguments for lowering the value of its Cardinal Plant coal-burning electric production equipment. Buckeye has submitted information regarding the closure of other coal-burning power plants, recent electricity market developments, the rise of renewable energy sources in generating electricity, and extensive appraisal materials. However, as explained above, pursuant to R.C. 5727.11(D)(1) and (D)(2), the Tax Commissioner may not consider any such appraisal materials or arguments and must value a rural electric company's electric production equipment and non-production equipment at cost less

prescribed allowances for depreciation.[2]

D. EVEN IF R.C. 5727.11(D)(1) & R.C. 5727.11(D)(2) DID NOT REQUIRE IT, THE STATUTORY VALUATION METHOD BEST ESTABLISHES THE TRUE VALUE FOR THE PETITIONER'S PRODUCTION EQUIPMENT

Assuming, *arguendo*, that R.C. 5727.11(D)(1) and R.C. 5727.11(D)(2) did not apply to the petitioner and require it to only value its electric production property under the true value computations, the petitioner still did not submit evidence to meet its burden of proving the statutory valuation method did not determine true value. Even if the petitioner had done so, the valuation that it provided had numerous flaws that rendered it incapable of reflecting true value, causing the petitioner to fail to meet its burden of proving another valuation method more accurately determines true value.

As explained above, the petitioner's production property that has been placed in service before, on, and after October 5, 1999 is required to be valued under R.C. 5727.11(D)(1) and (2). However, assuming arguendo, that the production equipment at issue was *not* required to be valued under the statutory method, the production equipment at issue would still be best valued under the statutory valuation method.

Burden of Proof Remains on the Taxpayer

Texas Eastern Transm. Corp. v. Tracy, 78 Ohio St. 3d 83 (1997) stands for the proposition that, for public utilities, an alternate evidence of value may be considered when the statutory value pursuant to the tax return yields an inappropriate value. Texas Eastern Corporation is a pipeline company, not an electricity producer, and, as such, does not fall under the governance of R.C. 5727.11(D). The *Texas Eastern* opinion allows for the use of an alternate valuation without needing to establish that special or unusual circumstances exist. However, *Texas Eastern* requires that the taxpayer must show that the statutory method of valuation does not produce the true value of the property before an alternate valuation of the property may be used. In the case at hand, the petitioner has not shown that the statutory method of determining true value produces an unreasonable result.

In interpreting R.C. 5727.11(A) in *Texas Eastern*, the Ohio Supreme Court explained that R.C. 5727.11, though it does not prevent a taxpayer from doing so, does not require a taxpayer to establish "special and unusual circumstances" in order to deviate from the statutory valuation method:

> R.C. 5727.11 does not preclude the use of a unit-appraisal method and, where true value is being contested, there need not be a finding of special or unusual circumstances. . . [T]he words 'special or unusual circumstances' do not appear in R.C. 5727.11 and are not a prerequisite for using an alternate valuation method where appellees are contesting true value rather than depreciation rates. If the statutory method does not yield true value, then another method of valuation may be used, whether or not there are special or

[2] R.C. 5727.11(D)(1) provides the general rule for valuation of the value of "all taxable property of a rural electric company", including non-production equipment, that it is valued at cost as capitalized on the company's books less a fifty percent allowance for depreciation. R.C. 5727.11(D)(2) then applies its directive that any post-October 5, 1999 production equipment of a rural electric company is valued at "purchase price of equipment as capitalized on the company's books less composite annual allowances". The effect of these sections applied together is that a rural electric company's post-October 5, 1999 production equipment is valued under R.C. 5727.11(D)(2) at cost less composite annual allowances, and the remainder of a rural electric property, including non-production equipment, is valued under R.C. 5727.11(D)(1) at cost less a fifty percent allowance for depreciation.

> unusual circumstances. Although a statute may provide a prima facie estimate or presumption of value, where rigid application of the statute would be inappropriate, the presumption of value must yield to other competent evidence reflecting true value. *Monsanto Co. v. Lindley* (1978), 56 Ohio St.2d 59, 61, 10 Ohio Op. 3d 113, 114, 381 N.E.2d 939, 941; *W.L. Harper Co. v. Peck* (1954), 161 Ohio St. 300, 53 Ohio Op. 178, 118 N.E.2d 643.

Id. at 85, 86.

The Court did not say that a taxpayer who is challenging the statutory valuation method does not carry the burden of proof to show that the statutory method's determination of true value is incorrect; instead, the Court said that the taxpayer was not required to meet that burden by establishing "special and unusual circumstances." The court's statement "if the statutory method does not yield true value, then another method of valuation may be used" (emphasis added) presumes that the taxpayer challenging the statutory method first must prove that the statutory method does not yield true value before the Tax Commissioner even is permitted to consider any other evidence of true value. A taxpayer still can meet this burden by establishing "special and unusual circumstances," though not required to, or through other evidence.

The taxpayer's burden to demonstrate the inadequacy of the statutory methodology is further affirmed by the Court's use of the phrase "where rigid application of the statute would be inappropriate" and the subsequent case citations. The case citations are identical to, and the quoted words are substantially the same as, those used by the Court in *PPG Industries v. Kosydar* (1981), 65 Ohio St.2d 80, 83. In that case, the Court set forth the need for the taxpayer to prove the statutory method was inaccurate because it produced an "unjust or unreasonable result":

> The board misstated the test used to determine the proper application of the "302 Computation." The depreciation rate may be adjusted not only in unusual or special circumstances but also whenever it appears rigid application of the "302 Computation" will create an unjust or unreasonable result. *Monsanto* v. *Lindley, supra,* at page 62; *W. L. Harper Co.* v. *Peck, supra,* at page 305; *Alcoa* v. *Kosydar, supra,* at page 481.[3]

The similarity in wording and legal authority indicates the Ohio Supreme Court's intent in *Texas Eastern* to maintain the burden on the taxpayer to establish that the statutory valuation method, itself, inaccurately portrays true value before the Tax Commissioner is permitted to consider a different valuation methodology. Otherwise, without such evidence, the Tax Commissioner is unable to make the finding required by R.C. 5727.11 that the statutory valuation method does not reflect true value before using another method of valuation. Therefore, the burden squarely rests on the petitioner to prove the inaccuracy of that method and to come forward with other evidence proving a different true value.

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[3] The Ohio Supreme Court introduced in *W.L. Harper v. Peck* (1954), 161 Ohio St. 300, the practice of establishing "special and unusual circumstances" as evidentiary means in general personal property tax cases to deviate from the prima facie correct determination of true value via the true value computation, also referred to as the "302 computation," though earlier cases alluded to the need to do so without using those precise words. The court added the requirement of determining if, absent special and unusual circumstances, the "rigid application of the '302 Computation' will create an unjust or unreasonable result," in *PPG Industries* v. *Kosydar* (1981), 65 Ohio St. 2d 80, followed shortly thereafter by *Towmotor Corp. v. Lindley* (1981), 66 Ohio St.2d 53.

Underlying the substantial deference accorded the Tax Commissioner's findings is the Commissioner's acknowledged role as an "expert" in tax matters. *Bd. of Educ. of South-Western City Schools v. Kinney* (1986), 24 Ohio St.3d 184. The Ohio Supreme Court has expressly held that the Tax Commissioner's determination of taxable value involves "the highest degree of official judgment and discretion." *Ashland County Bd. of Comm'rs. v. Ohio Dep't. of Taxation* (1992), 63 Ohio St.3d 64, 656.

In the *Texas Eastern* decision, the Ohio Supreme Court concluded that because R.C. 5727.11 did not contain the precise words "special or unusual circumstances," a taxpayer did not have to establish such circumstances to prove that the statutory method produced an inaccurate true value. However, the Ohio Supreme Court still required that the taxpayer prove that the statutory method produces an "unjust or unreasonable result" before R.C. 5727.11 permits consideration of a different valuation methodology. In the instant case, the taxpayer has not come forward with affirmative evidence proving that the statutory valuation methodology produced an unjust or unreasonable result.

Simply because the statutory valuation method generated a result different from the petitioner's valuation does not prove that the statutory valuation method does not reflect true value. The burden is not on the Tax Commissioner to demonstrate the accuracy of the statutory valuation method. The law is well-settled in Ohio that the statutory valuation method establishes the prima facie correct true value of personal property. Cf. *Wheeling Steel Corp. v. Evatt* (1944), 143 Ohio St. 71; *W.L. Harper v. Peck* (1954), 161 Ohio St. 300. It is the taxpayer's burden to prove that the statutory valuation method does not reflect true value. The plain wording of R.C. 5727.11 and the Ohio Supreme Court's interpretation of that statute require the taxpayer to provide affirmative evidence proving that the statutory valuation method as applied did not produce true value but, instead, an unjust or unreasonable result.

As explained above, the valuation computed by the petitioner's appraisal involves some rough estimates. Such estimates of value are not sufficient to make a reduction in value below what is carried on the petitioner's books. For example, in its cost approach to value, the EVC appraisal concludes that the physical plant has 65% physical deterioration based upon Units 1 and 2 being 51 years old compared to a purported "average physical life" of 50 years for the plant. The appraisal concludes that Unit 3, which has been in operation for 41 years and has a purported "average physical life" of 50 years also has a 65% physical deterioration. The appraisal's cost approach, thus, reduces its replacement cost new value for the plant by 65%. The appraisal computed a ratio of chronological age divided by a denominator of predicted physical life, which for units 1 and 2 is a chronological age of 51 years divided by an average physical life of 50 years. This fraction yields a "physical deterioration" of 102%, but as the appraiser appears to have decided that taking a reduction for physical deterioration of 102% was unrealistic, the appraiser chose its own physical deterioration percent of 65%. This 65% used in the appraisal is not supported by the appraiser's own formula, which shows 102% physical deterioration. The fact that the appraisal's computations yielded a reduction of 102% for physical deterioration demonstrates how unrealistic the appraisal's physical deterioration computations are. The plant clearly is capable of continuing to operate.

Obsolescence

Next in the cost approach to value, the appraisal computes economic obsolescence. The appraisal provides that "economic obsolescence" is "a loss in value due to factors external to the subject itself". In one part of the appraisal for the cost approach, the appraisal assumes only 6 more years of operation, and computes a 74% economic obsolescence if the plant operates only 6 more years from the December 31, 2017 appraisal date. If the plant is assumed to stay in operation "in perpetuity", the appraisal uses a 45% economic obsolescence in its cost approach. The appraisal uses the same physical

deterioration reduction of 65% in the income approach to value, as well as large, estimated reductions for functional obsolescence and economic obsolescence in the income approach.

Such an approximation of values is not probative evidence for a deduction from taxable personal property. See *United Tel. Co. of Ohio v. Tracy* (1999), 84 Ohio St. 3d 506. In *Anheuser-Busch Companies, Inc. v. Zaino* (Sept. 24, 2004), BTA No. 2003-K-699, unreported, the Board of Tax Appeals reaffirmed established case law holding that estimates of value are not sufficient to carry the burden of proof needed for such a reduction. In challenging the assessed value, the petitioner has the burden of establishing the value of its taxable property. The information submitted does not meet this burden.

In *The Duriron Co., Inc. v. Limbach* (Sept. 25, 1992), BTA No. 89-M-446, unreported, the Board of Tax Appeals held that a reduction in the value of inventory due to obsolescence can only be granted to the extent that the taxpayer is able to substantiate the obsolescence. In the instant case, the petitioner has failed to adequately substantiate its purported obsolescence.

E. THE APPRAISAL SUBMITTED DOES NOT PROVE THAT BUCKEYE'S CARDINAL PLANT IS OVERVALUED FOR PROPERTY TAX PURPOSES

In its July 20, 2020 post-hearing memorandum, the petitioner provided a summary of its arguments and a summary of the EVC appraisal. The petitioner explains in the post-hearing memorandum that the taxable value of units 2 and 3 at the Cardinal Station plant under the appraisal are $2,873,688 as of December 31, 2017 (tax year 2018) and $2,393,171 as of December 31, 2018 (tax year 2019). The petitioner explains that these appraisal values are much lower than the values under the statutory value computations. The EVC appraisal considered income and cost approaches to valuation. It did not consider a "comparable sales" approach because necessary data from comparable sales was not available.

The appraisal projects low market prices for electricity sales for the next ten years due to the projected low cost of other power generators to produce electricity from natural gas and renewable sources in the future. The value of the Cardinal Plant in the EVC appraisal is based upon these low projected electricity sales prices in the future. However, Buckeye Power has Wholesale Power Agreements under which it gets all its costs reimbursed by its members. The Wholesale Power Agreements are in effect through December 31, 2057. Thus, Buckeye Power, under these Wholesale Power Agreements, is in a much better situation than the Cardinal Station is under the appraisal scenario. Under the EVC appraisal, the plant is selling its electricity in the future at very low projected rates, while the actual plant has Wholesale Power Agreements in place under which it realizes much higher sales amounts for its electricity than projected in the appraisal. The appraisal, in using low electricity sale prices on the current open market to set the value of the Cardinal Plant, rather than using the actual electricity prices that Buckeye receives under its Wholesale Power Agreements with its 25 members, ignores the economic reality of the higher actual electricity prices that Buckeye receives under its Wholesale Power Agreements. The appraisal would arrive at a much higher value for the Cardinal Plant if the actual higher electricity prices realized under the Wholesale Power Agreements were used in computing the appraised value of the facility. Although the Cardinal Plant Units 2 and 3 might realize lower prices for its electricity sales if it was not owned by Buckeye Power and have the benefit of Buckeye's Wholesale Power Agreements, the fact is that Buckeye does own Units 2 and 3 and these units should be valued in the appraisal acknowledging that Buckeye owns these two units and receives good rates for its electricity under its Wholesale Power Agreements.

F. BUCKEYE POWER ARGUES ITS UNITS 2 AND 3 AT THE CARDINAL PLANT SHOULD BE VALUED LIKE UNIT 1, WHICH IS OWNED BY AMERICAN ELECTRIC POWER

Buckeye Power contends that it should be allowed to value Units 2 and 3 at the Cardinal Plant at the 15% floor, because the Department of Taxation is allowing American Electric Power (AEP) to value Unit 1 at the Cardinal Plant at the 15% floor. This contention is denied.

According to Buckeye's submitted materials, AEP wrote down the value of Unit 1 on its balance sheet to zero. Buckeye Power has kept the value of Units 2 and 3 on its balance sheet at its full historical cost and has not taken a write-down of Units 2 and 3 as AEP did for Unit 1. As explained above, R.C. 5727.11(D), the true value of public utility property "shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner." As AEP has Unit 1 valued on its books at a zero value, the Department was following R.C. 5727.11(D) in allowing AEP to value Unit 1 at the 15% floor. However, Buckeye has Units 2 and 3 valued on its books at full cost, and therefore, pursuant to R.C. 5727.11(D), the Department must likewise follow the valuation on Buckeye's books and records.

The petitioner has not adjusted its books and financial records to reflect the reduction in property value for obsolescence in its EVC appraisal that it is seeking for tax purposes. Thus, the petitioner is asking the Department to ignore the values of its property in its financial records and make an adjustment to the value of its property that it has not yet made on its own books. As companies routinely write down the value of their assets on their books, the fact that Buckeye did not do this tends to show that the company, itself, does not believe in the values obtained from the EVC appraisal to a sufficient degree to incorporate the appraised values into its financial records. It is well settled that a company is bound by its books and records. See *Rickenbacker Holding Corp. v. Tracy* (Apr. 12, 1993), BTA No. 91-Z-709, unreported.

G. BUCKEYE CONTENDS THAT IT IS NOT REQUIRED TO WRITE DOWN ITS CARDINAL PLANT UNITS 1 AND 2 PURSUANT TO ASC 360

Buckeye Power contends that, pursuant to Accounting Standards Codification ("ASC") 360, Buckeye Power was not required to write down the value of Cardinal Plant Units 1 and 2. In order to evaluate this contention, the investment bank/finance advisory firm, Stout, provides the following explanation of ASC 360:

> The Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC") Topic 360, Property, Plant, and Equipment ("ASC 360") addresses financial accounting and reporting for the impairment of long-lived assets and for long-lived assets to be disposed of. ASC 360 requires that a company recognize an impairment loss if, and only if, the carrying amount of a long-lived asset (asset group) is not recoverable from the sum of the undiscounted cash flows expected to result from the use and eventual disposal of the asset (the "Recoverable Amount") and if the carrying amount exceeds the asset's Fair Value.
>
> STEP I – TEST FOR RECOVERABILITY
> If indicators of impairment are present, the entity must then determine whether the carrying amount of the long-lived asset (asset group) is recoverable. This is done by comparing the total undiscounted future cash flows of the long-lived asset (asset group) to its carrying amount. If the total undiscounted future cash flows exceed the carrying

amount of the asset (asset group), the carrying amount is deemed recoverable.
* * *
STEP II – MEASUREMENT OF AN IMPAIRMENT LOSS
If the carrying amount of a long-lived asset (asset group) is deemed to be unrecoverable, an impairment loss needs to be estimated. In order to calculate the impairment loss, the Fair Value of the asset group must be determined.
* * *
Once the Fair Value of the asset group is determined, it is compared to the carrying amount of the asset group in order to derive an impairment loss. The excess of the carrying amount of the long-lived asset (asset group) over its Fair Value should be recognized as the impairment loss. Once the impairment loss is recognized, the adjusted carrying value becomes the long-lived asset's new cost basis and should be depreciated over its remaining useful life.[4]

As explained above, there are two steps in the ASC 360 analysis. First, one determines if the undiscounted cash flows exceed the carrying value of the asset. If they do exceed this value, no write down is needed. If the cash flows are less than the carrying value of the asset, step two is to measure the amount of impairment.

In the instant case, the petitioner explained during the hearing that all of its costs are reimbursed by its 25 Buckeye Members in the cooperative, and that Buckeye's undiscounted cash flows do exceed the carrying value of the Cardinal Plant Units 1 and 2, and therefore no write down is needed. The petitioner contends that, as no write down is required under ASC 360, the Department should not require a write down of its assets to allow it to value its Units 1 and 2 at the 15% floor. However, again, pursuant to R.C. 5727.11(D) the Department must prepare the value based upon Buckeye's value on its books and records, and no exception can be granted. Further, as Buckeye's ASC 360 analysis shows that Buckeye's cash flows exceed the carrying value of its Cardinal Plant assets, this ASC 360 analysis shows that Buckeye has robust cash flows for the periods at issue and therefore no write down is needed, as the original cost basis on Buckeye's books is well supported by cash flows that exceed the requirements of ASC 360. In summary, the ASC 360 analysis for Buckeye shows that Buckeye's substantial cash flows under its favorable Wholesale Power Agreements with its 25 members in the cooperative establishes that Buckeye property is fairly valued at its cost on its books and no write down or reduction in value is needed.

In summary, the petitioner is not permitted to use an alternate valuation under R.C. 5727.11(A) because the petitioner's production equipment is required to be valued under R.C. 5727.11(D)(1) and (2). However, assuming, arguendo, that the petitioner could consider an alternate valuation under R.C. 5727.11(A), the petitioner has not demonstrated that the statutory method of valuation failed to produce the true value of the property. In accordance with *Texas Eastern*, *supra*, a taxpayer may only use an alternative method if the petitioner can show that the statutory method fails to provide the true value of the property. As such, the petitioner's request for alternative valuation fails.

H. BUCKEYE'S EVC APPRAISAL

Buckeye contends that the EVC appraisal it has submitted to the Department is a better measure of value of the Cardinal Plant than the true value computations based upon historical cost on Buckeye's

[4] https://www.stout.com/en/insights/article/asc-360-impairment-testing-long-lived-assets-classified-held-and-used. Last accessed April 6, 2021.

books. The petitioner has submitted a plethora of materials showing that coal-burning power plants are being closed at a rapid pace throughout the Midwest and that power companies are closing coal-burning plants and building plants powered by natural gas, wind, or solar power. The petitioner has submitted information through its EVC appraisal arguing for a reduction in value in its Units Two and Three at the Cardinal Plant due to recent market developments, Cardinal revenues and costs, discounted cash flow analysis, income capitalization analysis, and a cost approach to value. The petitioner also writes about the purported current low market price for electricity, high cost of environmental compliance for coal-burning power plants, negative cash flow forecasts, other coal power plant retirements, sales of other coal power plants, the tax reduction granted for AEP for its Unit One at the Cardinal Plant, and Constitutional arguments.

Again, as explained above, pursuant to R.C. 5727.11(D)(2), the Tax Commissioner must follow the statutory method for electric production equipment acquired or placed in service after October 5, 1999, and, pursuant to R.C. 5727.11(D)(1), Buckeye's production equipment acquired or placed in service before October 5, 1999 must be valued at "cost as capitalized on the company's books and records less fifty per cent of that cost as an allowance for depreciation and obsolescence." Therefore, the appraisal cannot be reviewed by the Tax Commissioner because R.C. 5727.11(D)(1) and (2) require that such electric generation property and non-production equipment be valued under the true value computations as explained in R.C. 5727.11(D).

Again, the petitioner has submitted a large amount of information with its EVC appraisal and outside of its appraisal explaining the power industry and its shift away from coal power plants. The petitioner submitted this information in an attempt to value its electric production equipment under an alternative valuation. R.C. 5727.11(A) provides, in pertinent part, as follows: "If the commissioner finds that the application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation." However, as explained herein, the petitioner, as a public utility in Ohio and a rural electric company, is required by R.C. 5727.11(D)(1) and (2) to value both its electric production equipment and non-production equipment under the true value computations, and pursuant to R.C. 5727.11(D)(1) and (2), no deviation from the true value computations is permitted. R.C. 5727.11(D)(1) and (2) do not permit the use of an alternate valuation. Therefore, the information submitted by the petitioner, including its appraisal, cannot be considered with regard to the valuation of the petitioner's electric production and non-production equipment.

Even if the Department was able to review and accept the appraisal valuation, which the Department cannot do pursuant to R.C. 5727.11(D), as explained above, the Department would not accept this appraisal because of its exaggerated obsolescence claims, amongst other issues with the appraisal. The appraisal's cost approach takes a 65% reduction "physical deterioration" of the plant, as well as taking a 45% reduction for "economic obsolescence" of the plant, which results in the plant having a very low value. Such a valuation, based upon an obsolescence reduction of first 65% and then a 45% reduction, is an unrealistic result that ignores the current cash flow generated by Buckeye's Units 2 and 3 under the Wholesale Power Agreements.

I. CONSTITUTIONAL ARGUMENTS

The petitioner contends that the Department "is prohibited by Article 1, Section 2 of the Ohio Constitution and the Equal Protection Clause of the Fourteenth Amendment to the U.S. Constitution from valuing Buckeye's Unit Two significantly higher than AEP's Unit One because the Units are similarly situated."

To the extent that the petitioner is challenging the constitutionality of R.C. 5727.11(A) and R.C. 5727.11(D), the Commissioner is without jurisdiction to adjudicate the constitutionality of those statutes. However, the laws of Ohio are presumed to be constitutional. See *State ex rel. Swetland v. Kinney* (1982), 69 Ohio St.2d 567. Moreover, a discussion of the constitutional issues is warranted herein because the petitioner is misstating the facts of this matter in its constitutional arguments.

As stated above, Unit One and Unit Two are virtually identical, with Unit One owned by AEP and Unit Two owned by Buckeye. Buckeye has explained that AEP has valued Unit One on its books much differently than Buckeye values its Unit Two on its books. The petitioner writes in its materials that AEP in recent years has valued Unit One at a value of zero on its books, while Buckeye has valued Unit Two at full original cost on its books. The petitioner has submitted its communications with AEP that indicate that AEP has "fully impaired" Unit One on its books.

Further, it must be noted that Buckeye and AEP may be receiving much different revenue amounts from the sales of electricity from Units One and Two. As explained herein, Buckeye receives very favorable rates from its sales of electricity generated by Units Two and Three through its Wholesale Power Agreements. Information in the file does not show what rates AEP is receiving for its sales of electricity from Unit One. Also, Buckeye has not provided information about AEP's pricing and rates for its Cardinal Plant electricity sales.

R.C. 5727.11(D)(1) and (2) provide that the true value of taxable property shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances. The Department treated both AEP and Buckeye similarly in that it has required both AEP with Unit One and Buckeye with Unit Two to value these units based upon "cost as capitalized on the public utility's books and records less composite annual allowances". The Department is requiring both AEP and Buckeye to value their units as valued on their books. As AEP has valued Unit One on its books at zero, the Department allows them to value their unit at the 15% floor, the lowest value allowed for in-use generation property. As Buckeye values their unit at full original cost on its books, the Department requires Buckeye to value its unit also as it values it on its books, less the composite annual depreciation allowance. For both taxpayers, the Department is enforcing a valuation based on the cost on each company's books.

The petitioner also contends that "The Department is prohibited by Article VI, Paragraph 2 of the U.S. Constitution (the "Supremacy Clause") from requiring a book write-down of Buckeye's Units Two and Three where such write-down is prohibited by federal law pursuant to USDA Regulation Sections 1767.12 and 1767.41." First, it must be noted that the Department is not asking or requiring Buckeye to write down the value of Unit Two and Unit Three. How Buckeye values Units Two and Three on its books is a decision to be made by Buckeye and its accountants. The Department does not tell taxpayers when to take a write-down. However, when valuing Buckeye's property for Ohio Public Utility Property Tax purposes, the Department is required under R.C. 5727.11(D)(1) and (2) to value Buckeye's electric generation property and non-production property based upon the purchase price or cost of the equipment as capitalized on the company's books and records less a depreciation allowance. The petitioner is arguing that the Department is requiring it to take a write-down when what the Department is requiring is that the petitioner value its property at the purchase price or cost capitalized on its books.

VI. Conclusion

The Tax Commissioner is required to apply the R.C. 5727.11(D) statutory valuation method for rural electric companies such as the petitioner for both electric production equipment and non-production equipment. Again, R.C. 5727.11(D)(1) requires that all rural electric company equipment, production and non-production, be valued as the true value being the cost on the company's books less a flat fifty percent allowance for depreciation and obsolescence. For rural electric and electric companies with electricity production equipment placed into service after October 5, 1999, R.C. 5727.11(D)(2) requires that such electric companies must value their electric production equipment using the property's cost as capitalized on the company's books and records less the Tax Commissioner's composite annual allowances.

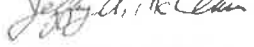
Pursuant to both R.C. 5727.11(D)(1) and R.C. 5727.11(D)(2), as a rural electric company, Buckeye's electric production equipment and non-production equipment must be valued under R.C. 5727.11(D)(1) and (2) and no alternative method of valuation under R.C. 5727.11(A) is available to the petitioner, as the petitioner is governed under R.C. 5727.11(D) alone. Again, R.C. 5727.11(A) and its alternate valuation such as an alternate valuation based upon the EVC appraisal and other arguments cannot be considered as the petitioner can only be valued under R.C. 5727.11(D). However, this final determination discussed the appraisal and alternate valuation methods to a limited extent to show that even if an alternate valuation method under R.C. 5727.11(A) was permitted herein, which it isn't, the petitioner still would not have qualified for an alternate valuation method.

Assuming, arguendo, that R.C. 5727.11(D)(1) and (2) did not apply to the petitioner and require it to value its property under the true value computations, with no deviation allowed for an alternate valuation, the petitioner still did not submit sufficient evidence to meet its burden of proving the statutory valuation method did not determine true value. Thus, even if an alternative valuation of R.C. 5727.11(A) was allowed here, which it isn't, as the petitioner is governed under R.C. 5727.11(D), the petitioner did not submit evidence sufficient to show it would have qualified for an alternative valuation under R.C. 5727.11(A) if such an alternative valuation was allowed in this matter.

Accordingly, the assessments are affirmed.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THESE MATTERS. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND NOTICE WILL BE SENT PURSUANT TO R.C. 5727.47 TO THE APPROPRIATE COUNTY AUDITORS, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5727.471.

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 8 2021

Youngstown Thermal, LLC
ATTN: Reg Martin, Receiver
250 North Avenue
Youngstown, OH 44502

Re: Youngstown Thermal, LLC
Case No. 18-00396
Public Utility Property Tax
Mahoning County
Tax Year: 2017

This is the final determination of the Tax Commissioner on a petition for reassessment pursuant to R.C. 5727.47 concerning a public utility property tax assessment.

I. FACTUAL BACKGROUND

The petitioner provides steam service and heat to Youngstown's Central Business District. The petitioner has operated its district steam system for more than 115 years. The plant originally operated with three coal-fired boilers and one natural gas fired boiler which produced the steam for the system's six miles of underground pipelines that heat office buildings, retail stores, banks, government buildings and educational buildings. The plant delivers steam through two systems. More recently, the petitioner has run its system exclusively with a leased natural gas fired boiler.

Sobe Thermal Energy Systems, LLC, is planning to purchase the petitioner. Sobe is planning to construct a tire-burning cogeneration facility next to the petitioner's property and to fuel the steam system with heat from the burning of tires.

II. PROCEDURAL BACKGROUND

Due to a loss of some large customers, which greatly reduced its revenues, the Public Utilities Commission of Ohio (PUCO) determined that the petitioner needed to go into receivership, and the PUCO filed an entry for receivership. On August 1, 2017, a Mahoning County Court of Common Pleas entry appointed Reg Martin as the court-appointed Receiver of the petitioner. The Receiver is authorized to take possession of and operate the assets and business of the petitioner. The petitioner is still under the control of the Receiver at the present time. The district steam system has maintained its operations throughout the receivership process.

The petitioner filed its tax year 2017 Annual Report with the Department of Taxation showing a zero value for all plant assets with a 100% impairment of all assets. The Department's audit staff reviewed this Annual Report.

The petitioner's prior year Annual Report for tax year 2016 showed a valuation for its assets of $1,055,091. The tax year 2017 Annual Report is based upon the petitioner's balance sheet as of a

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listing date of December 31, 2016, pursuant to R.C. 5727.06(A)(2). The petitioner's December 31, 2016 balance sheet shows fixed assets on hand with a true value of $1,042,583.00. In preparing the assessment at issue, the audit staff reduced the value of the petitioner's taxable personal property by valuing all such property at the 15% floor, the lowest valuation allowed for operating property in the true value computations. This reduced the petitioner's total taxable value of its property to $185,420.

In response to the assessment, the petitioner filed a timely petition for reassessment. A telephone hearing was conducted on this matter.

The petitioner filed its 2018 and 2019 tax year Annual Reports similar to the assessment herein for tax year 2017. For tax years 2018 and 2019, the petitioner used the cost values from its balance sheet as of December 31, 2016 in its true value computations, placing this property at the 15% floor.

III. Petitioner's Contentions

At the hearing, the petitioner contended that its fixed assets should be valued at $73,500.00, which is the value of its boiler plant equipment, underground pipes, and transportation equipment on its balance sheet as of December 31, 2017.

IV. Analysis

A. Statutory Cost Valuation

Pursuant to R.C. Chapter 5727, public utilities must pay property tax on their personal property. *Ohio Bell Tel. Co. v. Levin*, 124 Ohio St.3d 211, 2009-Ohio-6189, 921 N.E.2d 212, ¶ 2 (2009). The property tax is an ad valorem tax, and the Tax Commissioner must determine the value of the public utility's property. R.C. 5727.10 provides the process under which the Tax Commissioner assesses the value of public utility property stating, in pertinent part, that:

> Annually, the tax commissioner shall determine, in accordance with section 5727.11 of the Revised Code, the true value in money of all taxable property * * * to be assessed by the commissioner. * * * The commissioner shall be guided by the information contained in the report filed by the public utility and such other evidence and rules as will enable him to make these determinations.

The Tax Commissioner's valuation forms the base for the ultimate determination of the amount of the tax. R.C. 319.30, 319.301, 5705.02 –.05, 5705.19.

B. Types of Public Utilities

R.C. 5727.01(A) defines what types of persons qualify as public utilities stating that:

> "Public utility" means each person referred to as a telephone company, telegraph company, electric company, natural gas company, pipe-line company, water-works company, water transportation company, heating company, rural electric company, railroad company, combined company, or energy company.

The type of public utility determines the valuation and assessment process for the taxpayers. Relevant to this matter are definitions included in Division (D)(8) which defines a "heating company" as:

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(D) Any person [that]:

* * *

(8) Is a heating company when engaged in the business of supplying water, steam, or air through pipes or tubing to consumers within this state for heating purposes

R.C. 5727.11(A) provides in pertinent part:

> Except as otherwise provided in this section, the true value of all taxable property . . . required by section 5727.06 of the Revised Code to be assessed by the tax commissioner shall be determined by a method of valuation using cost as capitalized on the public utility's books and records less composite annual allowances as prescribed by the commissioner. If the commissioner finds that the application of this method will not result in the determination of true value of the public utility's taxable property, the commissioner may use another method of valuation.

R.C. 5727.11(A) provides the general rule for valuing public utility personal property, that the true value of all taxable property shall be based upon the cost as capitalized on the company's books less composite annual allowances as prescribed by the Tax Commissioner. This methodology must be followed, except if the Tax Commissioner finds that this method does not result in the determination of true value, then an alternate method of valuation may be used.

The Department of Taxation's "Valuation of Public Utility Property" booklet provides that the valuation method applicable to most taxable property of a public utility is similar to the "302 computation" used by general taxpayers in determining the true value of their taxable property. Therefore, case law interpreting the "302 computation" of general taxpayers is relevant to the true value computation procedures used for most personal property and public utility taxpayers.

R.C. 5727.11(A) provides that the Department should value public utility personal property based upon the cost on the company's books for the listing date at issue less composite annual allowances as prescribed by the Commissioner. In the case at hand, the Department's audit staff could have valued the petitioner's taxable property at a total taxable value of $1,055,091 using the normal composite annual allowances for tax year 2017. However, the audit staff valued the petitioner's property at the minimum value for operating equipment, which is a 15% floor value in which the property is valued at 15% of its cost on the books. In valuing the petitioner's property at the 15% floor, the petitioner's total taxable value for tax year 2017 is $185,420, which is a large reduction from the base property costs run through the much higher normal composite allowances that the audit staff could have used to value the property.

Again, the petitioner contends that its property should be valued based upon the cost on its December 31, 2017 balance sheet, which is $73,500.00. However, the proper listing date to use is December 31, 2016. Pursuant to R.C. 5727.06(A)(3)(c), heating company property should be valued using a listing date as follows:

> In the case of all other public utilities except telephone and telegraph companies, all tangible personal property that on the thirty-first day of December of the preceding year was both located in this state and either owned by the public utility or leased by the

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public utility under a sale and leaseback transaction, and that is not exempted from taxation under section 5727.75 of the Revised Code;

Thus, under R.C. 5727.06(A)(3)(c), for tax year 2017, the petitioner's property must be valued using the value on a December 31, 2016 listing date, which is what the audit staff used for the assessment at issue, and not the balance sheet values on the December 31, 2017 listing date which the petitioner argues to use herein.

Further, as explained above, the audit staff has granted the petitioner an 82.43% reduction herein outside of the normal true value computations by valuing the petitioner's property at the 15% floor to reflect the petitioner's situation in operating under receivership. Pursuant to the true value computation schedules, property currently in operation cannot be valued below the 15% floor. Thus, in seeking a reduction below the 15% floor, the petitioner is asking the Department to ignore and not follow its true value computation schedules.

As explained above, the appropriate listing date for tax year 2017 is December 31, 2016. It should be noted that the petitioner went into receivership on August 1, 2017, which is seven months after the December 31, 2016 listing date for the property at issue. Given that the property went into receivership seven months after the listing date at issue on which its property valuation was set, the Department's valuation using the 15% floor was a reasonable valuation. The Department was not required to value the property at the 15% floor as of the December 31, 2016 listing date and would have been justified in valuing the property at the much higher percentage normal composite allowances as of December 31, 2016. Therefore, the Department's valuation of the property at issue at the 15% floor for operational assets is reasonable.

VI. Conclusion

The Tax Commissioner is legislatively mandated to apply the R.C. 5727.11(A) computation methodology using cost on the petitioner's books as of December 31, 2016 less the composite annual allowances. Due to the petitioner's financial circumstances at the time the audit was performed, the property at issue has been valued for this assessment at the 15% floor, the lowest value of composite allowance for property currently in use. As the property at issue was in operation at the December 31, 2016 listing date, and is still in operation at the current time, allowing a reduction in property to the 15% floor for equipment in operation is the best value for the property as of the December 31, 2016 listing date.

Accordingly, the assessment is affirmed.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND NOTICE WILL BE SENT PURSUANT TO R.C. 5727.47 TO THE APPROPRIATE COUNITY AUDITOR, WHO SHALL PROCEED IN ACCORDANCE WITH R.C. 5727.471.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

5760 State, Inc.
5760 State Rt. 193
Kingsville, OH 44048

Re: Assessment No.: 100001730108
Sales Tax
Account No.: 04-042878

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$48,638.85	$4,611.11	$17,023.41	$70,273.37

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from January 1, 2017, through March 31, 2020. The petitioner filed a petition for reassessment. A hearing was held on May 27, 2021.

An assessment is presumptively valid. *RKE Trucking Inc. v. Zaino,* 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E. 2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing, *Federated Department Stores, Inc. v. Lindley,* 5 Ohio St.3d 213, 450 N.E. 2d 687 (1983); *Automotive Warehouse, Inc. v. Limbach,* BTA No. 87-D-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

Audit Methodology

A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's distributors. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, pop & soft drinks, energy drinks & other beverages, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements. A comprehensive audit methodology was determined to be representative and more accurate for the audit period. By conducting a comprehensive audit, cigarette rebates were included from 2018, 2019 and 2020. Invoice dates were used to determine which inventory purchase transactions occurred within the audit period. The audit period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the audit period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the audit period to determine the taxable percentage of gross sales. Taxable inventory purchase amounts

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derived from distributor summaries or estimates were divided by the number of months in the audit period and recorded as monthly purchase amounts. Complete and accurate records of net taxable sales and tax collected were not maintained by the taxpayer as required by R.C. 5739.11.

The remaining calculated taxable sales from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the taxpayer for the entire audit period. The resulting taxable percentage of reported gross sales were multiplied by the reported gross sales for each month of the audit period to determine the calculated monthly taxable sales for the audit period. The calculated taxable sales by month were then multiplied by the applicable tax rates in effect throughout the audit period to determine the gross sales tax liability by month for the entire audit period. Credits representing the tax reported and paid through the taxpayer's monthly sales tax returns were subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

Ohio law requires that a taxpayer have primary records that delineate between taxable and non-taxable sales. Ohio Adm.Code 5703-9-2(B)(1). The petitioner provided records during the audit; however, the records were not deemed adequate or complete as the auditor was not given z-tapes and only a few distributor invoices. Audit Remarks, p. 14. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Inaccurate Mark-up Percentage

The petitioner contends that the mark-up percentages used in the audit are inaccurate. Sufficient, competent, and probative evidence to support allegations of error in the assessment would show in what manner and to what extent the error exists. *See Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999). Here, the petitioner did not provide any evidence, let alone sufficient evidence to demonstrate error. Although the petitioner was given additional time to submit supporting evidence, nothing was submitted. Accordingly, this objection is denied.

Cigarette Rebates

The petitioner contends that cigarette buy downs and rebates were not fully credited in the audit. The petitioner did not support this assertion with any evidence or documentation. Although the petitioner was given additional time to submit supporting evidence, nothing was submitted. The petitioner has not provided sufficient evidence to prove error in the assessment. Accordingly, this objection is denied.

Penalty Abatement

The petitioner requests full abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *See Jennings*

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& Churella Constr. Co. v. Lindley, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Based on the facts and circumstances, partial abatement of the penalty is warranted.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$48,638.85	$4,611.11	$7,295.62	$60,545.58

Current records indicate that no payments have been made towards satisfaction of the assessment; however, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Abay Market LLC
1715 John St.
Cincinnati, OH 45214

RE: Assessment No. 100001673273
Sales Tax
Account No. 31-393449

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$53,010.92	$5,677.74	$26,505.33	$85,193.99

The petitioner is a full-service bar and restaurant. This assessment is the result of an audit of the petitioner's sales from January 1, 2017, through December 31, 2019. A hearing was requested; however, that hearing request was rescinded.

The petitioner requested penalty abatement. The surrounding facts and circumstances support full abatement of the penalty.

Accordingly, the assessment shall be adjusted as follows:

Tax	Interest	Penalty	Total
$53,010.92	$6,716.37	$0.00	$59,727.29

Current records indicate that payment has been made in full satisfaction of the assessment.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 2 8 2021

Douglas W. Adams
191 Sternberger Rd.
Jackson, OH 45640

RE: Refund Claim No: 20212263584
Refund Amount Requested: $942.50
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $942.50, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The claimant purchased a 1998 Harley Davidson for $13,000.00 on or around August 5, 2020 from Baxters Harley Davidson LLC. The claimant contends in his refund application that the motorcycle was unsafe to operate and was returned the day after purchasing it. The claimant provided proof of the tax paid on the vehicle and that the dealer refunded the claimant's lender but did not provide proof that the full purchase price was returned to the claimant.

The claim was initially denied. In the letter of denial, the claimant was instructed to submit:

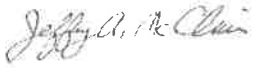
> (1) Copies of all retail buyer's agreements; or a notarized statement from the seller indicating the selling price of the vehicle was not submitted with the claim" and,
>
> (2) Evidence that the *full purchase price* of the vehicle or watercraft was refunded to you.
>
> Examples of acceptable documents include a copy of the cancelled check (front & back) or other documents that show the refund to you. This includes proof that a trade in was re-titled back to its original owner's name; the difference in the purchase price of the two (2) vehicles was refunded; and/or all money used as a down payment was refunded." (Emphasis added.)

In response to the letter of denial, the claimant again provided the information included with his original request with additional proof about the purchase price and copies of checks. The claimant provided a signed motorcycle bill of sale from the dealer noting the purchase date as August 4, 2020. The claimant also provided pictures of two checks dated August 11, 2020. The first check shows that the dealer refunded the financed amount to the lender. The second check was dated the same day as the first check, but it was from the claimant to the dealer. The second check written to the dealer has the effect of reimbursing the dealer for everything the dealer paid to the lending company over the $13,000.00 selling price. The bill of sale also has $195 listed as "title fees" for a total selling price of $13,195.00. Pursuant to R.C. 5739.01(H) "Price" includes the selling price of the vehicle and the charges for any service necessary to complete the sale. The claimant failed to provide an explanation of why they wrote the dealer a check for $1.055.30. The claimant failed to provide evidence that the dealer provided the claimant a full refund.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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



JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

American Modern Insurance Group, Inc.
7000 Midland Blvd.
Amelia, OH 45102

RE: Refund Claim No. 20181350576
Refund Period: April 1, 2015 – December 31, 2015
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund in the amount of $79,916.62 in sales tax filed pursuant to R.C. 5739.07. The claim was previously partially approved in the amount of $27,489.62, plus applicable interest. The claimant disagreed with the denial of the remaining amount and requested reconsideration of the matter. A hearing was held.

The claimant is an insurance company headquartered in Amelia, Ohio. They primarily sell automobile and homeowners insurance to consumers. The claimant contracted with United Mail to print and mail these insurance policies. They contend that sales tax was erroneously paid to this vendor on the service of printing, processing, and mailing the policies. The claimant contends that all the materials involved in this service are exempted from sales tax pursuant to R.C. 5739.02(B)(42)(c).

Pursuant to R.C. 5739.02, all sales made in Ohio are subject to tax unless an exception or exemption applies. The tax does not apply to sales where the purpose of the purchaser is to resell, hold, use, or consume the thing transferred *as evidence of a contract of insurance*. (Emphasis added.) R.C. 5739.02(B)(42)(c). Further, a claimant is allowed to request a refund of tax illegally or erroneously paid. R.C. 5739.07. However, the burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The claimant submitted copies of invoices and a copy of the Statement of Work to support the refund claim. The invoices contain charges for paper, printing, and envelopes. Additionally, invoice #T78204 provides that the invoice job was to recycle old material. As previously stated, the refund claim was partially approved. In the denial letter, the auditor explained that a portion of the denied transactions, which amounted to $30,549.46 in tax, were denied because the claimant did not provide sufficient proof of payment. The statement of work indicated that payment would be made by escrow account. However, these transactions were marked as paid by check. Another portion of the denial amount consisted of charges for envelopes which amounted to $20,253.29. The remaining denial pertained to invoice #T78204 which was denied because the transaction was not explained by the claimant, and the statement of work did not mention the recycling materials.

On appeal the claimant provided sufficient proof of payment to support a refund for the amounts denied for that reason. However, the claimant's contention that the envelopes should also be exempted

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is not well received. R.C. 5739.02(B)(42)(c) provides an exemption for things transferred that are evidence of a contract of insurance. Here, the envelopes are not evidence of the insurance contract between the claimant and their customers. The envelopes are not exempt because on their own, they cannot be used to prove that a contract exists. In other words, without the actual contract that is mailed inside of the envelopes, the envelope is meaningless. Additionally, the Supreme Court of Ohio has previously held that items that are separate from the actual policies and not sold or resold to anyone are not exempted as "evidence of a contract of insurance." *See Celina Mutual Ins. Co. v. Bowers,* 5 Ohio St.2d 12, 13, 213 N.E.2d 175 (1965). Envelopes are typically only used to send the contracts and documents but play no part in recording the contract. The claimant has not provided any information that would suggest that these envelopes are connected to the insurance policy. The paper used to print the contracts records the fact that a contract is in existence, but the envelopes have no such purpose. They cannot be used as evidence of an insurance contract pursuant to R.C. 5739.02(B)(42)(c).

Finally, while the claimant provided additional proof of payment evidence as requested, they did not provide any additional information to explain the invoice that involved recycled materials. Items used as evidence of a contract of insurance are exempted. However, the claimant has not sufficiently proven that these recycled materials were used to make other insurance contracts, or if they were recycled for some other purpose. Additionally, it is not clear if the line items on this invoice are purchases of envelopes or contracts. Without additional information, invoice #T78204 cannot be approved for refund.

Based on the evidence provided by the claimant, a refund in the amount of $30,549.46 with appropriate interest is granted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 30 2021

ArcRad Technologies Inc.
1455 Pymatuning Lake Rd.
Andover, OH 44003

RE: Assessment No.: 100001782297
Tax Type: Sales
Account No.: 31-392186
Reporting Period: 01/01/2020 – 06/30/2020

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$2,000.00	$50.79	$199.90	$69.97	$699.65	$3,020.31

A hearing was held on May 27, 2021.

On February 10, 2021, an estimated assessment was issued against the petitioner for failure to file the sales tax return for the period shown above. After the issuance of the assessment, the petitioner filed a sales tax return reflecting the sales that had been made in that period; therefore, a lower sales tax was owed. As a result, the assessment has been adjusted below.

The petitioner objects to the additional charge and additional charge penalty.

Each vendor is required to file a return for the preceding month on or before the twenty-third day of each month as stated in R.C. 5739.12(A)(1). Any vendor who fails to file a return *** in the manner prescribed under this section and the rules of the commissioner may, for each such return, be required to forfeit and pay into the state treasury an additional charge not exceeding fifty dollars or ten per cent of the tax required to be paid for the reporting period, whichever is greater, *** and such sum may be collected by assessment in the manner provided in section 5739.13 of the Revised Code. R.C. 5739.12(D). The Ohio Revised Code provides for both an additional charge for a vendor's failure to timely file sales tax returns and a penalty on sales tax assessments. *O'Brien v. Tracy*, BTA No. 96-B-665, 1997 WL 594266 (Sept. 19, 1997). R.C. 5739.133 provides that "a penalty may be added to every amount assessed under section 5739.13 or 5739.15 of the Revised Code." The penalty applies not only to the actual sales tax assessed, but also to the additional charge imposed. *Ernst Enterprises, Inc. v. Tracy*, 68 Ohio St.3d 542, 629 N.E.2d 410 (1994). Therefore, the petitioner's objection is denied.

Accordingly, the assessment is adjusted as follows:

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Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$1.01	$0.00	$50.00	$17.50	$0.00	$68.51

Current records indicate that a payment in the amount of $1.01 has been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:
JUL 2 8 2021

Chris Bayle
1360 Westlake Ave.
Lakewood, OH 44107

RE: Refund Claim No: 20202034218
Refund Amount Requested: $8,329.80
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $8,329.80, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was held on July 13, 2021.

The claimant operates as a seasonal transient mobile food vendor and contends that sales tax was erroneously remitted during the period of July of 2016 through April of 2019. The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). The claimant filed a refund claim and attached yearly sales summaries and amended UST-1 documents for the refund period. This claim was denied. In the letter of denial, the claimant was instructed to submit copies of its daily sales journals and proof that the customers were refunded or provided a waiver if tax was collected from the customer.

In response to the letter of denial, the claimant provided a letter explaining that it did not collect sales tax from customers. The claimant also provided daily sales summaries and original and amended UST-1 information for September 2018. However, this is not a daily sales journal as requested in the letter of denial. Pursuant to Ohio Adm.Code 5703-9-02(A), every vendor must maintain full and complete primary and secondary sales records. Here, the claimant has failed to maintain the proper records. The claimant has stated that it does not have records of the sales transactions and as such cannot show that sales tax was not collected from customers. After the hearing, the claimant provided pictures of its menu board that showed prices to prove that it did not advertise that tax was included in the price, but that is not conclusive that tax was not collected. The claimant failed to provide sufficient information about the figures to allow the Commissioner to come to the conclusion that it is entitled to a refund. Therefore, the evidence in the file does not support the claimant's refund request.

Accordingly, the claim for a refund is denied.

JUL 2 8 2021

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:
JUL 2 8 2021

Bonded Lock Service LLC
3224 Dixie Highway
Erlanger, KY 41018

RE: Refund Claim No: 20202141284
Sales Tax
Refund Amount Requested: $9,298.11
Refund Period: January 1, 2020 – January 31, 2020

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $9,298.11, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The claimant filed an amended return and then filed a refund application with an Ohio Business Gateway screen print of the amended return as supporting documentation. The claim was denied. In the letter of denial, the claimant was instructed to submit proof of amended and original figures. The letter stated that "[e]xamples of acceptable documents may consist of sales journals, cash register receipts, summary reports used to prepare the tax return, or any other verifiable documents used to prepare the original and/or amended returns."

In response to the letter of denial, the claimant provided their sales tax journals for the original and amended returns and an internal email as an explanation for the change. The sales tax journals showed that the taxes originally remitted for sales in Butler, Greene, and Athens counties were removed and the taxable sales for Hamilton County were reduced by $4,439.88. The internal email from the claimant stated that their new company, "UGA", is to pay the taxes for the sales that were removed. However, the claimant failed to provide any proof that those taxes were subsequently remitted. The Department sent correspondence to the claimant requesting confirmation that another account remitted the tax, and if so, that the claimant provide the account number. The claimant failed to answer the Department's request. The claimant failed to provide sufficient information about their figures. The evidence in the file does not support the claimant's refund request.

Accordingly, the claim for a refund is denied.

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JUL 2 8 2021

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

JUL 2 1 2021

Raymond M. Brown
432 NE 2nd Ave. #4
Fort Lauderdale, FL 33301

Re: Assessment No.: 100001356249
Tax Type: Sales (Responsible Party)
Period: 07/01/09 – 07/30/12
RGB LLC (Union Café)
Vendor's License No.: 25-308839

This is the final determination of the Tax Commissioner on petitions for reassessment pursuant to R.C. 5739.13 concerning the following sales tax assessments:

Tax	Pre-Assessment Interest	Penalty	Total
$155,000.00	$64,270.49	$35,000.00	$254,270.49

This is a responsible party assessment. RGB LLC incurred sales tax liability resulting in sales tax assessments for the above periods. This assessment was never fully satisfied by RGB LLC and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of RGB LLC has been derivatively assessed against Raymond Brown. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A telephone hearing was held on April 23, 2021.

The petitioner objects to the assessment. The petitioner contends that he is not a responsible party. The petitioner asserts that he was not a majority owner of RGB LLC, that he lacked the ability to control RGB LLC's payments of sales tax obligations, and that he had no authority or responsibility in regard to sales taxes. The evidence indicates that the petitioner is listed as a member of the LLC on the articles of organization, filed on October 20, 2008. The petitioner was listed as President of the LLC and had executed the vendor's license and Secretary of State documents, which were dated March 1, 2009. Also, the petitioner was an officer of RGB LLC, as well as a member of RGB LLC's taxpayer information report and liquor permit. Audit Remarks, p. 29. Generally, failure of a corporation to file returns or pay taxes, as it pertains to personal liability for officers of a corporation, is limited to those officers who have control, supervision, or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117, 271 N.E.2d 792 (1971): *Spithogianis v. Limbach*, 53 Ohio St.3d 55, 559 N.E.2d 449 (1990). However, even if an individual does not actually participate in or supervise the corporation's fiscal operations, if his or her position is one that would ordinarily be responsible for

JUL 2 1 2021

such duties, then the officer may be found to be responsible to the state. *Spithogianis, supra*. Here, according to the responsible party questionnaire on file, which was executed on November 5, 2012, the petitioner was listed as the member that actually exercised management control or authority, and had authority to assign the responsibility for exercising management control or authority over employees who were responsible for preparing, signing or filing Ohio business tax reports/returns. Further, the petitioner had a 45% interest in RGB LLC, which was documented on the taxpayer information report during the same period of this assessment. The petitioner did not submit any evidence showing that the Department erred in this responsible party assessment and there is no evidence in file that supports any of the petitioner's contentions. Although the petitioner submitted documentation indicating that the underlying corporate assessment has been paid-in-full, that does not relieve the petitioner from being a responsible party. Therefore, the petitioner's objections are denied.

The petitioner contends that another member of the company was actually the responsible party; however, the fact that one person may be responsible does not absolve another of liability. *Perry v. Tracy*, BTA No. 98-M-8, 1998 WL 741927 (Oct. 16, 1998). R.C. 5739.33 requires personal liability to fall on *any* officer or employee having the requisite indices of responsibility. *Beck v. Tracy*, BTA No. 96-K-156, 1997 WL 40124 (Jan. 17, 1997). (Emphasis added.) Furthermore, the capacity in which the petitioner signed documents, which assumed responsibility for the financial obligations of RGB LLC, suggests that the petitioner indeed had the requisite indices of responsibility.

Further, the petitioner contends RGB LLC executed a settlement agreement with the Department of Taxation wherein the Department agreed to indemnify, defend, and hold harmless the petitioner for RGB LLC's sales tax obligations. The petitioner has not presented evidence of such an agreement with those stated terms.

The petitioner failed to provide any evidence to validate that he was not a responsible party for this assessment. Therefore, it is determined that the petitioner was a responsible party of RGB LLC, under R.C. 5739.33, during the period shown above.

Accordingly, the assessment is affirmed as issued.

Current records indicate that the assessment is paid in full.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000242

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:
JUL 28 2021

Carmax Auto Superstores, Inc.
12105 Omniplex Ct.
Cincinnati, OH 45240

RE: Refund Claim No.: 756110011622
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,896.89, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to the customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). If the full price is not refunded to the customer, no partial refund is granted to the vendor; no deduction can be made for wear, damage, or use. Ohio Adm.Code 5703-9-11(B); *Buick Youngstown Co. v. Tracy*, BTA No. 93-R-1130, 1994 WL 193898 (May 13, 1994).

The claimant is a motor vehicle dealer. On or about June 18, 2020, the claimant collected and remitted sales tax on the sale of a 2018 Dodge Ram 1800. The claimant contends that a refund was given to the customer when the transaction was reversed.

The claimant provided a Hamilton County clerk of courts receipt, which reported the sales tax as $1,900.26. The claimant is requesting a refund for sales tax because the customer returned the vehicle after the sales tax was paid. Based on the used vehicle buyer's order, the total sale price of the vehicle was $30,082.26, which included the above sales tax amount. A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to a customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). "In no event shall a transaction be treated as a return of merchandise or a rejection of services * * * if the vendor or seller deducts from the customer's refund any amount for use, damage, or wear and tear of the merchandise returned, any restocking or handling charge, or otherwise fails to refund to the customer or credit the customer's account with the full purchase price and applicable tax." Ohio Adm.Code 5703-9-11(B). The Tax Commissioner shall refund to a consumer taxes paid illegally or erroneously to a vendor only if the Tax Commissioner has not refunded the tax to the vendor and the vendor has not refunded the tax to the consumer. R.C. 5739.07(C)(1).

The claimant provided a used vehicle buyer's order, which showed the total sales price noted above, that total payments of $3,559.86 had been made, and that the remainder of the total price was financed. Although the claimant has provided various documents, which includes a return agreement and receipt from the Hamilton County clerk of courts, there are inconsistencies with the amount of sales tax paid. The evidence provided does not show that a full and complete refund was made to the customer in order to warrant a refund of tax under Ohio law. According to the return agreement and the used vehicle buyer's agreement, the total price of the vehicle was $30,082.26, which included $1,900.22 of sales tax. Even though the return agreement shows the total price noted above, it also exhibited that the amount refunded to the customer was $30,028.89, which is less than the total sales price. The return agreement shows that the amount financed was paid-in-full; however, there was a "Carry Balance To New Order" in the amount of $3,506.49, which amounts to a refund of $30,028.89. The Ohio Administrative Code, as stated above, requires the vendor to return the full purchase price and sales tax amount before a refund request can be granted. Therefore, the evidence submitted is insufficient to warrant a refund of the sales tax as the claimant failed to demonstrate that the customer received a refund or credit for the full purchase price and sales tax for the vehicle.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Claris, LTD.
Candlewood Suites Columbus North- Polaris
8515 Lyra Dr.
Columbus, OH 43240

Re: Assessment No. 100001646591
Sales Tax
Account No. 21-032262

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

Tax	Pre-Assessment Interest	Penalty	Additional Charge	Additional Charge Penalty	Total
$11,872.02	$326.67	$1,780.80	$1,187.20	$178.08	$15,344.77

The assessment is the result of an audit of the petitioner's sales from March 1, 2020 through March 31, 2020. A hearing was held on July 7, 2021.

Penalty Abatement

The petitioner requests abatement of the penalty and additional charge. Considering all the surrounding facts and circumstances, abatement of the penalty and additional charge is warranted. The request is granted.

Therefore, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Additional Charge	Additional Charge Penalty	Total
$11,872.02	$326.67	$0.00	$0.00	$0.00	$12,198.69

Current records indicate that payments of $12,145.06 have been applied on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000266

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Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

CSC 5512, LLC
15810 Nixon Rd.
Mt. Vernon, OH 43050

Re: Assessment No. 100001590197
Sales Tax
Account No. 25-305122
Reporting Period: 07/01/2016 – 12/31/2019

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$66,274.34	$6,606.97	$23,195.80	$96,077.11

This assessment is the result of an audit of the petitioner's purchases for the reporting period shown above. The petitioner operates a bar in Columbus, Ohio. A hearing was held on April 13, 2021.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

Audit Methodology

A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's distributors. Utilizing these records, the auditor calculated the taxable beer – bottle and can, beer – draft, liquor – blended rate, and wine for "the Lounge" and beer – bottle and can, liquor – blended rate, and wine for "the Pelican Club". Each category was assigned a mark-up percentage by calculating the weighted average of the product sales price less the product cost per serving and dividing the difference by the product cost per serving. The sales prices were derived from the petitioner's drink price list.

On September 1, 2017, the bar changed ownership, but the filings were still made under the former taxpayer. Therefore, two separate markup analyses, calculating taxable sales, were used in this audit:

(1) a comprehensive review of the period 07/01/2016 through 08/31/2017 (The Lounge) and (2) a projection of the period of 09/01/2017 through 12/31/2019 (The Pelican Club), using a sample period of 01/01/2018 through 12/31/2018. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. The sample period purchases for each category were totaled and multiplied by one plus the applicable weighted mark-up percentage to determine the taxable sales. Reductions of ten percent for liquor – blended rate and five percent for beer – draft for "the Lounge", and ten percent for liquor – blended rate and five percent for wine for "the Pelican Club" were applied to the calculated taxable sales for the sample period to account for potential losses of inventory due to spillage and over-pours. The totals for each category of taxable merchandise were summed and divided by the total reported sales for the sample period to determine the taxable percentage of gross sales (The Lounge: 230.56%, The Pelican Club: 386.57%). The reported sales each month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each month. The calculated taxable sales each month were multiplied by the applicable tax rate to determine the sales tax liability for each month. The sales tax remitted by the taxpayer was subtracted from the tax liability total to arrive at assessed tax liability.

Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *See Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996). Here, the petitioner did not maintain complete records as required by Ohio Adm.Code 5703-9-02(A). Audit Remarks, pp. 8-9.

The petitioner contends that it kept adequate records for the portion of the audit period that was operated as "the Lounge", and that the markup analysis was improper. These contentions are not well met. The petitioner failed to provide complete records during the audit and has not produced any additional records since. The Audit Remarks state that the records were considered incomplete because there were no records for August 2017, the sales reported on sales tax returns did not match the total sales on the records, and 47.34% of the Z-tapes were missing, among other reasons. Audit Remarks p. 8. Pursuant to Ohio Adm.Code 5703-9-02(A), every vendor must maintain full and complete primary and secondary sales records. Because the petitioner did not maintain complete records and did not provide any additional information, they failed to meet their burden.

Theft and Spillage

The petitioner contends that it suffered theft and spillage during the audit period. The petitioner specifically contends that the spillage allowance given during the audit should be 15-20% not the 5% for draft beer and 10% for liquor that was given. The petitioner contends that the spillage percentages allowed in the Letter of Agreement are insufficient. A generalized description of losses incurred from theft and spillage does not meet the appellant's burden to prove error in an assessment. *24 Hours, Inc. v. Tracy*, BTA No. 97-M-1389, 1999 WL 349220 (May 21, 1999). The loss must be quantifiable from the evidence presented by the petitioner. *Theresa-Jo Inc. v. McClain*, BTA No. 2020-107, 2021 WL 681729, *2 (February 17, 2021). The petitioner submitted articles about spillage and loss in bars but did not provide any evidence about the specific losses that it suffered. This objection is denied.

Penalty Abatement

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The petitioner requests abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). During the audit, the penalty was partially abated from 50% to 35%. Based on the facts and circumstances, partial penalty abatement is warranted.

Therefore, the assessment is adjusted as follows:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$66,274.34	$6,606.97	$16,568.38	$89,449.69

Current records indicate that no payment has been made towards the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Cutting Edge Landscapes, LLC
3145 E. Peterson Rd.
Troy, OH 45373

Re: Assessment No. 100001114884
Sales Tax

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$26,963.21	$2,533.67	$13,481.14	$42,978.02

The petitioner operates as a landscaping and snow removal company. This assessment is the result of an audit of the petitioner's sales for the period March 1, 2014 through February 28, 2018. The petitioner filed a petition for reassessment and requested a hearing. However, the petitioner waived its hearing by email on June 24, 2021.

The petitioner requests penalty abatement. Based on the facts and circumstances, a partial penalty abatement is warranted.

Therefore, the assessment is modified as follows:

Tax	Interest	Penalty	Total
$26,963.21	$5,682.89	$12,353.90	$45,000.00

Current records indicate that payments of $45,000 have been made in full satisfaction of the assessment.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000238

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 8 2021

DD Logistics LLC
344 Mercer Ave.
Dayton, OH 45402

RE: Refund Claim No.: 956870824747
Refund Period: 01/12/2018 – 06/02/2018
Tax Type: Sales
Account No.: 57-203083

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,245.24, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). When a vendor or consumer has paid taxes to the state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner can only refund an amount of tax, illegally or erroneously paid to the state. R.C. 5739.07.

The claimant contends that it erroneously paid sales tax on purchases that should have been exempt. The claimant asserts that the self-imposed use tax was calculated and reported under the county vendor's license, which was based on purchases made and used in jobs with the Department of Defense. The Department sent a denial letter explaining that the invoices provided did not show that the claimant was charged sales tax by vendors. Further, the Department explained in that letter, that the claimant needed to provide proof that sales tax was paid in error. In response to the denial letter, the claimant submitted the same invoices that were provided with the claimant's original refund application. The claimant did not provide evidence or documentation that demonstrated proof of sales tax being paid in error. As noted above, the Tax Commissioner can only refund an amount of tax, erroneously or illegally paid to the state. Therefore, the evidence submitted is insufficient to warrant a refund.

Accordingly, the claim for a refund is denied.

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JUL 2 8 2021

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000236

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 28 2021

DD Logistics LLC
344 Mercer Ave.
Dayton, OH 45402

RE: Refund Claim No.: 956870854734
Refund Period: 07/12/2017 – 12/12/2017
Tax Type: Sales
Account No.: 57-203083

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $139.25, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially partially allowed in the amount of $5.29, plus applicable interest. The claimant disagreed with the partial denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). When a vendor or consumer has paid taxes to the state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner can only refund an amount of tax, illegally or erroneously paid to the state. R.C. 5739.07.

The claimant contends that it erroneously paid sales tax on purchases that should have been exempt. The claimant asserts that the self-imposed use tax was calculated and reported under the county vendor's license, which was based on purchases made and used in jobs with the Department of Defense. The Department sent a denial letter explaining that the remaining invoices did not show that the claimant was charged sales tax by vendors. Further, the Department explained in that letter, that the claimant needed to provide proof that sales tax was paid in error. In response to the denial letter, the claimant submitted the same invoices that were provided with the claimant's original refund application. The claimant did not provide evidence or documentation that demonstrated proof of sales tax being paid in error. As noted above, the Tax Commissioner can only refund an amount of tax, erroneously or illegally paid to the state. Therefore, the evidence submitted is insufficient to warrant a refund.

Accordingly, the claim for a refund is denied.

0000000237

JUL 2 8 2021

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000259

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Wilma DePiore
3611 Arden Blvd.
Youngstown, OH 44511-3017

RE: Assessment No.: 100001632298
Tax Type: Sales
Account No.: 50-900396
Reporting Period: 07/01/2019 – 12/31/2019

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following corrected sales tax assessment:

Tax	Additional Charge	Additional Charge Penalty	Total
$32.28	$50.00	$7.50	$89.78

A hearing was held on July 15, 2021.

On September 23, 2020, an assessment was issued after the petitioner failed to file the sales tax return for the period shown above. After the issuance of the assessment, the petitioner filed a sales tax return reflecting the sales that had been made in that period; therefore, a lower sales tax was owed, and a corrected assessment was issued. The petitioner then petitioned the corrected assessment and was given partial abatement of the additional charge penalty. A second corrected assessment was issued which the petitioner also petitioned and is being addressed in this final determination.

Each vendor is required to file a return for the preceding month on or before the twenty-third day of each month as stated in R.C. 5739.12(A)(1). Any vendor who fails to file a return *** in the manner prescribed under this section and the rules of the commissioner may, for each such return, be required to forfeit and pay into the state treasury an additional charge not exceeding fifty dollars or ten per cent of the tax required to be paid for the reporting period, whichever is greater, *** and such sum may be collected by assessment in the manner provided in section 5739.13 of the Revised Code. R.C. 5739.12(D). The Ohio Revised Code provides for both an additional charge for a vendor's failure to timely file sales tax returns and a penalty on sales tax assessments. *O'Brien v. Tracy*, BTA No. 96-B-665, 1997 WL 594266 (Sept. 19, 1997). R.C. 5739.133 provides that "a penalty may be added to every amount assessed under section 5739.13 or 5739.15 of the Revised Code." The penalty applies not only to the actual sales tax assessed, but also to the additional charge imposed. *Ernst Enterprises, Inc. v. Tracy*, 68 Ohio St.3d 542, 629 N.E.2d 410 (1994).

The petitioner objects to the additional charge and additional charge penalty and raises several arguments in equity. Penalty abatement is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley,* 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The surrounding facts and circumstances warrant complete abatement of the additional charge and the additional charge penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Additional Charge	Additional Charge Penalty	Total
$32.28	$0.00	$0.00	$32.28

Current records indicate that a payment in the amount of $33.52 has been made toward the assessment, resulting in an overpayment of $1.24. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 28 2021

Candise Didyk
5130 Edgeview Rd.
Columbus, OH 43027

RE: Refund Claim No: 126633651342
Refund Amount Requested: $295.21
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $295.21, of sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The claimant purchased a 2020 Honda Grom125L for $4,264.71 on June 22, 2020. The claimant contends in the refund application that she is entitled to a refund because she is a 100% disabled veteran and has a letter from the Department of Veterans Affairs stating vehicle tax relief may be granted in some states. While the letter from the Department of Veterans Affairs supports the contention that the claimant is a 100% disabled veteran, it does not entitle her to the relief sought. Ohio does not have this type of tax exemption for disabled veterans. This letter could entitle someone to tax relief in a state that has an exemption, but because there is no such exemption in Ohio, no relief can be granted.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Brendan Elliot
5355 Esplanade St.
Columbus, OH 43221

RE: Refund Claim No.: 908747310184
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $620.50, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). When a vendor or consumer has paid taxes to the state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner can only refund an amount of tax, illegally or erroneously paid to the state. R.C. 5739.07.

The claimant contends that he erroneously paid sales tax on an auto title transfer. The claimant asserts that since the vehicle was a gift from his father no sales tax should have been paid. The Department sent a denial letter requesting proof that the vehicle was a gift. Further, the Department explained in that letter, if the vehicle were gifted to the claimant, that "a notarized statement from seller stating the purchase price of the vehicle" would be acceptable documentation to demonstrate that the vehicle was a gift. In response to the denial letter, the claimant sent a notarized letter from his father, which confirmed that the vehicle was provided as a gift to the claimant. However, that letter also explained that the claimant assumed responsibility for the remaining loan balance for the vehicle.

According to R.C. 5739.01(B), "[s]ale" and "selling" include transactions for consideration in any manner, whether absolutely or conditionally, whether for a price or rental, in money or by exchange, and by any means whatsoever. "Consideration" means any consideration sufficient to support a simple contract. R.C. 1303.33(B). Here, the claimant assumed responsibility for the remaining loan balance of his father's vehicle, prior to the auto title transfer. Because the claimant assumed responsibility for the remaining loan balance, he provided consideration for the vehicle, which amounts to him purchasing the vehicle. "Purchase" means taking by sale, lease, discount, negotiation, pledge, lien, security interest, or any other voluntary transaction creating an interest in property. R.C. 1301.201(B)(29). Although the claimant submitted a notarized document with his father stating the vehicle was a gift, in that same document, his

father stated the vehicle was conditional on the claimant paying the remaining loan balance. That condition created a sale for which the claimant provided the consideration.

The claimant has not provided evidence to substantiate that sales tax was illegally or erroneously paid for on the vehicle purchased from his father. As noted above, the Tax Commissioner can only refund an amount of tax, erroneously or illegally paid to the state. Therefore, the evidence submitted is insufficient to warrant a refund.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

FCA US, LLC
CIMS 485-13-62
1000 Chrysler Dr.
Auburn Hills, MI 48326

RE: Refund Claim No.: 202003299
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,505.60, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. No hearing was requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to the customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). If the full price is not refunded to the customer, no partial refund is granted to the vendor; no deduction can be made for wear, damage, or use. Ohio Adm.Code 5703-9-11(B); *Buick Youngstown Co. v. Tracy*, BTA No. 93-R-1130, 1994 WL 193898 (May 13, 1994).

The claimant is a motor vehicle dealer. On or about November 30, 2018, the claimant collected and remitted sales tax on the sale of a 2017 Jeep Grand Cherokee. The claimant contends that a refund of the entire purchase price was returned to the customer when the deal was cancelled. The evidence in the file supports that contention.

Accordingly, the refund is granted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Fedco, LLC
833 Eastern Ave.
Chillicothe, OH 43216

Re: Assessment No. 100001424226
Account No. 71-205987
Sales Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$31,702.30	$2,574.21	$15,850.99	$50,127.50

The petitioner operates a convenience store. This assessment is the result of a field audit of the petitioner's sales from January 1, 2016, to February 28, 2019. A hearing was held on May 6, 2021.

As an initial matter, an assessment is presumptively valid. *See RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

Audit Methodology

Ohio law requires that a taxpayer maintain primary records that delineate between taxable and non-taxable sales. Ohio Adm. Code 5703-9-2(B)(1). The petitioner did not maintain such records for the audit period and did not provide the auditor with Z-tapes or similar documentation. Audit Remarks, p. 4. The auditor was provided with various vendor purchase invoices from a portion of the audit period, sales journals for the entirety of the audit period, price lists, and a menu. *Id.* at 3.

Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate a taxpayer's sales. As no Z-tapes or other documentation recording the amount of tax collected was produced, the auditor relied on the petitioner's own sales journals. These contained columns titled "Total In," "Total Out," and "profit." *Id.* at 4. After comparing the sales journals against returns filed by the petitioner for the

JUL 30 2021

corresponding periods, the auditor determined that the petitioner had been reporting "profit" as recorded in the journals as gross sales for the purposes of calculating its tax due. This methodology was repeated throughout the entirety of the audit period. As the petitioner lacked verifiable documentation showing sales tax collected, the auditor determined that the "Total In" figures in the sales journals were the best means by which to calculate taxable sales for audit purposes. The auditor then multiplied the "Total In," or gross sales, figures against the Ross County tax rate for each month in the audit period, crediting tax already remitted, to determine tax due. *Id.* at 3. The petitioner raises two objections to this method of determining tax liability, providing the hearing officer with additional purchase invoices, a spreadsheet recalculation of tax due, and a contest letter in which they outline these objections in additional detail.

First, the petitioner contends that the vendor purchase invoices demonstrate error in the auditor's calculations, which should result in lower taxable sales. The invoices do not support such a conclusion. As detailed above, the auditor did not rely on purchase invoices in calculating tax due. Instead, the auditor referenced journals used by the petitioner to track sales. Purchase invoices have no bearing on these figures. The petitioner also contends that purchase invoices provide a more accurate income record over the audit period but provides no support or explanation for this conclusion. The objection is denied.

Second, the petitioner objects to finding all sales taxable, contending that the auditor did not rely on purchase invoices and that non-taxable food items are occasionally sold. As to the first point, as discussed above, it is true that purchase invoices were not used to calculate sales. The petitioner's sales journals were relied upon to do so. The petitioner provided no information to show which sales were non-taxable, or indeed if any sales could be considered exempt. Without records to show the breakdown of taxable and non-taxable sales, the objection cannot stand. Finally, the petitioner provided conflicting statements as to food sales. Initially the petitioner claimed they did not normally sell food but gave it away for free. *Id.* at 4. Later the petitioner provided the auditor with a one-page document showing four food items and related pricing. No additional information or clarification was produced. The petitioner failed to sufficiently establish that food was served, that such food was non-taxable, or provide any accounting of what portion of food sales were non-taxable take-out versus taxable dine-in. The objection is denied.

Interest Waiver

The petitioner objects to the imposition of pre-assessment interest due to the adverse effects of COVID on the petitioner's business and requests a full waiver of said interest. The Tax Commissioner is without jurisdiction to reduce the statutory interest promulgated by the General Assembly under R.C. 5739.132. Therefore, this objection is denied.

Penalty Remission

The petitioner requests a penalty remission. The facts and circumstances support a partial penalty abatement.

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Accordingly, the assessment is adjusted as follows: JUL 3 0 2021

Tax	Pre-Assessment Interest	Penalty	Total
$31,702.30	$2,574.21	$7,925.42	$42,201.93

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

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000233

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 2 8 2021

Fox Towing & Truck Service Inc.
29 W. Curry Rd.
Wilmington, OH 45177-9645

RE: Refund Claim No: 201805372
Refund Amount Requested: $2,385.84
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,385.84, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The claimant amended its tax return for the tax period of June 1, 2017 through June 30, 2017, increasing the amount of exempt sales and lowering the taxable sales. The Department sent a letter to the claimant with the instructions to provide the Department with supporting documentation. In the letter of denial, the claimant was instructed that "[p]roof of your original and amended figures for the refund period stated on your application was not submitted. Examples of acceptable documents may consist of sales journals, cash register receipts, summary reports used to prepare the tax return, or any other document used to report your Ohio sales tax liability." Letter of Denial p.1.

In response to the letter of denial, claimant provided Ohio Business Gateway (OBG) printouts for the original and amended return. The OBG printouts do not prove why the income was changed from a majority being taxable to a majority being exempt and do not show the supporting figures used by the claimant. The claimant contends that the overpayment was caused by an error in keying for an accelerated sales tax payment. This contention is not well met. The category on the OBG printout the claimant is referring to includes accelerated payments from previous periods and current period credit. The claimed accelerated payment is in fact the payment that was made on the original return for this period, so it is a current credit. Further, the claimed accelerated payment keying entry does not explain why the gross sales, exempt sales, and net taxable sales have all changed between the original and amended returns. The claimant failed to provide any information about the original or amended figures and thus the reason for their amended return was not supported by any evidence. The evidence in the file does not support the claimant's refund request.

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JUL 2 8 2021

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Future Energy Services of Oklahoma Inc.
5000 Eldorado Pkwy., Ste. 150
Frisco, TX 75033-8443

Re: Refund Claim No.: 652442011333
Refund Amount Requested: $9,708.55
Refund Period: 12/01/2018 – 12/31/2018
Sales Tax
Account No.: 07-036751

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $9,708.55 in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

The claimant filed an amended return for December 2018 that indicated that its taxable sales were significantly lower than originally reported. A letter was then issued to the claimant stating that an overpayment existed on the account and requested supporting documentation in order to receive a refund, if appropriate. The claimant provided a letter explaining why the claimant was due a refund and a completed sales and use tax blanket exemption certificate. The Department denied the refund request and requested proof of an overpayment of sales tax. The claimant was advised that proof of its original and amended figures were needed, along with verifiable documents used to prepare the original and/or amended returns. Also, in that denial letter, the Department made clear that "[s]creen prints from the Gateway will not be accepted as proof of amended figures."

In response to that denial letter, the claimant replied with an excel spreadsheet listing invoices that were organized by customer, date of the transaction, and sale price. However, the excel spreadsheet did not include any reference to sales tax being charged or, if it was, how much was charged. Further, the claimant provided an Ohio Business Gateway screen print of its original sales tax return filing, which was for the requested refund period of December 2018. The claimant did not include any information regarding the sales tax due for the month, rather, just the figures listed on the excel spreadsheet of invoices. Subsequently, in December of 2020, the Department again requested supporting documentation. The Department explained that acceptable supporting documentation "may consist of sales journals, cash register receipts, summary reports used to prepare the tax return, or any other verifiable documents used to prepare the original and/or amended returns." However, the claimant had not provided any other supporting evidence or documentation.

Pursuant to R.C. 5739.07 a claimant is allowed to request a refund of tax illegally or erroneously paid; however, the burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

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Aside from the abovementioned submissions, the claimant provided no other evidence or documentation to substantiate this refund request. As mentioned, although an excel spreadsheet was provided, no description, detail, or computation described whether or if sales tax was being charged. Additionally, even though the claimant provided screen prints from the Ohio Business Gateway, a sales and use tax blanket exemption certificate, and a letter alleging the erroneous payment of sales tax, the claimant did not provide acceptable supporting documentation and calculations to support its amended return and demonstrate that a refund is warranted. Therefore, the claim for refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000231

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 8 2021

Loreta Gibson
7050 Chillicothe Rd.
Mentor, OH 44060

RE: Refund Claim No: 20202182986
Refund Amount Requested: $6,499.69
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $6,499.69, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant filed an application for refund for taxes paid from January 1, 2016 through December 31, 2019 for her hair cutting and styling services and included a spreadsheet listing the refund requests by sales tax period and a statement explaining that the tax was remitted due to an administrative error. No other supporting documentation was provided. This claim was initially denied. In the letter of denial, the claimant was informed that "[p]roof of your original and amended figures for the refund period stated on your application was not submitted. Examples of acceptable documents may consist of sales journals, cash register receipts, summary reports used to prepare the tax return, or any other verifiable documents used to prepare the original or and/or amended returns".

In response to the letter of denial, the claimant provided their sales journal for 2019, but the journal is not sufficient because it is not an itemized record. The Department cannot determine from the journal what services were performed that would qualify for an exemption under R.C. 5739.01(B)(3)(q) and 5739.02(B)(43)(m). The claimant did not provide any information for 2016, 2017, or 2018. The claimant failed to provide the records that were used to create the original and amended returns that were requested by the department. The evidence in the file does not support the claimant's refund request.

JUL 2 8 2021

Further, pursuant to R.C. 5739.07(D), a request for refund must be made to the department within four years of the erroneous payment. Here, the refund claim was made on August 28, 2020, and as such, any payment made to the Department before August 28, 2016 must be denied. Therefore, the return period for January 1, 2016 through June 30, 2016 must be denied because the payment was made to the department on July 28, 2016 and is outside the statute of limitations.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

0000000227

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 8 2021

Heng Xiang Liu
5830 Darrow Rd.
Hudson, OH 44236

RE: Refund Claim No.: 582123372357
Tax Type: Sales
Account No.:

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $223.90, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). When a vendor or consumer has paid taxes to the state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner can only refund an amount of tax, illegally or erroneously paid to the state. R.C. 5739.07.

The claimant contends that he erroneously paid sales tax. The claimant asserts that he accidentally filed a sales tax return for a period where he had no sales to report. The claimant alleges that no sales tax should have been paid, since the claimant did not have sales for that period. The Department sent an initial denial letter for the claimant's refund request. In that letter, the claimant was informed that the Department requires proof of the original and amended figures. The Department advised that verifiable documents used to prepare the original and/or amended returns are needed and acceptable documents may consist of sales journals, cash register receipts, summary reports used to prepare the tax return, or any other verifiable documents used to prepare the original and/or amended returns. Also, in that denial letter, the Department made clear that "[s]creen prints from the Gateway will not be accepted as proof of amended figures."

In response to that denial letter, the claimant submitted business account statements for three periods. Further, the claimant provided an Ohio Business Gateway screen print of the amended sales tax return filing, which was for the requested refund period of May 2020. Although the claimant provided bank statements for the period of the refund, the claimant did not provide sufficient evidence or documentation to support that no sales occurred for the refund period of May 2020. The claimant did not provide any verifiable proof, as requested by the Department, of the original and/or amended figures for the refund periods, which were not submitted with the

JUL 28 2021

original refund application. The Department illustrated that acceptable supporting documentation "may consist of sales journals, cash register receipts, summary reports used to prepare the tax return, or any other verifiable documents used to prepare the original and/or amended returns." However, the claimant had not provided any other acceptable evidence or documentation to support the contention there were no sales for the refund request period. As noted above, the Tax Commissioner can only refund an amount of tax, erroneously or illegally paid to the state. Therefore, the evidence submitted is insufficient to warrant a refund.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

JAC Installations LLC
P.O. Box 35694
Canton, OH 44735-5694

RE: Assessment No. 100001647976
Sales Tax
Account No. 76-157357

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$11,602.11	$1,240.68	$2,900.36	$15,743.15

The petitioner's primary business activity was maintenance and cleaning of commercial refrigeration equipment including refrigerated storage cases, portable coolers, and freezers. This assessment is the result of a mark-up audit of the petitioner's sales from January 1, 2017 through November 30, 2019. A hearing was held on July 6, 2021.

The petitioner requested penalty abatement. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). Based on the facts and circumstances, an abatement of the penalty is warranted.

Accordingly, the assessment shall be adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$11,602.11	$1,240.68	$0.00	$12,842.79

Current records indicate that no payments have been made towards satisfaction of the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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JUL 30 2021

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Jersey Baptist Church
13260 Morse Rd. SW
New Albany, OH 43054

RE: Refund Claim No.: 20202041980
Sales Tax
Refund Period: 06/17/2016 – 06/09/2020

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $6,193.53 of sales tax filed pursuant to R.C. 5739.07. The Department granted a partial refund in the amount of $6,042.86, plus applicable interest, on January 13, 2021. The Department then denied the remainder of the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. The additional documentation resulted in the Department granting an additional partial refund in the amount of $2.93, plus applicable interest, on January 29, 2021, prior to the issuance of this final determination. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant contends that they are exempt from sales tax because they are a 501(c)(3) tax-exempt organization under IRS regulations. The Department reviewed the information provided by the claimant regarding their taxed purchases. The records provided by the claimant included invoices and receipts for the period of June 17, 2016, through June 9, 2020. The claimant also provided proof that the tax was paid by the organization. However, the Department denied the request, in part, because the claimant did not provide proof of either an invoice or a payment for several claimed transactions. A partial refund of $6,042.86, plus applicable interest was issued.

The Department requested additional information, including the invoices or proof of payment for the specific transactions that were denied. The Department also informed the claimant that based on their records provided for consideration, the total amount that was being claimed was $6,046.54, as no records were provided for any additional sales. The claimant provided the missing proof of payment as requested and a subsequent partial refund of $2.93, plus applicable

interest, was issued. However, the claimant failed to provide the requested invoice. Because there is no proof that the remaining refund balance was charged tax at the time of sale, the claimant has failed to prove that it was erroneously remitted to the state. Therefore, these contentions are allowed for the amount previously refunded by the department.

Accordingly, the remainder of the requested refund amount is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 8 2021

Jet Auto Group LLC
2001 E. Wheeling Ave.
Cambridge, OH 43725

RE: Refund Claim No: 202002725
Refund Amount Requested: $493.81
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $493.81, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The claimant sold a 2011 Ford Edge for $7,320.00 on September 18, 2019. The claimant contends in the refund application that there were reoccurring issues with the vehicle and the customer returned the vehicle. The claimant provided proof of the tax paid on the vehicle and that it refunded the customer's lender but did not provide proof that the whole purchase price was returned to the customer. In the letter of denial, the claimant was instructed that "Examples of acceptable documents include a copy of the cancelled check (front & back) or other documents that show the refund to your customer. This includes proof that a trade in was re-titled back to its original owner's name; the difference in the purchase price of the two (2) vehicles was refunded; and/or all money used as a down payment was refunded."

In response to the letter of denial, the claimant again provided the information included with their original request with additional proof about refunding the customer's lender. The claimant failed to provide the requested information. With no proof that the whole purchase price was refunded to the customer, the claimant failed to prove that tax was paid erroneously. Therefore, the evidence in the file does not support this contention.

Accordingly, the claim for a refund is denied.

0000000230

JUL 2 8 2021

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Joyce Market Inc.
1580 Joyce Ave.
Columbus, OH 43219-1952

RE: Assessment No.: 100001661763
Sales Tax
Account No.: 25-324311

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$48,321.77	$5,271.19	$24,160.81	$77,753.77

The petitioner operates a gasoline station and convenience store. This assessment is the result of an audit of the petitioner's sales from April 14, 2017, through June 30, 2019. The petitioner filed a petition for reassessment. A hearing was held on May 26, 2021. However, the petitioner failed to appear at the hearing.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

The auditor determined that the petitioner did not have adequate primary sales records as required by R.C. 5739.11. Audit Remarks, p. 5. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

A mark-up analysis was conducted using some purchase invoices, distributor records, as well as estimates based on the best available information. Utilizing these records, the auditor calculated the taxable beer, cigarettes, other tobacco, pop & soft drinks, energy drinks & other beverages,

and taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the product checklist, industry standards, and state minimum requirements.

The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales of 123.0184 percent. The reported gross sales for each non-sampled month of the audit period were multiplied by that percentage to determine the calculated taxable sales for each non-sampled month. The calculated taxable sales for each non-sampled month were multiplied by the applicable tax rate to determine the sales tax liability for each non-sampled month. Sales tax liability for sampled months was determined by multiplying the actual calculated monthly taxable sales for each sampled month by the applicable tax rate. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

The petition for reassessment contends that the petitioner has additional documents for the Department that will lower their tax liability. The petitioner failed to provide any evidence to support their contention in the petition and failed to appear at the hearing. Therefore, the objection is denied.

Therefore, the assessment is affirmed.

Current records indicate that payments of $1.37 have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Lovella Fashion Apparel, LLC
P.O. Box 737
Put in Bay, OH 43456

Re: Assessment No. 100001560239
Sales Tax
Account No. 62-900097
Reporting Period: 04/01/2016 – 03/31/2019

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$35,703.42	$4,023.69	$17,851.65	$57,578.76

This assessment is the result of an audit of the petitioner's purchases for the reporting period shown above. The petitioner operates a clothing and accessory store in Put in Bay, Ohio. A hearing was held on June 28, 2021.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

The petitioner contends that the audit methodology is improper. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Here, the petitioner did not maintain complete records as required by Ohio Adm.Code 5703-9-02(A). Audit Remarks, p. 5. The petitioner contends that it was improper for the Department to estimate cash sales. However, the petitioner did not maintain complete records and as such there were no records available from which to base their sales. Because the petitioner failed to maintain proper records and failed to submit evidence for their cash transactions, the Department was required to estimate the sales. The objection is denied.

The petitioner contends that sales from its Michigan store have been included in the audit. This objection is not well met. The petitioner provided credit card records to the auditor after the auditor

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issued the initial findings. Audit remarks, p. 9. These records were again provided at the hearing. After review of those records, the auditor removed those transaction from the audit. *Id.* After explaining that the Ohio and Michigan stores operate under the same FEIN, the underreported credit card sales were removed from the audit. Audit remarks, p. 6. Therefore, this objection is denied.

The petitioner also contends that they sell food on the premises, and it was not excluded from the audit as exempt sales. This contention is not well met. At the hearing, the petitioner said they have limited seating on site for their customers. The petitioner failed to provide any distinction between food and retail sales and further failed to provide any distinctions between food carried out and eaten on the premises. The petitioner claims that the food sales are recorded on a separate cash register, but the only registers included in this audit were from Press House and Lovella Fashion. The daily summary z-tapes that were provided did not show the breakdown of sales. The petitioner failed to provide evidence to show error in the assessment. The objection is denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payment has been made towards the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Magic 1077 LLC
1077 Wooster Rd. W
Barberton, OH 44203-7152

RE: Assessment No. 100001554357
Sales Tax
Account No. 77-198587

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$26,754.94	$2,184.08	$13,377.39	$42,316.41

The petitioner is a full-service bar and restaurant. This assessment is the result of an audit of the petitioner's sales from January 13, 2017, through June 30, 2019. A hearing was held on April 1, 2021.

The petitioner requested penalty abatement. The surrounding facts and circumstances support full abatement of the penalty.

Accordingly, the assessment shall be adjusted as follows:

Tax	Interest	Penalty	Total
$26,754.94	$2,245.06	$0.00	$29,000.00

Current records indicate that payment has been made in full satisfaction of the assessment.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 2 1 2021

Emigert Mehmeti
12200 Mayfield Rd.
Cleveland, OH 44106-1926

Re: Assessment No.: 100001594626
Tax Type: Sales (Responsible Party)
MiaBella LLC
Reporting Period: 01/01/16 – 02/28/19

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$396,558.71	$55,722.00	$216,290.05	$668,570.76

This is a responsible party assessment. MiaBella LLC incurred sales tax liability resulting in the sales tax assessment for the period listed above. This assessment was never satisfied by MiaBella LLC and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amount. Accordingly, the outstanding liability of MiaBella LLC has been derivatively assessed against Emigert Mehmeti. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 during the period listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was requested but later waived by the petitioner in an email dated May 11, 2021.

Responsible Party

The petitioner initially contended that he is not the responsible party, but later conceded that he is a responsible party for this assessment in an email dated May 11, 2021. The petitioner is listed as the vice president on the liquor permit and business filings submitted to the State of Ohio. The petitioner was the sole signatory on the articles of organization. The petitioner was listed on the Responsible Party Questionnaire as being responsible for the fiscal responsibilities and tax filings. Responsible Party Questionnaire p.1.

Underlying Assessment

The petitioner contends that MiaBella LLC entered into a payment plan with the Attorney General's Office in order to resolve the underlying assessment. The petitioner contends that

because he is in a payment plan with the Attorney General's Office the State of Ohio cannot issue a responsible party assessment, under R.C. 5739.33, for the underlying tax liability. However, the Board of Tax Appeals and the Supreme Court of Ohio have both held that payment plan agreements do not estop the Tax Commissioner from collecting unpaid sales tax, in absence of any long-standing administrative practice to exempt the officer from liability. *See Weiss v. Limbach*, 64 Ohio St.3d 79, 591 N.E.2d 1242, 1992-Ohio-141 (June 17, 1992). Additionally, since this is a responsible party assessment, the only issue that can be considered is whether the petitioner is a responsible party, under R.C. 5739.33, for the period listed above. Therefore, these contentions cannot be considered, as they relate to the underlying assessment.

The petitioner failed to present evidence that the assessment was in error. Therefore, it is determined that the petitioner is a responsible party of MiaBella LLC under R.C. 5739.33.

Accordingly, the assessment shall stand as issued.

Any reduction or credit made to the underlying corporate assessment on appeal or in collection will be applied to the corresponding responsible party assessment. Proper credit for any payments will be given at the collection stage. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above referenced total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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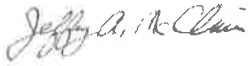

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date:

JUL 2 1 2021

Helga Mehmeti
863 Cranbrook Dr.
Highland Heights, OH 44143

Re: Assessment No.: 100001594625
Tax Type: Sales (Responsible Party)
MiaBella LLC
Reporting Period: 01/01/16 – 02/28/19

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$396,558.71	$55,722.00	$216,290.05	$668,570.76

This is a responsible party assessment. MiaBella LLC incurred sales tax liability resulting in the sales tax assessment for the period listed above. This assessment was never satisfied by MiaBella LLC and remains outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amount. Accordingly, the outstanding liability of MiaBella LLC has been derivatively assessed against Helga Mehmeti. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 during the period listed above. Neither the underlying substantive issues nor consideration of remission of the penalty can be considered. A hearing was held on May 11, 2021 but the petitioner failed to attend.

Responsible Party

The petitioner contends that she is not the responsible party. The petitioner is listed as the president on the liquor permit and business filings submitted to the State of Ohio. The petitioner is the sole authorized signatory on the change of registered agent. The petitioner was listed on the Responsible Party Questionnaire as being responsible for the fiscal responsibilities and tax filings. Responsible Party Questionnaire p.1.

Generally, personal liability for officers of a corporation for failure of a corporation to file returns or pay taxes is limited to those officers who have control or supervision or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117, 271 N.E.2d 792 (1971): *Spithogianis v. Limbach*, 53 Ohio St.3d 55, 559 N.E.2d 449 (1990). Here, the president of a limited liability corporation would have the authority to control the finances of the

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JUL 2 1 2021

business and the power to direct the operations of the corporation, and according to the questionnaire completed by the petitioner those duties were assigned to and performed by her. Therefore, this contention is denied.

Underlying Assessment

The petitioner contends that MiaBella LLC entered into a payment plan with the Attorney General's Office in order to resolve the underlying assessment. The petitioner contends that because she is in a payment plan with the Attorney General's Office the State of Ohio cannot issue a responsible party assessment, under R.C. 5739.33, for the underlying tax liability. However, the Board of Tax Appeals and the Supreme Court of Ohio have both held that payment plan agreements do not estop the Tax Commissioner from collecting unpaid sales tax, in absence of any long-standing administrative practice to exempt the officer from liability. *See Weiss v. Limbach*, 64 Ohio St.3d 79, 591 N.E.2d 1242, 1992-Ohio-141 (June 17, 1992). Additionally, since this is a responsible party assessment, the only issue that can be considered is whether the petitioner is a responsible party, under R.C. 5739.33, for the period listed above. Therefore, these contentions cannot be considered, as they relate to the underlying assessment.

The petitioner failed to present evidence that the assessment was in error. Therefore, it is determined that the petitioner is a responsible party of MiaBella LLC under R.C. 5739.33.

Accordingly, the assessment shall stand as issued.

Any reduction or credit made to the underlying corporate assessment on appeal or in collection will be applied to the corresponding responsible party assessment. Proper credit for any payments will be given at the collection stage. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above referenced total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:
JUL 2 8 2021

Monaco, Jessica
474 Landings Loop E
Westerville, OH 43082

RE: Refund Claim No: 20202151398
Refund Amount Requested: $2,111.18
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $2,111.18, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). The Tax Commissioner shall refund to a consumer taxes paid illegally or erroneously to a vendor only if the Tax Commissioner has not refunded the tax to the vendor and the vendor has not refunded the tax to the consumer. R.C. 5739.07(C)(1).

The claimant submitted documentation proving that she purchased a vehicle from Felix Sabates in North Carolina on June 5, 2020. The evidence shows that the claimant paid a tax of $2,111.18 during that transaction. The claimant titled the vehicle in Ohio as she was on active-duty military service at the time of the sale, stationed in Tennessee. The claim was denied for not providing proof of military orders and proof that Ohio sales tax was paid.

The claimant responded to the letter of denial with proof of her current and future military orders and the receipt from the clerk of courts. The tax that the claimant paid in North Carolina was the states "highway-use tax" for vehicles purchased in North Carolina whenever a title is transferred. "Revenue from the highway-use tax goes to the North Carolina Highway Trust Fund and the North Carolina's General Fund and is earmarked for road improvements."[1] The Department has no record indicating that North Carolina's highway use tax was remitted to Ohio. Further, there is no sales tax listed on the receipt from the clerk of courts and the exemption code "CM", which is for "Conversion – Military", is present on the receipt. Because the claimant has failed to show that they erroneously remitted tax to the state, she has failed to meet her burden. Therefore, the contention is rejected.

[1] https://www.ncdot.gov/dmv/title-registration/taxes/Pages/default.aspx

Accordingly, the claim for a refund is denied. JUL 28 2021

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Morris Cadillac Buick GMC
26100 Lorain Rd.
North Olmsted, OH 44070

RE: Refund Claim No: 202000058
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $51,369.73, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was requested; however, the claimant later waived this request in an email dated June 17, 2021.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The claimant contends that it erroneously paid penalties and interest on a certified assessment. The claimant asserts that the basis for the refund is for the penalties and interest paid on that certified assessment, which should be refunded or credited to future liabilities. The Department sent a denial letter explaining that the tax payment was not timely received and, consequently, an additional penalty incurred, and interest accrued. "The additional amounts that were paid in excess of the original tax due was for [assessment] related charges." In response to the denial letter, the claimant sent a letter requesting a hearing, which was later waived.

Per R.C. 5739.07, when a vendor or consumer has paid taxes to the state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner can only refund an amount of tax, illegally or erroneously paid to the state. Here, the claimant did not submit any evidence or documentation that taxes were illegally or erroneously paid to the state. The claimant has not provided evidence to substantiate that tax was erroneously paid on the certified assessment, which is the basis of this refund request. As noted above, the Tax Commissioner can only refund an amount of tax, erroneously or illegally paid to the state. R.C. 5739.07 does not allow refund claims for fees, interest, or penalty. Therefore, the evidence submitted is insufficient to warrant a refund.

Accordingly, the claim for a refund is denied.

JUL 3 0 2021

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 2 8 2021

Ohio Handyman LLC
8692 Deer Run
Harbor Springs, MI 49740

RE: Refund Claim No: 20201770911
Refund Period: 07/01/2018 – 4/30/2019
Refund Amount Requested: $6,785.81
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $6,785.81, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The claimant filed amended returns for their tax returns for the periods from July 2018 through April 2019 and then filed a refund application with a spreadsheet describing the work performed during the period as supporting documentation. The claimant contends that all tax remitted was paid directly by them. The Department requested additional information, but the claimant failed to provide any additional information. This claim was initially denied. Pursuant to R.C. 5739.07(A), a refund will only be granted if the vendor has repaid the tax in full to the consumer or has billed a consumer but has not collected tax from the consumer. In the letter of denial, the claimant was informed that "Sufficient detail was not provided to verify that tax was paid/remitted to the state for which a refund is being claimed." and to submit "Copies of original invoices or similar documents indicating amount of sales tax charged must be submitted with your claim." and "Credit Memos issued to customer(s)." Letter of Denial, p. 1.

In response to the letter of denial, the claimant provided a spreadsheet detailing all their transactions for the period listed above and 256 invoices. Of the 256 invoices, 185 of the invoices listed sales tax for the whole amount due with tax charged to the customer and paid. Of the remaining 71 invoices, 28 invoices included both taxed and exempt line items and again the tax was charged to the customer and paid. No credit memos or proof of refunds to the customers were provided by the claimant, failing to meet the requirement for a refund under R.C. 5739.07(A).

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JUL 2 8 2021

In addition, the total sales from the invoices matched what was claimed on the spreadsheet, but neither the invoices nor spreadsheet matched the total amount for sales reported on the original or amended return for any return during the period. Further, invoices in which no tax was charged to the customer did not match the amounts in which taxable sales were reduced on the amended returns for all the returns in the period apart from August and September 2018. The claimant failed to provide sufficient information to allow the Tax Commissioner to come to the conclusion that tax was erroneously paid and that the taxpayer is entitled to a refund.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

DATE: JUL 14 2021

Oregon Ford Inc
2811 Navarre Avenue
Oregon, OH 43616

Re: Refund Claim No: 20202041992
Refund Period: 1/01/2010 to 12/31/2014
Account No. 97-145747

This is the final determination of the Tax Commissioner on an application for refund of sales/use tax filed pursuant to R.C. 5739.07 and 5741.10.

In resolution of this matter, the refund has been granted with appropriate interest.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Phoenix Upfitters, LLC
2411 Carmody Blvd.
Middletown, OH 45042

RE: Refund Claim No.: 201903347
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $5,478.67, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). When a vendor or consumer has paid taxes to the state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner can only refund an amount of tax, illegally or erroneously paid to the state. R.C. 5739.07.

The claimant contends that he erroneously paid sales tax on three out-of-state vehicle sales. The claimant asserts that it sold three vans to a company in Indianapolis, Indiana. The Department sent a denial letter explaining that proof that the sales tax was remitted to the State of Ohio was not provided. Further, the Department explained it would need to submit taxable sales journals for the relevant periods, showing that sales tax on the transactions in question was reported and remitted. In response to the denial letter, the claimant submitted copies of its account statements for the periods in question, as well as receipts from the Indiana Bureau of Motor Vehicles showing proof of tax paid to the State of Indiana. However, upon the Department's review of the documents provided, the claimant was unable to definitively prove that it is eligibility for a refund. According to the Department, even if the claimant was correct in claiming tax on its sales tax returns, the documents that the claimant provided to the Department were insufficient to serve as proof of payment. The figures on the account statements did not match those on the claimant's sales tax returns. Further, when the Department requested an additional explanation for the discrepancies, the claimant failed to provide sufficient information.

Although the claimant was given additional time to provide evidence or documentation for a breakdown by transaction of the claimant's tax filings for the periods at issue, none were provided. The claimant only submitted Ohio Business Gateway copies of sales tax returns, which do not demonstrate a breakdown of the figures, as requested. The figures the Department has on file, which the claimant provided, do not match the returns filed. The claimant has not provided

evidence to substantiate that sales tax was illegally or erroneously paid for on the vehicles. As noted above, the Tax Commissioner can only refund an amount of tax, erroneously or illegally paid to the state. Therefore, the evidence submitted is insufficient to warrant a refund.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Douglas E. Price, IV
6875 Bridgecreek Dr.
Painesville, OH 44077-2355

RE: 4 Assessments
Tax Type: Sales (Responsible Party)
Apple Landscaping & Snowplowing, LLC
Vendor's License No.: 91-353393

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessments:

Assessment No.	Time Period	Total
100001653527	07/01/14 – 12/31/14	$9,815.84
100001653528	04/01/14 – 06/30/14	$4,904.62
100001653529	01/01/15 – 06/30/15	$11,934.90
100001653530	07/01/15 – 12/31/15	$8,639.22
	Total	$35,294.58

These are responsible party assessments. Apple Landscaping & Snowplowing, LLC ("Apple") incurred sales tax liability resulting in multiple assessments. These assessments were never fully satisfied by Apple and remain outstanding. Under such circumstances, R.C. 5739.33 holds officers or employees who are responsible for the filing and payment of sales tax returns, those in charge of, or those with the authority to control the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Apple has been derivatively assessed against Douglas E. Price, IV. Therefore, the only issue that can be considered is whether the petitioner is a responsible party under R.C. 5739.33 for the periods listed above. Neither the underlying substantive issues, nor consideration of remission of the penalties, can be considered. A hearing was held on May 25, 2021.

The petitioner objects to the assessments. The petitioner asserts that the calculations reflected on the assessments are erroneous and the penalties are inflated. The petitioner contends that the department erred in the assessment by holding the petitioner as a responsible party.

Responsible Party

The evidence indicates that the petitioner is listed as a member of the LLC on the articles of organization, which was executed and filed on January 22, 2014. The petitioner was the sole

name listed on the application for vendor's license and Secretary of State documents, which the petitioner had executed and filed on March 11, 2014. Further, the petitioner was listed as the owner, as well as the tax filing administrator for Apple, on the business' online tax account registered on Ohio.gov. Generally, failure of a corporation to file returns or pay taxes, as it pertains to personal liability for officers of a corporation, is limited to those officers who have control, supervision, or are charged with the responsibility of filing returns and making payments. *Weiss v. Porterfield*, 27 Ohio St.2d 117, 271 N.E.2d 792 (1971): *Spithogianis v. Limbach*, 53 Ohio St.3d 55, 559 N.E.2d 449 (1990). However, even if an individual does not actually participate in or supervise the corporation's fiscal operations, if his or her position is one that would ordinarily be responsible for such duties, then the officer may be found to be responsible to the state. *Spithogianis, supra.*

Here, the petitioner contends that he was a young man with no prior experience owning or operating a business with taxation matters. The petitioner asserts that his partner at Apple would manage Apple's financial and tax operations. However, the petitioner contends that when he discovered his partner was not handling the tax obligations appropriately, the petitioner took control of those duties and hired a CPA to resolve any tax liabilities or issues that may have been outstanding. Once the petitioner took over those duties, he never relinquished authority. Also, the petitioner was listed as the filing administrator on Apple's Ohio Business Gateway account and exercised management control or authority and had authority to assign the responsibility for exercising management control or authority over employees who were responsible for preparing, signing, or filing Ohio business tax reports/returns. This was most apparent when the petitioner took over supervision of Apple's fiscal operations and hired a CPA to handle the business' tax matters.[1] According to Ohio Adm.Code 5703-9-49(C)(4), an officer or trustee has demonstrated responsibility for tax liabilities of a corporation, LLC, or business trust if that "officer or trustee retains, directs or otherwise exercises control over outside accountants, bookkeepers, or other persons who are charged with filing sales tax…"

Further, the petitioner has never denied that he was a responsible party. The petitioner only asserts that the responsible party assessments should be invalid due to unperfected service of process. The petitioner has not submitted any evidence demonstrating that the petitioner was not a responsible party for Apple. Because the petitioner did not submit any evidence showing he was not a responsible party and there is no evidence in file supporting the petitioner not being a responsible party, the Department's issuance of responsible party assessments was not erroneous. Therefore, the petitioner's objections are denied.

Delivery of Underlying Corporate Assessments

The petitioner contends that the assessments are invalid because the underlying business was not properly served, and by extension, any derivative liability assessed against the petitioner is completely invalid. The petitioner asserts that insufficient service of process is a complete defense against a responsible party assessment.

R.C. 5703.37(B)(1)(b)(2) explains that if the mailing of a notice or order by certified mail is

[1] *See* Petition for Reassessment, p. 4

returned for some cause other than an undeliverable address or if a person does not access an electronic notice, the commissioner shall resend the notice or order by ordinary mail. The notice or order shall show the date the commissioner sends the notice or order and include the following statement: "This notice or order is deemed to be served on the addressee under applicable law ten days from the date this notice or order was mailed by the commissioner as shown on the notice or order, and all periods within which an appeal may be filed apply from and after that date." Also, unless the mailing is returned because of an undeliverable address, the mailing of that information is prima-facie evidence that delivery of the notice or order was completed ten days after the commissioner sent the notice or order by ordinary mail and that the notice or order was served. R.C. 5703.37(B)(1)(b)(2).

Here, the petitioner contends that he never received notice of the underlying assessments because the assessments were sent to an old address. However, the petitioner filed amended tax returns with the State of Ohio on June 22, 2016 and July 5, 2016, which was 8 days before and 6 days after the assessments were issued. In addition, the petitioner never updated the LLC's address. The Department's records illustrate that the underlying assessments were sent by certified mail. Further, the evidence shows that those parcels went unclaimed, and notices or orders were issued deeming delivery, as explained above in R.C. 5703.37(B)(1)(b)(2).

As it pertains to an LLC, each limited liability company shall maintain continuously in this state an agent for service of process on the company. The agent shall be a domestic LLC * * * that has a business address in this state. If the agent is an entity other than a domestic corporation, the agent shall meet the requirements of Title XVII of the Revised Code for an entity of the agent's type to transact business or exercise privileges in this state. R.C. 1705.06(A)(2). Further, R.C. 1705.06(E) explains that if the agent described in division (A) of this section changes the agent's address from the address stated in the records of the Secretary of State, the agent or the limited liability company shall file forthwith with the secretary of state, on a form prescribed by the secretary of state, a written statement setting forth the new address. Here, even after the petitioner amended his tax filings and dissolved the LLC, the petitioner failed to update the change of address for the business. Because the petitioner never updated the change in address, especially after amending tax filings just before and right after the issuances of the underlying assessments, the Department had no reason to believe the petitioner would not be reached at the listed address.

Even if the petitioner did not receive notice of the assessments from the Department, R.C. 5703.37(B)(1)(b) states "[n]otwithstanding certification to the attorney general under division (B)(1)(a) of this section, once the commissioner or attorney general, or the designee of either, makes an initial contact with the person to whom the notice or order is directed, the person may protest an assessment by filing a petition for reassessment within sixty days after the initial contact. The certification of an assessment under division (B)(1)(a) of this section is prima-facie evidence that delivery is complete and that the notice or order is served."

Here, the petitioner alleges he never received notice of the underlying assessments when the assessments were first issued in 2016. However, the petitioner also states that he first learned of these assessments when he received a letter from a designee of the attorney general's office

informing the petitioner of a debt owed in February of 2020. Subsequent to that notification, the Department issued these responsible party assessments and the petitioner filed a petition for reassessment against the responsible party assessments. Because the petitioner confirms he received notice of the underlying assessments from a designee of the attorney general's office, this is prima-facie evidence that delivery is complete, as well as the notice or order is served. Although the petitioner filed a petition for reassessment, the petitioner did not file the petition against the underlying assessments, rather, the petitioner filed the petition against these responsible party assessments. By filing a petition against the responsible party assessments instead of the underlying assessments, the petitioner failed to protest the underlying assessments 60 days from initial contact, which began with the correspondence by the designee from the attorney general's office in February of 2020.

Additionally, the petitioner contends that no penalties and no interest should be assessed, since the calculations of the assessments are erroneous, and the penalties are inflated. Under R.C. 5739.33, issues of interest, remission of penalty, or other substantive issues cannot be considered in a responsible party assessment.

Accordingly, the assessments are affirmed as issued.

Any reduction or credit made to the underlying corporate assessment on appeal or in collection will be applied to the corresponding responsible party assessment. Proper credit for any payments will be given at the collection stage. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above referenced total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Prime Auto Sales LLC
12825 Cleveland Ave. NW
Uniontown, OH 44685

RE: Refund Claim No: 202003947
Refund Amount Requested: $871.01
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $871.01, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The claimant sold a 2004 Chevrolet Silverado 2500 HD for $12,013.99 on March 6, 2020. The claimant states in the refund application that the vehicle was returned by the purchaser after a few days. The claimant contends that they have fully refunded the purchase price of the vehicle. The evidence in the file supports that contention.

However, the claimant is only entitled to a refund in the amount of $864.47. The Department is unable to provide the claimant with the full requested refund amount because the Department is only able to refund sales tax paid. The claimant paid a lesser amount than requested because they received a vendor discount.

Accordingly, a refund of $864.47 plus applicable interest is granted.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 28 2021

Q C Storage LLC
P.O. Box 1344
Jennings, LA 70546

RE: Refund Claim No.: 20202467358
Refund Period: 11/01/2020 – 11/30/2020
Tax Type: Sales

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $249.68, in sales tax, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). A refund of sales tax for returned merchandise is granted when the vendor refunds the full purchase price and sales tax to the customer or credits the customer's account. Ohio Adm.Code 5703-9-11(A). If the full price is not refunded to the customer, no partial refund is granted to the vendor; no deduction can be made for wear, damage, or use. Ohio Adm.Code 5703-9-11(B); *Buick Youngstown Co. v. Tracy*, BTA No. 93-R-1130, 1994 WL 193898 (May 13, 1994).

The claimant is a full-service medical storage and supply company. On or around November 1, 2020, the claimant contends that they collected and remitted sales tax on the sale of medical supplies. The claimant contends that a refund was returned to the customer when a portion of the medical supplies were returned to the claimant on or around November 30, 2020.

The claimant submitted an application for a refund of sales tax. The Department sent a denial letter for the claimant's refund request. In that letter, the claimant was informed that for a refund to be issued, all tax returns for the refund period above must be current. Further, the department explained that it's records indicated that the claimant's November 2020 return has not been filed or paid and requested that the claimant "electronically file and pay [it's] November 2020 tax return and submit [the] confirmation." Also, in that denial letter, the Department made clear that an original invoice was not included with the refund request, an original invoice will be needed, and that a bill of lading will not be accepted in place of an original invoice for this refund request.

In response to that denial letter, the claimant provided an original invoice and the confirmation page from the Ohio Business Gateway ("Gateway") tax filing. However, the claimant filed a

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return with zero sales and zero tax liability. Also, when comparing the original invoice to the bill of lading provided with the refund application, the claimant charged a restocking fee upon the return of the merchandise. According to Ohio Adm.Code 5703-9-11(B), in no event shall a transaction be treated as a return of merchandise if the vendor or seller deducts from the customer's refund any amount for use, damage, or wear and tear of the merchandise returned, any restocking or handling charge, or otherwise fails to refund to the customer or credit the customer's account with the full purchase price and applicable tax.

The evidence submitted is insufficient to warrant a refund of the sales tax as the claimant failed to demonstrate both that the tax was remitted to the state and that the customer received a refund or credit of the full purchase price and sales tax for the medical supplies or merchandise returned.

Accordingly, the claim for a refund is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Ronel LLC
1505 S. Heritage St.
Port Clinton, OH 43452

RE: Refund Claim No: 202003090
Refund Amount Requested: $642.47
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $642.47, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was held on June 9, 2021.

The claimant purchased a 2018 Polaris Ranger for $8,985.00 on October 1, 2018. The claimant states in their refund application that the vehicle was used exclusively on its farm. The claimant contends that the purchase of the vehicle qualifies for the farm use exception.

Pursuant to R.C. 5739.02, an excise ("sales") tax is levied upon all retail sales made in Ohio. By virtue of R.C. 5741.02, a corresponding tax is imposed upon the storage, use, or consumption in this state of any tangible personal property, or the benefits realized in this state of services provided, with it being the obligation of the user to file a return and remit tax on the purchase of such items when tax was not paid to a seller.

There is a farming exception to the Ohio sales and use tax under R.C. 5739.02(B)(42)(n) if the purpose of the transaction is "To use or consume the thing transferred primarily in producing tangible personal property for sale by farming, agriculture, horticulture, or floriculture." However, not every agricultural activity is "farming." "Farming" is defined in Ohio Adm. Code 5703-9-23(A)(1) as the "occupation of *tilling the soil for the production of crops as a business* and shall include the raising of farm livestock, bees, or poultry, where the purpose is to sell such livestock, bees, or poultry, or the products thereof as a *business*." (Emphasis added.) "Business" requires the "object of gain, benefit, or advantage." R.C. 5739.01(F). Equipment that generally qualifies for the exemption are tractors, combines, planters, balers, and similar equipment.

In order to claim the exemption, the claimant must first prove that they are farming as a business. The claimant provided a Schedule F for 2018. However, at the hearing, the claimant presented information that the farmland is used in the Lake Erie CREP which is a program to use the land for conservation purposes. While conservation may be an agricultural use, it does not produce anything that is sold as a business. The evidence presented does not support the claimant's contention that they are engaging in farming as a business.

There remains the question as to whether the vehicle's primary use is exempt. According to the claim filed by the claimant, the vehicle is used 50% for farm use and 50% for non-exempt activities. The claimant later submitted an updated questionnaire that stated the vehicle is used 60% for farm use and 40% for non-exempt activities. Notably, the claimant indicated at the hearing that the exempt activities, seeding and spraying for weeds, are done for conservation purposes, and not farming purposes. The weeds are controlled to maintain the requirements of Lake Erie CREP and the seeding is to provide food for wildlife. Thus, while these are farming activities, they are not being done in the furtherance of a farming business as defined in Ohio Adm. Code 5703-9-23(A)(1). While the vehicle in question may be used exclusively on the claimant's farmland and may be a necessary piece for that activity, "The law does not provide… that any item necessary for farming is exempt." *Bahan Farms, LLC v. McClain*, B.T.A. No. 2017-2180, 2019 WL 1260533 (March 11, 2019).

The claimant failed to provide sufficient evidence that the vehicle is used primarily in the production of tangible personal property for sale by farming as required under R.C. 5739.02(B)(42)(n). Therefore, it does not qualify for the exemption.

Accordingly, the refund request is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 2 1 2021

Rush of Mansfield Inc.
305 Marion Ave.
Mansfield, OH 44903-2032

Re: Assessment No.: 100001577343
Sales Tax
Account No.: 70-153976

This is the final determination of the Tax Commissioner regarding a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$159,838.95	$13,230.44	$79,919.42	$252,988.81

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from April 10, 2017 through May 31, 2019. The petitioner filed a petition for reassessment. A hearing was held on March 25, 2021.

An assessment is presumptively valid. *RKE Trucking Inc. v. Zaino,* 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E. 2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing, *Federated Department Stores, Inc. v. Lindley,* 5 Ohio St.3d 213, 450 N.E. 2d 687 (1983); *Automotive Warehouse, Inc. v. Limbach,* BTA No. 87-D-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections.

Audit Methodology

A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's distributors. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, pop & soft drinks, energy drinks & other beverages, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements. A sample period of January 1, 2018 through December 31, 2018 was used as a representation of the entire audit period to calculate taxable sales. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The totals for each category of taxable merchandise were summed and divided by the total reported gross sales for the sample period to determine the taxable percentage of gross sales (187%). Taxable

inventory purchase amounts derived from distributor summaries or estimates were divided by the number of months in the sample period and recorded as monthly purchase amounts. Complete and accurate records of net taxable sales and tax collected were not maintained by the taxpayer as required by R.C. 5739.11.

The remaining calculated taxable sales from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the taxpayer for the entire sample period. The resulting taxable percentage of reported gross sales were multiplied by the reported gross sales for each non-sampled month of the audit period to determine the calculated monthly taxable sales for the audit period. Tax liability for sampled periods were calculated on the actual calculated monthly taxable sales for that sample period. The calculated taxable sales by month were then multiplied by the applicable tax rates in effect throughout the audit period to determine the gross sales tax liability by month for the entire audit period. Credits representing the tax reported and paid through the taxpayer's monthly sales tax returns were subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

Ohio law requires that a taxpayer have primary records that delineate between taxable and non-taxable sales. Ohio Adm.Code 5703-9-2(B)(1). The petitioner provided records during the audit; however, the records were not deemed adequate or complete and the auditor was unable to tell what products were classified in designated categories. Audit Remarks, p. 6. Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

The petitioner contends that the auditor erred in his mark-up calculations. The petitioner contends, throughout the entire audit period, that the auditor erred by determining additional sales tax liability, erred by the imposition of pre-assessment interest, erred by using mark-up percentages and procedures that are not reflective of the actual markups of the petitioner, erred by excluding theft or employee waste, erred by not fully crediting the petitioner's cigarette rebates and buy-down payments by cigarette manufacturers, and erred in not crediting or excluding purchases the petitioner made from third parties that were already subject to sales tax. However, the petitioner has not provided any evidence, documents, or additional objections to substantiate these errors or contentions. During the hearing, the petitioner disagreed with the amount of the assessment, but did not provide any additional documentation that would support a change in the tax liability. After the hearing, the petitioner was given additional time to submit documentation or evidence that would substantiate the contentions, along with providing a brief that included calculations to show error in the assessment. No additional information was provided.

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Inaccurate Markup Percentage

The petitioner contends that the markup percentages used in the audit are inaccurate. Sufficient, competent, and probative evidence to support allegations of error in the assessment would show in what manner and to what extent the error exists. *See Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999). Here, the petitioner did not provide any evidence, let alone sufficient evidence to demonstrate error. The petitioner did not provide any records with the petition and the records that were provided to the auditor were used to determine the tax liability. Although the petitioner was given additional time to submit supporting evidence, such as primary backups of checks and invoices, along with submitting a brief regarding the assessment that included calculations to show error is the assessment, nothing was submitted. The petitioner has provided no information to demonstrate error in the assessment. Accordingly, this objection is denied.

Purchases from Third Parties

The petitioner asserts that the Department erred in not crediting or excluding purchases the petitioner made from third parties that were already subject to sales tax during the audit period. According to Ohio Adm.Code 5703-9-02(D), "[i]f any vendor fails to maintain complete primary sales records which may be utilized in verifying the accuracy of the figures reflected in their secondary records and/or reported on their tax returns, the commissioner may audit and assess as provided in section 5739.13 of the Revised Code." During the audit, the petitioner submitted purchase records for the full audit period; however, the records submitted were not deemed adequate or complete. Audit Remarks, p. 6. Although the petitioner was given additional time to submit supporting evidence, nothing was submitted. The petitioner has provided insufficient evidence to prove error in the assessment. Accordingly, this objection is denied.

Employee Theft/Waste

The petitioner contends that employee theft/waste was not addressed in the audit calculation. However, to support this assertion, the petitioner must provide proof in the form of police reports, insurance claims, or other documentation that would demonstrate such losses to be reflected in the audit methodology. During the audit, the auditor requested "cigarette purchase records, cigarette rebates, and proof of theft of taxable inventory"; however, no documentation or evidence was provided. Audit Remarks, p. 4. Further, when the petition was filed, no evidence and documentation was provided that highlighted this contention by the petitioner. Although the petitioner was given additional time to submit supporting evidence, such as police reports and insurance claims, nothing was submitted. The petitioner has not provided sufficient evidence to prove error in the assessment. Accordingly, this objection is denied.

Cigarette Rebates

The petitioner contends that cigarette buy downs and rebates were not fully credited in the audit. To support this assertion, the petitioner provided spreadsheets of summary invoices and summary payment requests; however, the petitioner provided no calculations, and no actual

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copies of checks and invoices to substantiate these contentions. Although the petitioner was given additional time to submit supporting evidence, such as primary backups of checks and invoices, along with submitting a brief regarding the assessment that included calculations to show error in the assessment, nothing was submitted. The petitioner has not provided sufficient evidence to prove error in the assessment. Accordingly, this objection is denied.

Penalty Abatement

The petitioner requests full abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed where a taxpayer fails to collect and remit the tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *See Jennings & Churella Constr. Co. v. Lindley*, 10 Ohio St.3d 67, 461 N.E.2d 897 (1984). The facts and circumstances do not support abatement of the penalty.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been made towards satisfaction of the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Sam's East, Inc.
702 SW 8th St.
Bentonville, AR 72716

RE: Refund Claim No. 201704642
Sales Tax
Refund Period: February 1, 2012 - January 31, 2015
Account No. 97-138278

This is the final determination of the Tax Commissioner on an application for refund in the amount of $508,668.56, plus applicable interest, filed pursuant to R.C. 5739.07. The claim was initially granted, in part, with a refund of the sales tax paid in the amount of $3,514.64, plus applicable interest. The claimant disagreed with the partial denial and requested reconsideration of the matter. A hearing was held.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the State. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). R.C. 5739.07 allows a claimant to request a refund of tax illegally or erroneously paid.

The claimant contends that it erroneously paid tax on exempt transactions. The claimant submitted a list of twelve contentions for exemption; however, the Department informed the claimant during the initial denial that the claimant failed to establish a tax exemption or exception for the requested refund claim, as the claimant failed to provide any supporting documentation. The claimant also failed to reconcile the amount on the refund application with its cover letter because the claimant submitted two refund request letters with differing requested refund amounts. The claimant completed a Sales and Use Tax Refund Application dated March 9, 2017 with a requested refund amount of $508,668.56 and the claimant submitted a Request for Refund letter dated March 17, 2017 with a requested refund amount of $584,998.09. The Department requested that the claimant submit invoices and proof of payment of tax collected and remitted.

Background

Sam's East, Inc., doing business as Sam's Club, is headquartered in Bentonville, Arkansas. The claimant is a chain of membership-only retailer warehouse clubs owned and operated by Walmart. The claimant is engaged in retail operations throughout the world through traditional brick and mortar stores and digital retail. The claimant sells most of its merchandise in bulk and directly off pallets. The claimant also sells products such as jewelry, designer goods, crystal and collectibles, electronics, floral, apparel, and food. Audit Remarks, p. 4. The claimant supplies

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products to the following business sectors: auto, catering and restaurants, childcare and schools, construction, convenience stores, grocery, hotels and hospitality, housekeeping and janitorial, offices, religious organizations, salons and spas, specialty businesses, special orders, technology, and vending and concessions. *Id.* The claimant's operations include full-service supermarkets with baked goods, pharmacies, optical centers, one-hour photo processing labs, and other amenities such as auto repair, floral departments, and cafes. During the audit of the taxpayer, the claimant maintained 29 Ohio facilities. *Id.*

The claimant submitted a CD with invoices and an excel spreadsheet of contested transactions. The claimant submitted a joint memorandum of contentions in support of a refund request application and a petition for reassessment requesting a reduction in the assessment; however, the claimant did not submit matching transactions for both claims. Therefore, this refund request only addresses the claimant's contentions and transactions that were applicable to the refund claim.

The claimant initially filed its application for refund in the amount of $508,668.56. After the Department requested additional information to support the claimant's contentions, the claimant submitted a spreadsheet of 51 contested transactions. However, the claimant only provided invoices for 24 of the 51 transactions. The claimant's objections are addressed in detail below.

Food Services

The claimant contends that it erroneously paid tax on exempt purchases of tangible personal property used by a licensed food service operator under R.C. 5739.02(B)(27). The claimant failed to identify food services transactions in its refund request application; however, during the hearing, the claimant contended that it purchased exempt food service items such as slicers, ovens, and cleaning chemicals. The claimant contends that its food service operation and manufacturing occur in its deli and bakery.

R.C. 5739.02(B)(27) provides a sales tax exemption to persons licensed to conduct a food service operation under R.C. 3717.43 of tangible personal property primarily used directly to prepare food for human consumption, preserve food for human consumption, and to clean tangible personal property used to prepare food for sale. This exemption does not apply to tangible personal property used to display food for selection by the consumer.

The Department requested the claimant submit invoices and additional information to support its contention. The claimant failed to elaborate on this contention. Additionally, the claimant failed to include any transactions in its refund claim pertaining to food service or manufacturing, except for one transaction from Qualserv Corp concerning food equipment maintenance. However, the claimant failed to submit an invoice for the transaction. Therefore, the objection is denied.

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Manufacturing

The claimant contends that it erroneously paid tax on items used primarily in a manufacturing operation to produce tangible personal property for sale which are exempt from sales and use tax under R.C. 5739.02(B)(42)(g) and 5739.011.

R.C. 5739.02(B)(42)(g) provides a sales tax exemption for items used primarily in manufacturing. The manufacturing operation is defined in relevant part as the process in which materials are changed, converted, or transformed into a different state or form from which they previously existed. Ohio Adm.Code 5703-9-21(B)(1). Materials handling equipment that moves the product through a continuous manufacturing operation and equipment that temporarily stores the product during the manufacturing operation are exempt. R.C. 5739.011(B)(2). Additionally, R.C. 5739.02(B)(15) provides that purchases of packaging material for use primarily in packaging tangible personal property produced for sale is not taxable. The claimant contends that its transactions used in the manufacturing operation, such as parts, repairs, and materials handling equipment pursuant to Ohio Adm.Code 5703-9-21(C)(11) and R.C. 5739.011(B)(2) and packaging pursuant to R.C. 5739.02(B)(15) are exempt.

During the hearing, the claimant contended that its manufacturing equipment concerned food service and food service equipment. The claimant failed to elaborate on its manufacturing operation. Additionally, the claimant submitted a spreadsheet of 51 contested transactions in its refund claim; however, the claimant only provided one transaction under the exemption of manufacturing. The claimant states that the transaction was for an induction cook top used in food processing. The claimant contends that the food processing equipment is exempt as manufacturing equipment because it physically alters raw materials to produce a final good for sale under R.C. 5739.02(B)(42)(a) and any services to the equipment are likewise exempt. However, the claimant failed to provide an invoice for this transaction. Therefore, the objection is denied.

Nontaxable Services

The claimant contends that it erroneously paid tax on nontaxable services. During the hearing, the claimant contends that it purchased off-duty law enforcement services, delivery charges, environmental services, and similar professional and personal services that are exempt under R.C. 5739.01(B)(3) and (Y)(2). However, this contention is not explained, developed, or demonstrated with probative evidence. Most notably, the claimant failed to identify which transactions qualify for exemption under these provisions. The claimant submitted a spreadsheet of contested transactions; however, only two transactions from Environmental Products and Services and January Environmental Services, respectively, were contested as nontaxable services.

The citations included by the claimant do not support its contention, as R.C. 5739.01(B)(3) refers to the general listing of transactions that result in a sale. Additionally, R.C. 5739.01(Y)(2) refers to the general listing of transactions that qualify as personal and professional services. The claimant failed to identify what type of personal and professional services under R.C.

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5739.01(Y)(2) were included in its contested transactions, except for environmental services. Additionally, the claimant failed to provide any evidence of transactions concerning non-enumerated services, such as invoices, contracts, and change or purchase orders. Further, the claimant contests delivery charges: however, R.C. 5739.01(H)(1)(a)(iv) provides that delivery charges are taxable as part of the purchase price. Therefore, this objection lacks merit.

Waste Removal

Following the hearing of the taxpayer, the claimant submitted invoices from Environmental Products and Services and January Environmental Services for waste removal services. The claimant contends that Invoice 2040700 is for the removal of waste from broken compactors; therefore, the transaction is exempt because waste removal services are not enumerated as taxable pursuant to R.C. 5739.01(B).

R.C. 5739.01(B)(3)(j) includes in the definition of "sale" all transactions by which building maintenance and janitorial services are provided. "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. R.C. 5739.01(II). Janitorial cleaning services are generally understood to encompass activities such as washing floors or windows and removing garbage. *Great Lakes Bar Control, Inc. v. Testa*, 156 Ohio St.3d 199, 2018-Ohio-5207, 124 N.E.3d 803.

Based on the invoice and emails between the claimant and January Environmental Services and Environmental Products and Services, the auditor determined that the transaction at issue was for taxable compactor repairs and taxable janitorial services under R.C. 5739.01(B)(3)(a) and 5739.01(B)(3)(j), respectively as the vendor transported the rented open top container to the landfill to dispose of the waste. Therefore, the objection lacks merit.

Additionally, the claimant submitted Invoice 18013112 and contends that the invoice is a monthly billing for hazardous waste removal services to an oil and water separator. The claimant contends that hazardous waste removal services are not enumerated as taxable under R.C. 5739.01(B) and, therefore, are exempt. The auditor reviewed the claimant's refund request a second time on appeal and determined that the invoice was for an oil water separator, which is a piece of equipment used to separate oil and water mixtures into separate components and not hazardous waste removal services. Alternatively, the claimant failed to provide evidence that it contracted with January Environmental Services for hazardous waste services or that January Environmental Services maintained a hazardous waste permit issued by the Public Utility Commission of Ohio or the United States Department of Transportation authorizing it to transport personal property belonging to others for consideration in accordance with R.C. 5739.01(Z)(1).

Although the claimant was given an opportunity to provide proof that its purchases qualified for exemption, no additional information was provided. The evidence submitted is insufficient to warrant a refund of the tax as the claimant failed to identify any transactions concerning non-

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enumerated services. The claimant has not satisfied its burden that the claimant is entitled to a refund. Accordingly, this objection is denied.

Off-Duty Police Officers

During the hearing, the claimant contended that it purchased exempt security services of off-duty police officers to monitor its stores and parking lots. The claimant informed the hearing officer it would submit invoices that contained the names of the officers and their status as off-duty police after the hearing. The Department requested that the claimant submit invoices to support its contention. However, the claimant failed to provide any evidence of security service transactions in its refund claim. Although the claimant was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Further, the auditor already excluded nontaxable services with proof of purchase, such as off-duty police officers, during the audit. Audit Remarks, p. 13. Therefore, the objection is denied.

Packaging

The claimant contends that it erroneously remitted tax on exempt packaging items that became an integral part of the finished product. The claimant contends that shrink wrap, boxes, hot dog wrappers, pizza boxes, bags, clamshells, pallets, and similar materials are exempt packaging materials. However, the claimant failed to include any transactions in its refund claim pertaining to packaging.

During the hearing, the claimant contended that its distribution center uses shrink wrap to wrap its pallets and boxes to package products. The claimant contends that it sends its packaged products from its distribution center to its stores. During the hearing, the Department requested that the claimant provide photos of the contested shrink-wrapped pallets and other packaging items. Although the claimant was given an opportunity to provide invoices, and proof that its contested purchases qualified for exemption, no additional information was provided.

Packaging as defined in R.C. 5739.02 means placing in a package. Packaging materials is not defined, but R.C. 5739.02(B)(15) includes a list of examples of packages, such as labels, bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings and parts for packages, and of machinery, equipment, and material for *use primarily in packaging* tangible personal property produced for sale. (Emphasis added). Ohio case law has further clarified the exemption of packaging. In *Custom Beverage Packers v. Kosydar*, 33 Ohio St.2d 68, 294 N.E.2d 672 (1973), the Court reviewed R.C. 5739.02(B)(15) and concluded that *packages* are enclosures or restraints which *restrain the movement of the object contained therein on more than one plane of direction.* (Emphasis added.)

The claimant failed to elaborate on the manner and extent in which it wraps its pallets with shrink wrap. Additionally, the claimant failed to provide any evidence that the contested items restrain movement of its products. Ohio case law has clarified that unbound pallets are not "packages" within the meaning of R.C. 5739.02(B)(15) and, therefore, are not excepted from sales and use taxation. *Newfield Publications, Inc. v. Tracy*, 87 Ohio St.3d 150, 718 N.E.2d 420

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(1999); *Cole Natl. Corp. v. Collins*, 46 Ohio St.2d 336, 338, 348 N.E.2d 708 (1976). The claimant has not satisfied its burden to demonstrate error in the amount of tax paid. Therefore, the objection is denied.

Sale for Resale

The claimant contends that tax was erroneously paid on items purchased with the intent of reselling the items themselves or were purchased for the benefit of the customers while engaging in retail sales under R.C. 5739.01(E)(2). The claimant contends that it purchased the following exempt items for resale under R.C. 5739.01(E): optical supplies such as nose pieces, screws, and hinges; photo paper, photo envelopes, and ink for use in its photo processing labs; motorized and other types of shopping carts; and consumables such as food services, cleaning materials, and packaging items identified above. The claimant cites *Hilton Hotels Corp. d.b.a. The Netherland Hilton Hotel v. Bowers*, BTA No. 48023 (July 31, 1962) and *Hyatt Corp. v. Limbach*, 69 Ohio St.3d 537, 634 N.E.2d 995 (1994) in support of its contention. However, the claimant failed to provide any further context on these cases. Further, this contention is not explained, developed, or demonstrated with probative evidence.

R.C. 5739.02 levies an excise tax on any retail sale made in this state. Laws relating to exemption from taxation are to be strictly construed against exemption. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). R.C. 5739.01(B)(1) defines "sale" as all transactions by which title or possession, or both, of tangible personal property is transferred for a consideration in any manner. R.C. 5739.01(E) excepts from the definition of retail sale the purchase of items by a consumer whose purpose is to *resell* the thing transferred or benefit of the service provided, by a person engaging in business, *in the form in which the same is, or is to be, received by the person.* (Emphasis added.) The Supreme Court of Ohio has consistently held that when the purchaser has put property to more than one use, the purchaser's primary use of the property controls the determination as to the property's taxability under R.C. 5739.01(E)(1). *Dresser Industries, Inc. v. Lindley*, 12 Ohio St. 3d 68, 465 N.E.2d 430 (1984).

The claimant submitted a spreadsheet of 51 contested transactions in support of its refund claim; however, the claimant failed to identify any transactions under the resale exemption in its refund claim spreadsheet. The claimant failed to provide any invoices referencing the aforementioned list of items. Further, during the hearing, the claimant stated that Walmart accrued tax on its general ledger accounts. Additionally, the claimant's application for refund stated that Walmart purchases photo paper, photo envelopes, and ink used in photo processing labs. Therefore, it appears the claimant did not remit tax on the transactions, but rather Walmart. Accordingly, the objection is denied.

McKesson and Amerisource

During the hearing, the claimant contended that transactions with McKesson and Amerisource for pill bottles and caps are exempt as used in the claimant's pharmacies. The Department requested that the claimant submit invoices to support its contention; however, the claimant failed to provide any invoices regarding pharmaceutical supplies. Additionally, the claimant

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specifically omitted any transactions regarding pharmaceutical products or packaging from its refund spreadsheet. Although the claimant was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Therefore, this objection is denied.

Real Property Construction Services

The claimant contends that it erroneously paid tax on exempt real property transactions under R.C. 5739.01(B)(5) and Ohio Adm.Code 5703-9-14(D)(1). During the hearing, the claimant contended that its purchases of HVAC repairs, electrical services, plumbing services, building repair, and similar transactions were exempt as real property construction services. Additionally, the claimant contends that it erroneously paid tax on exempt rent for mall settings with shared spaces, hallways, parking, and common areas among multiple tenants. During the hearing, the claimant contended that it would provide its rent sheet; however, the claimant failed to provide this information. Since the claimant failed to provide sufficient information for rent payments, the objection is denied.

R.C. 5739.01(B)(5) excludes from the definition of "sale" tangible personal property incorporated into a structure or improvement and becoming a part of real property under R.C. 5739.03. Further, R.C. 5739.01(B)(5) states, in relevant part, that the construction contractor is the consumer of tangible personal property. Ohio Adm.Code 5703-9-14(D)(1) states, in relevant part, a construction contractor who purchases materials or taxable services for incorporation into real property is the consumer of those materials or services and shall pay sales or use tax on their purchase price, except as provided by paragraph (F) of this rule. Ohio Adm.Code 5703-9-14(D)(1) provides a sales tax exemption for construction contractors who purchase materials or services that will be incorporated into exempt facilities; however, the claimant does not qualify as an exempt facility as listed under this division.

The claimant cites Ohio Adm.Code 5703-9-14(D)(1) in support of its contention that its contractors are the consumer of its HVAC systems, and therefore, are responsible for remitting tax. However, the invoices provided by the claimant merely include transactions for repairs to business fixtures and not for the installation of real property. Further, the claimant failed to provide any invoices for construction contracts regarding the initial transactions for the purchases or installation of the HVAC systems. Therefore, this division is not applicable to the claimant's purchases.

R.C. 5701.02(C) defines a "fixture" as an item of tangible personal property that has *become permanently attached or affixed* to the land or to a building, structure, or improvement, *and that primarily benefits the realty and not the business*, if any, conducted by the occupant on the premises. (Emphasis added.) A "business fixture" is an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. R.C. 5701.03(B). However, even after affixed to land or a building, business fixtures retain their status as personal property. Ohio Adm.Code 5703-9-14(B). Therefore, unless

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a reason is provided to support an exemption, business fixtures are taxable tangible personal property. R.C. 5739.01(B)(1).

Most notably, if the tangible personal property at issue primarily benefits the business on the property it is a business fixture, and not real property. Ohio Adm.Code 5703-9-14(B); *Metamora Elevator Co. v. Fulton City Board of Education,* 143 Ohio St.3d 359, 364, 2015-Ohio-2807, 37 N.E.3d 1223; *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, 822 N.E.2d 781. Further, pursuant to R.C. 5739.01(B)(3)(a) and (b), repair and installation of tangible personal property subject to taxation is included in the definition of "sale" and "selling" and likewise subject to taxation. Therefore, the nature of the fixture or improvement controls the taxability of any subsequent repairs or installations related to that property.

The claimant submitted a spreadsheet with 48 transactions contested as exempt real property; however, the claimant only submitted 22 invoices labeled as real property transactions. The Department only evaluated transactions with proof of payment. Therefore, 26 transactions from A-Atherton Plumbing Inc.; Acornvac, Inc.; Jeff The Plumber; Melvin Clark Plumbing & Heating Co.; Miner Fleet Management Group; and No Extra Charge, Inc. were denied because the claimant failed to provide invoices for the contested transactions.

The claimant submitted seven invoices that did not match the amounts, vendors, descriptions, and contentions of the transactions in the claimant's refund request spreadsheet. The claimant's spreadsheet listed the transactions as invoices from No Extra Charge, Inc., Jardine Plumbing & Heating, and Roto-Rooter Services for plumbing services; however, all invoices were from different vendors and did not match the amounts, descriptions, invoice number designations, and contentions included by the claimant. Since the claimant did not provide invoices that matched the claimant's spreadsheet, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Accordingly, the Department could not verify tax was paid in error for the invoices labeled by the claimant as Invoices 36321, 39707, 40891, 3217007540, 17316796947, 25261, and 17317103421. Therefore, the objection is denied.

The claimant submitted two invoices from Miner Fleet Management Group Ltd. The claimant submitted Invoice 1083554; however, this invoice merely contained sales tax charges from Florida. The claimant failed to provide evidence that the claimant was charged, paid, or remitted Ohio tax for the invoice. Accordingly, the Department could not verify tax was paid in error. Additionally, the claimant submitted Invoice 1077835; however, the claimant failed to include this transaction in the initial refund request application received by the Department on March 9, 2017. The amount requested at this time was $508,668.56, and the transaction list provided by the claimant on March 17, 2017 did not include the invoice. The claimant was provided with the opportunity to provide additional information, which was received by the Department on February 15, 2019. This additional information included a new transaction dated September 7, 2012, with a posting date of February 18, 2013. The statute of limitations for requesting a refund of erroneous tax for this transaction was required to be filed by February 2017 under R.C. 5739.07(D); however, on August 10, 2016, the Department extended the statute of limitations until March 31, 2017 for the limited purpose of extending the time period in which the

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Department could complete the audit. Despite this extension, the transaction was not received by the Department until February 15, 2019. There is no proof that this transaction was submitted before the statute of limitations ended. The claimant specifically acknowledged this in its February 27, 2019 email to the Department that it was submitting the items for the first time by stating, "[a]dditionally, these items we are presenting were never reviewed/presented to the auditor for review." Therefore, the transaction dated September 7, 2012 is out of statute, and the objection is denied.

The claimant contends that it erroneously paid tax on exempt repairs from Plyler's At Your Service, Inc., for HVAC equipment affixed to the roof constituting a real property service under R.C. 5739.01(B); however, Invoice 1362 from Plyler's At Your Service, Inc., describes the service provided as coil cleaning. The invoice merely describes the services as coil cleaning and fails to include any designations of HVAC equipment repairs affixed to a roof. The Department provided the claimant with an opportunity to submit additional information following the hearing; however, the claimant failed to present any evidence to support its contentions that the coil cleaning is exempt real property. The auditor reviewed the invoice a second time on appeal and determined that it was taxable building maintenance and janitorial services. It is important to note the Department's Information Release ST 2002-04 specifically lists cleaning ventilating systems, including ductwork as taxable building maintenance and janitorial services. Additionally, the Release lists cleaning grease traps and other similar industrial cleanings if the trap, furnace, etc. is located inside the building as taxable building maintenance and janitorial services. Information Release ST 2002-04. The services provided by the vendor are routine, non-specialized ventilation cleanings of the claimant's building, as included in Information Release ST 2002-04, and are taxable building maintenance and janitorial services. Further, the cleaning of ventilation equipment has been held as taxable janitorial services. *Champion Cleaning Specialists, Inc. v. Testa*, BTA No. 2015-788, 2016 WL 3018424 (April 6, 2016). Accordingly, this objection is denied.

The claimant submitted four additional invoices that it contends are repairs to HVAC equipment affixed to the roof constituting a real property service from McPhillips Plumbing Heating and Air Conditioning Inc., Daniel J. Ellis Company, and Total Line Refrigeration Inc. However, the invoice from Daniel J. Ellis Company includes a description of the services as a repair of claimant's hand washing station and not an HVAC system. Additionally, the remaining invoices were for specialty HVAC systems that primarily benefit the claimant's business and, therefore, are taxable business fixtures under R.C. 5701.03.

As set forth in *Funtime v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, 822 N.E.2d 781, the inquiry into whether an item is a business fixture or real property does not end just because an item meets the definition of real property. If an item meets the definition of real property, it is real property, unless it is "otherwise specified" in R.C. 5701.03. Therefore, if an item meets the definition of a "business fixture" as defined in R.C. 5701.03(B), it is not real property. R.C. 5701.03(B) provides that a "business fixture" means those portions of *buildings*, structures, and *improvements* that are *specially designed, constructed, and used for the business conducted in the building*, structure, or improvement. (Emphasis added.) R.C. 5701.03 explicitly excludes heating, ventilation and air conditioning systems primarily used to control the environment for

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people or animals; however, when a ventilation system is installed in a manufacturing facility, it is often a business fixture primarily because it benefits the business conducted by the occupant on the premises, not the realty. Thus, the question becomes does the HVAC system at issue primarily benefit the realty or the business conducted on the premises.

Invoice 132396 and 73024 from McPhillips Plumbing and Total Line Refrigeration Inc., respectively, include HVAC system repairs to the claimant's Munters Corporation units. During review of these units, the auditor determined that the Munters Corporation unit is a specific piece of equipment that is custom made to accommodate the removal of humidity from a large area. The claimant is a large warehouse-type retailer. As such, the specialty units benefit the claimant's businesses and not the realty. The claimant failed to provide evidence that the units are standard HVAC systems. Therefore, the evidence suggests that because of the special considerations of the business, the claimant required more than a standard HVAC and purchased specially designed units for the claimant's operational needs. Consequently, the HVAC systems at issue benefit the specific business on the premises and is therefore a business fixture.

The claimant submitted Invoice 70461 from Total Line Refrigeration Inc., for the purchase of HVAC repair services; however, the invoice contained a description of the services as a gas valve repair in the claimant's tire garage for a series of tubular infra-red heaters designed for overhead heating. The heaters appear to be related to the claimant's garages and are not common to other retail businesses. Similar to canopies at service stations in *F.P. & E., Inc. v. Tracy*, BTA No. 96-M-806, 1999 WL 163976 (March 18, 1999), the claimant's overhead tube heaters for its tire garages have more benefit to the specific business conducted upon the land than to the land itself. Therefore, the heaters are taxable business fixtures. Accordingly, the objection is denied.

The claimant submitted three invoices for exempt door maintenance from Stanley Access Technologies LLC and Door Controls Inc.; however, the Department reviewed invoices 52206, 77364, and 901978219 and determined that the transactions were taxable business fixtures. The claimant contends that the vendors provide real property contractor services for repairs to the building's dock doors which run on a track that are affixed into the ceiling and walls. The claimant incorrectly focuses on the permanency of the affixed property. The fact that an item is permanently attached or affixed to land does not demonstrate that it is exempt real property. Ohio Adm.Code 5703-9-14(B) states in relevant part "[t]angible personal property that *is permanently affixed to real property, but that primarily benefits the business conducted on the premises by the occupant, is a 'business fixture,'* as defined in section 5701.03..." (Emphasis added.) Additionally, R.C. 5701.03 includes in the definition of a "business fixture" tangible personal property that has *become permanently attached or affixed to a building*, and that primarily benefits the business conducted by the occupant. (Emphasis added.) The Ohio Board of Tax Appeals has stated the determination of whether an item constitutes a "business fixture" often turns upon the specific facts relating to both use and installation. *Pep Boys v. Testa*, BTA No. 2015-706, 2016 WL 3018415 (Apr. 4, 2016). Therefore, unless a reason is provided to support an exemption, business fixtures are taxable tangible personal property. R.C. 5739.01(B)(1).

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The auditor determined that the invoices provided by the claimant are transactions for security doors, repairs to doors, locks for doors, and locks for safes that primarily benefit the claimant's business. The claimant failed to demonstrate that the specific security doors, locks, and safe primary benefit the use of the land, and not the business conducted upon the land. The doors, locks, and safe continue to primarily benefit the claimant's business conducted and are, therefore, "business fixtures" as defined in R.C. 5701.03. Therefore, the objection is denied.

The claimant submitted sufficient information to warrant a refund of tax for exempt real property for five transactions from Coldren Mechanical Inc. for Invoice 10179, Climatech Inc. for Invoice 78588, and Mechanical Systems of Dayton, Inc. for Invoices 37531, 39080, and 43082. Therefore, the objection is granted in part.

Transportation for Hire

The claimant contends that it erroneously paid tax on exempt items attached to or incorporated in motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire under R.C. 5739.02(B)(32). However, this contention is not explained, developed, or demonstrated with probative evidence. Additionally, the claimant failed to address this contention during its requested hearing. Further, the claimant failed to include or identify any transactions in its refund claim pertaining to highway transportation for hire.

The claimant failed to provide any evidence to satisfy the requirements of exemption for transportation for hire. The claimant failed to provide valid Public Utility Commission of Ohio or the United States Department of Transportation numbers and it did not provide any vehicle information or vehicle usage information. Further, the claimant failed to submit a completed usage questionnaire from the Ohio Department of Taxation that requests a percentage breakdown of the use of the vehicle, which should add up to 100 percent.

Advertising Materials

The claimant contends that it erroneously paid tax on exempt advertising materials under R.C. 5739.02(B)(35) and 5739.01(O). The claimant contends that its purchases of carryout menus are exempt as advertising materials as the items price and describe tangible personal property offered for retail sale. However, this contention is not explained, developed, or demonstrated with probative evidence. Additionally, the claimant failed to address this contention during its requested hearing.

The claimant submitted spreadsheets on appeal; however, it failed to include any contested transactions labeled as exempt advertising materials. The claimant failed to provide any other information, such as the method of shipping, examples of advertisements sent, and invoices of a subsequent transaction in which the claimant shipped tangible personal property from its fulfillment facility by means of the United States mail, delivery service, or common carrier. Further, during the audit, the auditor excluded exempt advertising materials from the audit.

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R.C. 5739.02(B)(35)(a) excepts sales where the purpose of the consumer is to use or consume the things transferred in making retail sales and *consisting of newspaper inserts, catalogues, coupons, flyers, gift certificates, or other advertising material* that prices and describes tangible personal property offered for retail sale. (Emphasis added.) Further, R.C. 5739.02(B)(35)(b) exempts sales to direct marketing vendors or preliminary materials such as photographs, artwork, and typesetting that will be used in printing adverting materials. R.C. 5739.02(B)(35) defines "direct marketing" as:

> [T]he method of selling where consumers order tangible personal property by United States mail, delivery service, or telecommunication and the vendor delivers or ships the tangible personal property sold to the consumer from a warehouse, catalogue distribution center, or similar fulfillment facility *by means of the United States mail, delivery service, or common carrier*. (Emphasis added.)

To meet the requirements of "direct marketing" the taxpayer must ship items through United States mail, delivery service, or common carrier, and the advertising materials must price and describe the tangible personal property offered for retail sale. While carryout menus price and describe tangible personal property offered for sale, carryout menus are not advertising materials as contemplated by R.C. 5739.02(B)(35).

The Board of Tax Appeals clarified the language of "advertising materials" under R.C. 5739.02(B)(37)(a), now R.C. 5739.02(B)(35)(a) in *Doyle d.b.a. AD Mail v. Tracy*, BTA No. 98-V-131, 2001 WL 930340 (Aug. 10, 2001). "By its plain meaning, this provision requires two things: 1) that *the advertising medium be one of the alternatives listed*, and 2) that it 'prices and describes.'" *Doyle d.b.a. AD Mail v. Tracy*. (Emphasis added.) Here as with *Doyle*, the claimant provided evidence that displayed products and services. However, the claimant failed to provide evidence that its advertising medium was one of the alternatives listed in statute, as carryout menus are dissimilar to newspaper inserts, catalogues, coupons, flyers, and gift certificates under R.C. 5739.02(B)(35)(a). Words and phrases must be read in context and construed according to the rules of grammar and common usage. R.C. 1.42. Specifically, words and phrases that have acquired a technical or particular meaning, whether by legislative definition or otherwise, shall be construed accordingly. The statutory canon of construction *ejusdem generis* meaning, "Of the same kind, class, or nature," Black's Law Dictionary 1224 (10th Ed.2014) provides that when there is a listing of specific terms followed by a catchall word or phrase which is linked to the specific terms by the word "other," the statute is to be strictly construed. Additionally, the statutory canon *expressio unius* provides that the expression of one thing implies the exclusion of others. *Id.*

R.C. 5739.02(B)(35)(a) includes a list of examples of advertising materials such as newspaper inserts, catalogues, coupons, flyers, gift certificates, or *other advertising material*. (Emphasis added). While the list is not exhaustive, it does include a list of similar materials that qualify as advertising materials. The statute does not exclude carryout menus; however, it also does not include carryout menus as similar advertising materials. Carryout menus are not inherently similar to the list of items enumerated as advertising or advertising materials. It is unclear how carryout menus are materials for use primarily in advertising based on its common usage.

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The claimant also failed to elaborate on its status as a direct marketing vendor. The claimant failed to provide any evidence that it shipped through means of the United States mail, delivery service, or common carrier. During the hearing, the claimant stated that items are shipped from the claimant's distribution center to the claimant's stores for use. The claimant failed to provide invoices or agreements between the claimant and its carrier vendors identifying a fee for transporting the claimant's inventory. Based on this information, the Department is unable to verify that the claimant utilized a common carrier to transport the claimant's personal property for consideration. The claimant has a burden to do more than merely state an unsubstantiated assertion that it qualifies under the direct marketing exemption. The evidence provided is insufficient to satisfy exemption under R.C. 5739.02(B)(35)(a), as no advertising materials were provided. Therefore, the objection is denied.

Warehouse and Distribution Center

The claimant contends that it erroneously paid tax on tangible personal property used in handling purchased sales inventory under R.C. 5739.02(B)(42)(j) and 5741.02(C)(2). However, this contention is not explained, developed, or demonstrated with probative evidence.

R.C. 5739.02(B)(42)(j) excepts from taxation sales where the purpose of the purchaser is:

> [T]o use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility to be *distributed outside this state* to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or *by means of direct marketing*. (Emphasis added.)

During the audit, the claimant informed the auditor that it understood it did not qualify for exemption because it did not distribute 51 percent of its inventory and equipment outside of Ohio. However, the claimant submitted an appeal contending the transactions were exempt under the warehousing exemption. The Department requested that the claimant provide additional information in the form of invoices, shipping logs, shipping details, asset and inventory listings, and any other information to demonstrate that the claimant primarily distributed its inventory outside of Ohio and shipped the inventory by means of direct marketing as defined in R.C. 5739.02(B)(35).

To meet the requirements of "direct marketing" the taxpayer must ship items through United States mail, delivery service, or common carrier. The claimant failed to provide any shipping information to verify it utilized United States mail, delivery service, or common carrier as required by 5739.02(B)(35). The claimant did not provide transaction specific records regarding the contested transactions. The claimant failed to provide invoices or agreements between the claimant and its carrier vendors identifying a fee for transporting the claimant's inventory. Further, during the audit, the auditor noted that the claimant shipped its inventory and equipment

using its own fleet of trucks rather than through United States mail, delivery service, or common carrier.

Based on this information, the Department is unable to verify that the claimant shipped its inventory by means of direct marketing. The claimant has a burden to do more than merely state an unsubstantiated assertion that it is qualifies under the warehousing exemption. Accordingly, this objection is denied.

Nontaxable Employee Expense Reimbursement

During the hearing, the claimant contends that it erroneously paid tax on nontaxable employee expense reimbursements. The Department requested that the claimant provide more information regarding this contention such as employee names, the nature of the claimed reimbursements, and invoices. Although the claimant was given an opportunity to provide proof that its purchases qualified for exemption, no additional information was provided. Since the claimant did not provide invoices, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Accordingly, the Department could not verify tax paid in error. The evidence submitted is insufficient to warrant a refund of the sales tax, as the claimant failed to identify any transactions concerning employee expense reimbursements. Therefore, the objection is denied.

Tax Paid

The claimant contends that it erroneously paid tax on transactions on which the claimant already paid the tax. The claimant contends that transactions from Lexmark for toner and ink were double taxed. Further, the claimant contends that it paid tax twice on multiple transactions because it remitted use tax to account for insufficient sales tax collection by its vendors. The Department requested that the claimant provide invoices and evidence of tax twice remitted. The claimant provided insufficient evidence to warrant a refund of tax paid, as the claimant failed to identify transactions and invoices on twice taxed transactions. Therefore, this objection is denied.

Other Nontaxable Items and Issues

The claimant contends that it erroneously paid tax on items and services which are not subject to tax. The claimant contends that the aforementioned list of exempt transactions is not inclusive, and the claimant reserves the right to include additional nontaxable items in its refund claim. However, the claimant failed to identify any additional transactions that are exempt. The claimant states that a denial of its refund claim constitutes a denial of equal protection and due process and is therefore a violation of the Commerce Clause and Supremacy Clause of the United States Constitution. Further, the claimant raises the issue as to whether the issuance of the denial of a refund was contrary to prior administrative rules, releases, rulings, and pronouncements promulgated by the Tax Commissioner. The claimant states it reserves the right to submit additional support for issues discovered between the date of the request for a reconsideration of the denied refund claim and the issuance of the Final Determination. The Department provided the claimant with an opportunity to submit additional information

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following the hearing; however, the claimant failed to present any evidence to support its contentions. Further, the Department of Taxation is an administrative agency without jurisdiction to consider constitutional issues. Therefore, the objection is denied.
Therefore, based upon the foregoing, the claim for a refund is granted in part in the amount of $1,046.80, plus applicable interest.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Schweitzer Engineering Laboratories, Inc.
2350 NE Hopkins Ct.
Pullman, WA 99163

RE: Refund Claim No. 20212273462
Sales Tax
Refund Period: January 1, 2017 – January 31, 2017
Account No. 99-040477

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $15,561.22, plus applicable interest, filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). R.C. 5739.07 allows a claimant to request a refund of tax illegally or erroneously paid.

The claimant filed an amended return for the filing period of January 2017 which indicated that their taxable sales were significantly lower than originally reported. A letter was then issued to the claimant indicating that there was an overpayment on the account and requested supporting documentation in order to receive a refund if appropriate.

The claimant contends that the amendment credit balance was caused by a cancelation and re-issuance of an invoice in the amount of $277,945.80 with sales tax reported in the amount of $20,151.07 and paid in the claimant's January 2017 filing. The claimant states that the invoice was credited in May 2017 with credit invoice 000162117. Further, the claimant contends that the original invoice was incorrectly issued with sales tax when the customer, EPC Services Co., had a tax exemption for resale and a new invoice was issued in May 2017 without sales tax. The claimant submitted copies of the three invoices. The claimant also included a spreadsheet created by the claimant which it contends is a reconciliation between the $20,151.07 credit and the amended filing. The claimant contends it amended the sales tax return in September 2019.

R.C 5739.03(B) requires tax to be reported and paid with the return for the period in which the sale is made, regardless of when payment is received. The Department requested that the claimant file an amended tax return for the periods in which the transactions occurred instead of rolling the credits forward onto future periods. Additionally, the Department requested the claimant submit additional information to support its contention, such as providing a spreadsheet of all credits previously applied and the county and period where the tax was originally remitted

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to the state. The Department also requested that the claimant provide information regarding which transactions made up the rolling credits recovered under the refund period in the form of invoices, credit memos, and exemption certificates. The Department provided the claimant with an opportunity to submit additional information to support its contention.

The claimant submitted copies of invoices and a spreadsheet created by the claimant showing all transactions that made up the credit initially taken. Additionally, the claimant submitted exemption certificates for the transactions and a letter in support of its position. The claimant explained in its letter dated May 21, 2021 that the refund amount requested was from the result of a voided invoice that contained sales tax from January 2017. The invoice amount was credited back to the consumer in May 2017. The claimant contends that in September 2019 it filed an amendment for the January 2017 return. Further, the claimant contends that it is not requesting the full amount of the sales tax paid on the invoice in the amount of $20,151.07, but rather the claimant is taking out smaller credits and rolling them forward.

The claimant acknowledged that its refund claim was denied under R.C. 5739.03(B) for failing to amend each return in which a customer provides an exemption after the tax has been remitted to Ohio; however, the claimant contends that from an administrative standpoint, it is not feasible for the claimant to amend its returns for every month and every State and local jurisdiction because it operates in 45 states in the United States with a two-person sales tax team. The claimant confirmed that it tracks credit by jurisdiction until it can offset credited sales tax amounts paid with current period amounts due. The claimant further contends that it receives a large quantity of exemption certificates after the tax has been remitted to the various states, and the claimant does not file amendments once it determines that it will not have future sales in that jurisdiction to cover the credits.

Based on the information submitted by the claimant, the Department determined that the claimant amended some of the periods at issue and provided exemption certificates; however, the claimant did not amend its returns as requested by the Department of Taxation in its denial letter. It is unclear if the claimant has already taken credit for the invoice at issue. The claimant failed to provide amended returns for the period at issue and continued to roll the credits forward onto future periods. The claimant has not satisfied its burden that the claimant is entitled to a refund as required by R.C. 5739.07. The evidence submitted is insufficient to warrant a refund of the sales tax. Accordingly, this objection is denied. Therefore, the claim for a refund in the amount of $15,561.22, plus applicable interest is denied.

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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 8 2021

Star Carpet & Cleaning Co.
3787 Elida Rd.
Elida, OH 45807-1542

RE: Refund Claim No: 731062025683
Refund Period: 10/01/2019 -12/31/2019
Sales Tax
Account No.: 97-118351

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $1,345.50, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. After reviewing the additional information, the Department issued a partial refund for $1,285.82 plus applicable interest. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to conclude that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). When a vendor or consumer has paid taxes to the state or the treasurer of state's agent, or to the tax commissioner or the commissioner's agent, the commissioner can only refund an amount of tax, illegally or erroneously paid to the state. R.C. 5739.07.

The claimant contends that he erroneously paid sales tax. The claimant asserts that he accidentally filed a sales tax return by calculating and paying on the total sales, rather than calculating and paying for the taxable sales. The claimant alleges that there was an overpayment of sales tax, since it figured the fees on the total sales, rather than the taxable sales. The Department sent a denial letter for the claimant's refund request. In that letter, the claimant was informed that proof of it's original and amended figures, for the refund period stated, were not submitted with the refund application. The Department advised that verifiable documents used to prepare the original and/or amended returns were needed and acceptable documents may consist of sales journals, cash register receipts, summary reports used to prepare the tax return, or any other verifiable documents used to prepare the original and/or amended returns.

In response to the denial letter, the claimant sent summary reports of its sales tax liability for each Ohio county, along with calculations of the tax liability owed based on taxable sales. Upon further inspection and review of the refund claim, the Department identified the overpayment was valid and granted a partial refund. That refund amount was $1,285.82, which was $59.58 less than requested refund amount. The claimant's summary report supports their first amended return filed on March 22, 2021. However, the claimant filed a second amended return on April 8,

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2021, which lowered the tax liability further. The claimant failed to provide sufficient proof to support the total requested refund amount. As noted above, the Tax Commissioner can only refund an amount of sales tax, erroneously or illegally paid to the State. Therefore, the evidence submitted is insufficient to warrant a full refund.

Accordingly, the remaining requested refund of $59.58 is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 2 1 2021

The Standard Register Co.
600 Albany St., Building 2
Dayton, OH 45417

RE: Refund Claim No.: 201704641
Sales Tax
Refund Period: 12/27/12 – 06/16/14

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $508,149.71 of sales tax filed March 17, 2017 pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant sought reconsideration of the matter. A hearing was held.

The claimant states it paid sales tax in error on purchases that were exempt professional services. An auditor of the Department reviewed the claim. The auditor initially denied the bulk of the transactions as the claimant had not provided sufficient proof of payment. The auditor requested copies of cancelled checks or some other proof the invoices were paid in full. After requesting more information, the auditor allowed three transactions. The auditor denied $458,408.79 of the claim due to the claimant's failure to provide proof of payment and for some transactions that were out of statute. The claimant objected to $412,894.71 of the denial.

A taxpayer is entitled to a refund of taxes that were paid illegally or erroneously. R.C. 5739.07(B). The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to determine that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar,* 38 Ohio St.2d 135, 143, 311 N.E.2d 1, 6 (1974). This requires a claimant to provide information of undisputed facts that taxes were paid on the claimed transactions. *See AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487, *2 (June 4, 1987). The Tax Commissioner will not engage in speculation. The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. For a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to determine that a refund should be paid. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018). The claimant must provide information of undisputed facts that taxes were not only paid but paid in a sum certain. *CSI Controls v. Testa,* 2018 WL 1372809, *2.

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Out of Statute

The claimant filed its refund application March 17, 2017. It requested $68,752.87 for payments made in January 2013 and February 2013. Refunds are only allowable within four years from the date of illegal or erroneous payment per R.C. 5739.07(D). The emailed appeal of the partial denial does not explicitly state that these transactions are being contested, but they were included on the schedule submitted at hearing. As such, the refund request for these transactions is denied.

Proof of Payment

The claimant supplied additional documentation after its appeal. The claimant's documents reflect sales tax paid in error for the period of March 2013 to September 2013 and July 2014 to November 2014. The record does not reflect proof of payment documentation for November 2013 to June 2014. Additionally, the record reflects an invoice provided for October 2013 but no further information. The amounts with proper documentation are allowed. The objection as to the balance is denied.

Accordingly, the refund claim is further partially allowed in the amount of $211,822.25 with statutory interest as provided at law.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

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FINAL DETERMINATION

Date:

JUL 30 2021

Wagner's IGA Market Inc.
257 East 4th St.
Minster, OH 45865

RE: Refund Claim No.: 20201839356
Sales Tax
Refund Period: 06/01/2019 – 08/31/2019
Account No.: 89-036635

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $16,320.89 of sales tax filed pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. The additional information resulted in the Department partially granting an amount of $9,824.60, plus applicable interest, on October 22, 2020, prior to the issuance of this final determination. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid erroneously to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135 at 143, 311 N.E.2d 1 (1974). The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due, unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. In order for a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid.

The claimant contends that during the refund period, it paid the same tax twice, once as ordinary sales tax and again to the Division of Liquor Control. The claimant contends that it erroneously remitted tax twice on the purchases of state-controlled liquor sales.

The Department reviewed the information provided by the claimant regarding their state-controlled liquor sales. The Department initially denied the request in full because the claimant did not provide proof that they had paid the tax twice for the period at issue.

The Department requested additional information, including the Division of Liquor Control sales summary for the period that covers the sales upon which the sales tax return was based. The Division of Liquor Control sales summary for the period of 05/27/2019 – 08/25/2019 was provided. The information provided substantiates claimant's contentions that tax was erroneously remitted to the state. However, the records provided only listed $9,824.60 in tax paid to the Division of Liquor Control. Because there is no proof that the remaining $6,496.29 was

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remitted to the Division of Liquor Control, the claimant has failed to prove that it was erroneously remitted to the state. Therefore, these contentions are allowed for the amount supported by the Division of Liquor Control sales summary.

Accordingly, the remainder of the claim for refund amount is denied.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Amy L. Wall
5213 Maclellan St. S.
Groveport, OH 43125

Re: 4 Refund Claims
Tax Type: Sales

Refund Claim No.	Refund Period	Refund Amount Requested:
20201956565	01/01/14 – 12/31/14	$5,866.05
20201956566	01/01/15 – 05/31/15	$1,205.87
20201956567	05/01/13 – 12/31/13	$2,850.10
20201956568	04/01/12 – 12/31/12	$345.91
	Total:	$10,267.93

This is the final determination of the Tax Commissioner with regard to four applications for refunds in the amount of $10,267.93 in sales tax filed pursuant to R.C. 5739.07. The claims were initially denied. The claimant disagreed and requested reconsideration of the matter. A hearing was scheduled for June 9, 2021; however, the claimant did not appear.

Pursuant to R.C. 5739.07, a claimant is allowed to request a refund of tax illegally or erroneously paid; however, the burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The claimant filed amended returns for the filing periods above, which indicated that the taxable sales were significantly lower than originally reported. A letter was then issued to the claimant indicating that there was an overpayment on the account and requesting supporting documentation in order to receive a refund, if appropriate. In response, the claimant submitted Ohio Business Gateway printouts. However, the claimant did not explain the amended return calculations.

The auditor denied the refund requests in full. The auditor explained that the refund denials were based on R.C. 5739.07, which states that refund applications must be filed with the commissioner, on the form prescribed by the commissioner, within four years from the date of the illegal or erroneous payment of the tax. The claimant responded but provided no additional assertions, other than the original contentions given with the initial refund requests, and provided no additional evidence or documentation that demonstrates there was an illegal or erroneous payment of the tax.

Accordingly, these refund claims are denied.

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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

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FINAL DETERMINATION

Date: JUL 30 2021

Wal-Mart Stores East, LP
702 SW 8th St.
Mail Stop 0555
Bentonville, AR 72716

RE: Refund Claim No. 201704626
Sales Tax
Refund Period: February 1, 2012 - December 31, 2015
Account No. 89-035811

This is the final determination of the Tax Commissioner on an application for refund in the amount of $2,396,393.19, plus applicable interest, filed pursuant to R.C. 5739.07. The claim was initially granted, in part, with a refund of the sales tax paid in the amount of $13,070.68, plus applicable interest. The claimant disagreed with the partial denial and requested reconsideration of the matter. A hearing was held.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the State. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974). R.C. 5739.07 allows a claimant to request a refund of tax illegally or erroneously paid.

The claimant contends that it erroneously paid tax on exempt transactions. The claimant submitted a list of twelve contentions for exemption; however, the Department informed the claimant during the initial denial that the claimant failed to establish a tax exemption or exception for the requested refund claim, as the claimant failed to provide sufficient detail to verify tax was paid or remitted to the state of Ohio. The claimant also failed to reconcile the amount on the refund application with its cover letter because the claimant submitted two refund request letters with differing requested refund amounts. The claimant completed a Sales and Use Tax Refund Application dated March 9, 2017 with a requested refund amount of $2,396,393.19 and the claimant submitted a Request for Refund letter dated March 13, 2017 with a requested refund amount of $4,930,601.39. The Department requested that the claimant submit invoices and proof of payment of tax collected and remitted.

Background

Wal-Mart Stores East, LP, doing business as Wal-Mart, is headquartered in Bentonville, Arkansas. The claimant is an American multinational retail corporation that operates a chain of hypermarkets, discount department stores, and grocery stores. As of 2014, the claimant was the world's largest company by revenue, as well as the largest private employer in the world with 2.2

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million employees. Audit Remarks, p. 2. During the audit of the taxpayer, the claimant maintained 145 Ohio facilities. Audit Remarks, p. 4.

The claimant submitted a CD with invoices and an excel spreadsheet of contested transactions. The claimant submitted a joint memorandum of contentions in support of a refund request application and a petition for reassessment requesting a reduction in the assessment; however, the claimant did not submit matching transactions for both claims. Therefore, this refund request only addresses the claimant's contentions and transactions that were applicable to the refund claim.

The claimant initially filed its application for refund in the amount of $2,396,393.19. After the Department requested additional information to support the claimant's contentions, the claimant submitted a spreadsheet of 195 contested transactions indicating the alleged amount of tax erroneously paid was $60,211.96. However, the claimant only provided invoices for 130 of the 195 transactions. The claimant's objections are addressed in detail below.

Food Services

The claimant contends that it erroneously paid tax on exempt purchases of tangible personal property used by a licensed food service operator under R.C. 5739.02(B)(27). The claimant failed to identify food services transactions in its refund request application; however, during the hearing, the claimant contended that it purchased exempt food service items such as slicers, ovens, and cleaning chemicals. The claimant contends that its food service operation and manufacturing occur in its deli and bakery.

R.C. 5739.02(B)(27) provides a sales tax exemption to persons licensed to conduct a food service operation under R.C. 3717.43 of tangible personal property primarily used directly to prepare food for human consumption, preserve food for human consumption, and to clean tangible personal property used to prepare food for sale. This exemption does not apply to tangible personal property used to display food for selection by the consumer.

The Department requested the claimant submit invoices and additional information to support its contention. The claimant failed to elaborate on this contention. The claimant merely included seven transactions from Qualserv Corp., Pettus Plumbing & Piping Inc., Commercial Kitchen Exhaust, Commercial Fire Inc., Kasco Corporation Inc., GCS Service Inc., and Commercial Parts and Service of Cincinnati in its refund claim pertaining to food service or food equipment maintenance; however, the claimant listed the transactions as exempt manufacturing equipment.

The claimant described Invoice 3534661 from Qualserv Corp. as a transaction for a microwave, which is used as food processing equipment. The claimant contends that food processing equipment is exempt as manufacturing equipment because it physically alters raw materials to produce a final good for sale. R.C. 5739.02(B)(42)(a). The auditor reviewed the invoice and determined that the microwave had multiple uses and was used by employees for personal use. Therefore, the objection is denied.

The claimant contends that two invoices from Kasco Corporation Inc., and GCS Service Inc. are exempt services and materials as food processing equipment. The claimant contends that the food processing equipment is exempt as manufacturing equipment because it physically alters raw materials to produce a final good for sale. R.C. 5739.02(B)(42)(a). However, both invoices were out of statute, and therefore, cannot be considered. The claimant failed to include the transactions in the initial refund request application received by the Department on March 9, 2017. The refund request at this time, and the transaction list provided by the claimant on March 13, 2017, did not include the invoices. The claimant was provided with the opportunity to provide additional information, which was received by the Department on February 15, 2019. This additional information included new transactions dated April 16, 2012 for Invoice 15307544 from Kasco Corp., Inc., and May 2, 2012 for Invoice 92390048 from GCS Service Inc.

Under R.C. 5739.07(D) a claim for refund must be filed with the Department within four years of the payment of the tax. However, on August 10, 2016, the Department extended the statute of limitations until March 31, 2017 with a waiver for the limited purpose of extending the time period in which the Department could complete the audit. Therefore, in order to include the two additional transactions in the claim for refund, the payment of the tax must have occurred on or after March 31, 2013. The transactions were not received by the Department until February 15, 2019. There is no proof that the transactions were submitted before the statute of limitations ended. The claimant specifically acknowledged this in its February 27, 2019 email to the Department that it was submitting the items for the first time by stating, "[a]dditionally, these items we are presenting were never reviewed/presented to the auditor for review." Therefore, the transactions are out of statute, and the objection is denied.

The claimant contends that Invoice 1718410 and 428322 from Commercial Fire Inc., and Commercial Kitchen Exhaust are exempt as food equipment maintenance; however, the claimant's spreadsheet lists the food processing equipment as exempt as manufacturing equipment because it physically alters raw materials to produce a final good for sale. R.C. 5739.02(B)(42)(a). The auditor reviewed the invoices and determined that Invoice 428322 from Commercial Kitchen Exhaust was taxable building maintenance and janitorial services, and Invoice 1718410 from Commercial Fire Inc. was taxable repairs.

R.C. 5739.01(B)(3)(j) includes in the definition of "sale" all transactions by which building maintenance and janitorial services are provided. "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. R.C. 5739.01(II).

Invoice 428322 from Commercial Kitchen Exhaust is for kitchen exhaust cleaning in the deli. It is important to note the Department's Information Release ST 2002-04 specifically lists cleaning ventilating systems, including ductwork, as taxable building maintenance and janitorial services. Additionally, the Release lists cleaning grease traps and other similar industrial cleanings if the trap, furnace, etc. is located inside the building as taxable building maintenance and janitorial services. ST 2002-04. The services provided by the vendor are routine, non-specialized

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ventilation cleanings of the claimant's building as included in IR ST 2002-04 and are taxable building maintenance and janitorial services. Further, the cleaning of ventilation equipment has been held as taxable janitorial services. *Champion Cleaning Specialists, Inc. v. Testa*, BTA No. 2015-788, 2016 WL 3018424 (April 6, 2016). Accordingly, this objection is denied.

The auditor reviewed Invoice 1718410 from Commercial Fire Inc. and determined that the invoice was for repairs to a fire extinguisher. R.C. 5739.01(B)(3)(a) and (b) provide that repair and installation of tangible personal property subject to taxation is included in the definition of "sale" and "selling" and likewise subject to taxation. Accordingly, this objection is denied as fire extinguisher repairs are taxable.

The claimant contends that Invoice 337319 from Commercial Parts and Service of Cincinnati is exempt as maintenance for food processing equipment; however, the claimant's spreadsheet lists the food processing equipment as exempt as manufacturing equipment because it physically alters raw materials to produce a final good for sale. The auditor reviewed the invoice and determined that it was the purchase of tangible personal property, as the claimant purchased a customized equipment display case in the deli. Further, R.C. 5739.02(B)(27) specifically excludes tangible personal property used to display food for selection by the consumer. Accordingly, the objection is denied.

The claimant contends that Invoice 13251201 from Pettus Plumbing & Piping Inc. is exempt as manufacturing equipment as it is an equipment contract for a bakery oven HVAC repairs. The claimant provided sufficient information to demonstrate exemption as real property. Therefore, the objection is granted in part under the real property exemption.

Manufacturing

The claimant contends that it erroneously paid tax on items used primarily in a manufacturing operation to produce tangible personal property for sale which are exempt from sales and use tax under R.C. 5739.02(B)(42)(g) and 5739.011.

R.C. 5739.02(B)(42)(g) provides a sales tax exemption for items used primarily in manufacturing. The manufacturing operation is defined in relevant part as the process in which materials are changed, converted, or transformed into a different state or form from which they previously existed. Ohio Adm.Code 5703-9-21(B)(1). Materials handling equipment that moves the product through a continuous manufacturing operation and equipment that temporarily stores the product during the manufacturing operation are exempt. R.C. 5739.011(B)(2). Additionally, R.C. 5739.02(B)(15) provides that purchases of packaging material for use primarily in packaging tangible personal property produced for sale is not taxable. The claimant contends that its transactions used in the manufacturing operation, such as parts, repairs, and materials handling equipment pursuant to Ohio Adm.Code 5703-9-21(C)(11) and R.C. 5739.011(B)(2), and packaging pursuant to R.C. 5739.02(B)(15) are exempt.

During the hearing, the claimant contended that its manufacturing equipment concerned food service and food service equipment. The claimant failed to elaborate on its manufacturing

operation. The claimant submitted a spreadsheet of 13 transactions under the exemption of manufacturing. The claimant listed seven transactions as manufacturing and food services. The seven transactions listed as both manufacturing and food services were already addressed above. Since the claimant failed to provide any information regarding its manufacturing operation, the seven transactions addressed above will not be discussed under the manufacturing exemption. Therefore, the objection is denied as to the seven transactions addressed above.

The claimant contends that two transactions from Marathon Equipment Company for Invoice 51059437 and PTR Baler & Compactor Company for Invoice 3045754 are exempt as manufacturing equipment; however, the claimant failed to include the invoices. Although the claimant was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Since the claimant did not provide invoices that matched the claimant's spreadsheet, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Accordingly, the Department could not verify tax was paid in error for Invoices 51059437 and 3045754.

The claimant contends that four invoices from Marathon Equipment Company and PTR Baler & Compactor Company are exempt as manufacturing for baler equipment. The auditor reviewed the invoices and determined that the invoices were taxable repairs to onsite waste compactors and installation of the compactor, as R.C. 5739.01(B)(3)(a) and (b) include in the definition of "sale" all transactions by which an item of tangible personal property is repaired or installed. Further, the claimant failed to provide any evidence that it manufactured a product for sale. Although the claimant was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Therefore, the objection is denied.

Nontaxable Services

The claimant contends that it erroneously paid tax on nontaxable services. During the hearing, the claimant contends that it purchased off-duty law enforcement services, delivery charges, environmental services, and similar professional and personal services that are exempt under R.C. 5739.01(B)(3) and (Y)(2). However, this contention is not explained, developed, or demonstrated with probative evidence. Most notably, the claimant failed to identify which transactions qualify for exemption under these provisions. The claimant submitted a spreadsheet with five transactions contested as nontaxable services from Environmental Products and Services, January Environmental Services, and Manweb Services Inc. The claimant failed to identify any transactions for off-duty law enforcement services, delivery charges, and environmental services.

The citations included by the claimant do not support its contention, as R.C. 5739.01(B)(3) refers to the general listing of transactions that result in a sale. Additionally, R.C. 5739.01(Y)(2) refers to the general listing of transactions that qualify as personal and professional services. The claimant failed to identify what type of personal and professional services under R.C. 5739.01(Y)(2) were included in its contested transactions, except for environmental services and waste removal services. Additionally, the claimant failed to provide any evidence of transactions

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concerning non-enumerated services and off-duty police officers. Further, the claimant contests delivery charges: however, R.C. 5739.01(H)(1)(a)(iv) provides that delivery charges are taxable as part of the purchase price. Therefore, this objection lacks merit.

Waste Removal

Following the hearing of the taxpayer, the claimant submitted invoices from Environmental Products and Services and January Environmental Services for waste removal services. The claimant contends that Invoice 2039902 and 2034915 from Environmental Products and Services is for the removal of waste from broken compactors; therefore, the transaction is exempt because waste removal services are not enumerated as taxable pursuant to R.C. 5739.01(B). Based on the invoices and emails between the claimant and Environmental Products and Services, the auditor determined that the transactions at issue were taxable janitorial services under R.C. 5739.01(B)(3)(j) as both invoices involve clean up from either a broken freezer or a broken trash compactor. The auditor noted that Invoice 2039902 describes the services as frozen food cleanup, and Invoice 2034915 describes the services as an oil spill cleanup. Therefore, the objection lacks merit as both invoices describe taxable janitorial services.

Additionally, the claimant contends that Invoice 118013113 and 148129 from January Environmental Services are monthly billings for hazardous waste removal services to an oil and water separator. The claimant contends that hazardous waste removal services are not enumerated as taxable under R.C. 5739.01(B) and, therefore, are exempt. The auditor reviewed the claimant's refund request a second time on appeal and determined that the invoices were for an oil water separator, which is a piece of equipment used to separate oil and water mixtures into separate components and not hazardous waste removal services. Alternatively, the claimant failed to provide evidence that it contracted with January Environmental Services for hazardous waste services or that January Environmental Services maintained a hazardous waste permit issued by the Public Utility Commission of Ohio or the United States Department of Transportation authorizing it to transport personal property belonging to others for consideration in accordance with R.C. 5739.01(Z)(1). Although the claimant was given an opportunity to provide proof that its purchases qualified for exemption, no additional information was provided.

The claimant contends that a transaction from Manweb Services Inc., is exempt as nontaxable services for audit inspection services. The auditor reviewed the invoice and determined that the invoice was for refrigeration and cooler maintenance at the claimant's distribution center. Accordingly, the objection is denied as the invoice is taxable repairs. R.C 5739.01(B)(3)(a). The evidence submitted is insufficient to warrant a refund of the tax, as the claimant failed to identify any transactions concerning non-enumerated services. The claimant has not satisfied its burden that the claimant is entitled to a refund. Accordingly, this objection is denied.

Off-Duty Police Officers

During the hearing, the claimant contended that it purchased exempt security services of off-duty police officers to monitor its stores and parking lots. The claimant informed the hearing officer it would submit invoices that contained the names of the officers and their status as off-duty police

after the hearing. The Department requested that the claimant submit invoices to support its contention. However, the claimant failed to provide any evidence of security service transactions in its refund claim. Although the claimant was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Therefore, the objection is denied.

Packaging

The claimant contends that it erroneously remitted tax on exempt packaging items that became an integral part of the finished product. The claimant contends that shrink wrap, boxes, hot dog wrappers, pizza boxes, bags, clamshells, pallets, and similar materials are exempt packaging materials. The claimant submitted 53 contested transactions in its refund claim pertaining to packaging. The claimant failed to provide one invoice from Berry Plastics Corporation; therefore, the objection is denied as to the transaction because the claimant failed to provide an invoice for the contested transaction. Additionally, the claimant failed to provide sufficient evidence to demonstrate the remaining transactions were exempt packaging.

During the hearing, the claimant contended that its distribution center uses shrink wrap to wrap its pallets and boxes to package products. The claimant contends that it sends its packaged products from its distribution center to its stores. During the hearing, the Department requested that the claimant provide photos of the contested shrink-wrapped pallets and other packaging items. Although the claimant was given an opportunity to provide invoices, and proof that its contested purchases qualified for exemption, no additional information was provided.

Packaging as defined in R.C. 5739.02 means placing in a package. Packaging materials is not defined, but R.C. 5739.02(B)(15) includes a list of examples of packages, such as labels, bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings and parts for packages, and of machinery, equipment, and material for *use primarily in packaging* tangible personal property produced *for sale*. (Emphasis added). Ohio case law has further clarified the exemption of packaging. In *Custom Beverage Packers v. Kosydar*, 33 Ohio St.2d 68, 294 N.E.2d 672 (1973), the Court reviewed R.C. 5739.02(B)(15) and concluded that *packages* are enclosures or restraints which *restrain the movement of the object contained therein on more than one plane of direction.* (Emphasis added.)

The claimant contends that two invoices from Sterling Paper Co. for shrink wrap are exempt as packaging. The claimant failed to elaborate on the manner and extent in which it wraps its pallets with shrink wrap. Additionally, the claimant failed to provide any evidence that the contested items restrain movement of its products for resale. Ohio case law has clarified that unbound pallets are not "packages" within the meaning of R.C. 5739.02(B)(15) and, therefore, are not excepted from sales and use taxation. *Newfield Publications, Inc. v. Tracy*, 87 Ohio St.3d 150, 718 N.E.2d 420 (1999); *Cole Natl. Corp. v. Collins*, 46 Ohio St.2d 336, 338, 348 N.E.2d 708 (1976). The auditor noted that the stretch film is used by the claimant to aid in storage at the claimant's distribution centers or stores and is not for restraining movement of items for resale. Therefore, the objection is denied.

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The claimant contends that 50 invoices from Rehrig Pacific Company, Packaging Corp. of America, and International Paper Inc. are exempt as purchases of boxes used in packaging. Similar to the shrink wrap transactions addressed above, the claimant's boxes are used for moving inventory back and forth from the distribution centers into the Ohio stores. The claimant has not satisfied its burden to demonstrate error in the amount of tax paid. Therefore, the objection is denied.

Sale for Resale

The claimant contends that tax was erroneously paid on items purchased with the intent of reselling the items themselves or were purchased for the benefit of the customers while engaging in retail sales under R.C. 5739.01(E)(2). The claimant contends that it purchased the following exempt items for resale under R.C. 5739.01(E): optical supplies such as nose pieces, screws, and hinges; photo paper, photo envelopes, and ink for use in its photo processing labs; motorized and other types of shopping carts; and consumables such as food services, cleaning materials, and packaging items identified above. The claimant cites *Hilton Hotels Corp. d.b.a. The Netherland Hilton Hotel v. Bowers*, BTA No. 48023 (July 31, 1962) and *Hyatt Corp. v. Limbach*, 69 Ohio St.3d 537, 634 N.E.2d 995 (1994) in support of its contention. However, the claimant failed to provide any further context on these cases. Further, this contention is not explained, developed, or demonstrated with probative evidence.

R.C. 5739.02 levies an excise tax on any retail sale made in this state. Laws relating to exemption from taxation are to be strictly construed against exemption. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). R.C. 5739.01(B)(1) defines "sale" as all transactions by which title or possession, or both, of tangible personal property is transferred for a consideration in any manner. R.C. 5739.01(E) excepts from the definition of retail sale the purchase of items by a consumer whose purpose is to *resell* the thing transferred or benefit of the service provided, by a person engaging in business, *in the form in which the same is, or is to be, received by the person.* (Emphasis added.) The Supreme Court of Ohio has consistently held that when the purchaser has put property to more than one use, the purchaser's primary use of the property controls the determination as to the property's taxability under R.C. 5739.01(E)(1). *Dresser Industries, Inc. v. Lindley*, 12 Ohio St. 3d 68, 465 N.E.2d 430 (1984).

The claimant submitted a spreadsheet of 195 contested transactions in support of its refund claim; however, the claimant failed to identify any transactions under the resale exemption in its refund claim spreadsheet. The claimant failed to provide any invoices referencing the aforementioned list of items. Accordingly, the objection is denied.

McKesson and Amerisource

During the hearing, the claimant contended that transactions with McKesson and Amerisource for pill bottles and caps are exempt as used in the claimant's pharmacies. The Department requested that the claimant submit invoices to support its contention; however, the claimant failed to provide any invoices regarding pharmaceutical supplies. Additionally, the claimant specifically omitted any transactions regarding pharmaceutical products or pharmaceutical

packaging from its refund spreadsheet. Although the claimant was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Therefore, this objection is denied.

Real Property Construction Services

The claimant contends that it erroneously paid tax on exempt real property construction transactions as defined under R.C. 5739.01(B)(5) and Ohio Adm.Code 5703-9-14(D)(1). During the hearing, the claimant contended that its purchases of HVAC repairs, electrical services, plumbing services, building repair, and similar transactions were exempt as real property construction services. Additionally, the claimant contends that it erroneously paid tax on exempt rent payments for mall settings with shared spaces, hallways, parking, and common areas among multiple tenants. During the hearing, the claimant contended that it would provide its rent sheet; however, the claimant failed to provide this information. Since the claimant failed to provide sufficient information for rent payments, the objection is denied.

R.C. 5739.01(B)(5) excludes from the definition of "sale" tangible personal property incorporated into a structure or improvement and becoming a part of real property under R.C. 5739.03. Further, R.C. 5739.01(B)(5) states, in relevant part, that the construction contractor is the consumer of tangible personal property. Ohio Adm.Code 5703-9-14(D)(1) states, in relevant part, a construction contractor who purchases materials or taxable services for incorporation into real property is the consumer of those materials or services and shall pay sales or use tax on their purchase price, except as provided by paragraph (F) of this rule. Ohio Adm.Code 5703-9-14(D)(1) provides a sales tax exemption for construction contractors who purchase materials or services that will be incorporated into exempt facilities; however, the claimant does not qualify as an exempt facility as listed under this division.

R.C. 5701.02(C) defines a "fixture" as an item of tangible personal property that has *become permanently attached or affixed* to the land or to a building, structure, or improvement, *and that primarily benefits the realty and not the business*, if any, conducted by the occupant on the premises. (Emphasis added.) A "business fixture" is an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. R.C. 5701.03(B). However, even after affixed to land or a building, business fixtures retain their status as personal property. Ohio Adm.Code 5703-9-14(B). Therefore, unless a reason is provided to support an exemption, business fixtures are taxable tangible personal property. R.C. 5739.01(B)(1).

Most notably, if the tangible personal property at issue primarily benefits the business on the property it is a business fixture, not real property, and does not receive the R.C. 5739.01(B)(5) exemption. Ohio Adm.Code 5703-9-14(B); *Metamora Elevator Co. v. Fulton City Board of Education,* 143 Ohio St.3d 359, 364, 2015-Ohio-2807, 37 N.E.3d 1223; *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, 822 N.E.2d 781. R.C. 5701.03(B) provides that a "business fixture" means those portions of *buildings*, structures, and *improvements* that are *specially designed, constructed, and used for the business conducted in the building*, structure, or

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improvement. (Emphasis added.) Further, pursuant to R.C. 5739.01(B)(3)(a) and (b), repair and installation of tangible personal property subject to taxation is included in the definition of "sale" and "selling" and likewise subject to taxation. Therefore, the nature of the fixture or improvement controls the taxability of any subsequent repairs or installations related to that property.

The claimant submitted a spreadsheet with 124 transactions contested as exempt real property; however, the claimant only submitted 62 invoices labeled as real property transactions. The Department only evaluated transactions with proof of purchase and tax payments. Therefore, 62 transactions were denied because the claimant failed to provide invoices for the contested transactions.

The claimant submitted 18 invoices from Network Engineering Tech and Telaid Industries Inc., contested as exempt cabling maintenance and repair. The claimant contends that the transactions are exempt real property under R.C. 5739.01(B)(5) and Ohio Adm.Code 5703-9-14(D)(1) as installation of network cabling that runs through walls, ceiling, and flooring which requires holes to be drilled in the realty. The auditor reviewed the invoices from Network Engineering Tech and determined that the location of the services was listed as Bentonville, Arkansas. Further, Arkansas taxes were included on the invoices. The auditor noted that the claimant was allocating the cost across divisions for usage; and the invoices do not appear to be real property improvements. Similar to the invoices from Network Engineering Tech, the claimant submitted three invoices from Telaid Industries Inc. with location services and taxes listed as Bentonville, Arkansas. The auditor again noted that the claimant is allocating costs across divisions for usage. The auditor determined that the invoices were for computer cabling that retained its status as tangible personal property as business fixtures, and the transactions are not construction services. Accordingly, the objection is denied.

The claimant submitted 15 invoices from 4Front Engineered Solutions, Door Controls Inc., Hired Hand Green, Miner Fleet Management Group, and Stanley Access Technologies LLC for exempt door maintenance as a real property service contract for dock doors. The auditor reviewed the invoices and determined that the invoices from 4Front Engineered Solutions and Stanley Access Technologies LLC did not contain charges for labor to demonstrate a construction services contract. Since the invoices merely included charges for materials and the claimant failed to provide additional information to determine exemption as real property, the transactions remain taxable as the purchase of tangible personal property. Therefore, the objection is denied.

The claimant submitted two invoices from Hired Hand Green as exempt real property for door maintenance; however, the auditor noted Invoice 533012 was a transaction for a motorized interior window. Additionally, Invoice 529993 contained an invoice description as miscellaneous labor; however, the auditor noted that the vendor supplies customized items as it is a leading supplier of high-performance, automated door systems, portable evaporative cooling systems and contract manufacturing services. The invoice failed to include sufficient detail to determine whether the transaction was real property. Further, the vendor at issue and descriptions included on the invoices contained specialized items that primarily benefit the claimant's specific

business. The claimant failed to demonstrate that the specific transactions primary benefit the use of the land, and not the business conducted upon the land. The transactions primarily benefit the claimant's business conducted and are, therefore, "business fixtures" as defined in R.C. 5701.03. Further, installation of tangible personal property is taxable. R.C. 5739.01(B)(3)(b). Therefore, the transactions are taxable as the installation of tangible personal property.

The claimant submitted three invoices from Miner Fleet Management Group; however, the claimant failed to include the transactions in the initial refund request application received by the Department on March 9, 2017. Additionally, the transaction list provided by the claimant on March 17, 2017 did not include the invoices. The claimant was provided with the opportunity to provide additional information, which was received by the Department on February 15, 2019. This additional information included the three new transactions dated May 9, 2012, May 24, 2012, and July 5, 2012.

As discussed supra, the Department of Taxation agreed to waive the statute of limitations for the filing of a claim for refund as required under R.C. 5739.07(D) to March 31, 2017 for the limited purpose of extending the time period in which the Department could complete the audit. Therefore, in order to include the three additional transactions in the claim for refund, the payment of the tax must have occurred on or after March 31, 2013. The transactions were not received by the Department until February 15, 2019. There is no proof that the transactions were submitted before the statute of limitations ended. The claimant specifically acknowledged this in its February 27, 2019 email to the Department that it was submitting the items for the first time by stating, "[a]dditionally, these items we are presenting were never reviewed/presented to the auditor for review." Therefore, the transactions dated May 9, 2012, May 24, 2012, and July 5, 2012 are out of statute, and the objection is denied.

The claimant contends that invoices from Door Controls Inc., are exempt as real property for installation and repairs of dock doors. The claimant contends that the dock doors slide on a track that is bolted into the building, and as such, the doors are a real property contract service and is tax exempt. The claimant incorrectly focuses on the permanency of the affixed property. The fact that an item is permanently attached or affixed to land does not demonstrate that it is exempt real property. Ohio Adm.Code 5703-9-14(B) states in relevant part "[t]angible personal property that *is permanently affixed to real property, but that primarily benefits the business conducted on the premises by the occupant, is a 'business fixture,'* as defined in section 5701.03..." (Emphasis added.) Additionally, R.C. 5701.03 includes in the definition of a "business fixture" tangible personal property that has *become permanently attached or affixed to a building*, and that primarily benefits the business conducted by the occupant. (Emphasis added.) The Ohio Board of Tax Appeals has stated the determination of whether an item constitutes a "business fixture" often turns upon the specific facts relating to both use and installation. *Pep Boys v. Testa*, BTA No. 2015-706, 2016 WL 3018415 (Apr. 4, 2016). Therefore, unless a reason is provided to support an exemption, business fixtures are taxable tangible personal property. R.C. 5739.01(B)(1).

The auditor determined that the invoices provided by the claimant are transactions for the installation of magnets on the doors for securing the claimant's inventory as asset protection. The

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claimant failed to demonstrate that the specific items primarily benefit the use of the land, and not the business conducted upon the land. The door magnets primarily benefit the claimant's business and are, therefore, "business fixtures" as defined in R.C. 5701.03. Further, installation of tangible personal property is taxable. R.C. 5739.01(B)(3)(b). Therefore, the transactions are taxable as installation of tangible personal property.

The claimant contends that eight invoices from Clouse Electric LTD, Cogburn Electric Inc., Jett Electric LLC, Lane Valente Industries National Inc., Reddy Electric Co., Timberlyn Lighting MGMT Co., and Wiring Unlimited Inc., are exempt as real property services for cabling. The claimant contends that the invoices are electrical maintenance for the installation of new electrical cabling that run through walls, ceiling, and flooring which require holes to be drilled in the realty. The auditor reviewed the invoices and determined that the invoices concerned taxable repair and installation of business fixtures.

The auditor reviewed Invoice 145689 from Clouse Electric LTD and noted that it included an invoice description as the replacement of 22 ballasts on the sales floor. Additionally, Invoice 35639 from Timberlyn Lighting MGMT Inc. includes a description of the transaction as a 400-watt metal halide ballast, which is specialty lighting that is not common to buildings. The claimant submitted four invoices from Wiring Unlimited Inc., Reddy Electric Co., and Lane Valente Industries National Inc., for emergency lighting, emergency lighting repair, and LVI installation for emergency lights throughout the store for securing inventory. Accordingly, all lighting invoices are business fixtures as they benefit the business and not the realty. The claimant submitted two invoices from Jett Electric LLC and Cogburn Electric Inc. for transformer and breaker maintenance. The auditor noted that both were not common to all buildings, as the claimant is a retail store with special electrical outlets for displays. Further the transactions concern specialty lighting that are not common to buildings. Therefore, the objection is denied.

The claimant contends that five invoices from Pyler's At Your Service Inc., and Climatech Inc., are exempt as real property construction services for HVAC systems affixed to the roof constituting a real property service under R.C. 5739.01(B). However, the claimant also listed a description of the transactions as HVAC coil cleaning, filters, and maintenance. The invoices merely describe the services as coil cleaning and fail to include any designation of HVAC equipment repairs affixed to a roof. The Department provided the claimant with an opportunity to submit additional information following the hearing; however, the claimant failed to present any evidence to support its contentions that the coil cleaning is exempt real property. The auditor reviewed the invoices a second time on appeal and determined that the invoices were taxable building maintenance and janitorial services. R.C. 5739.01(B)(3)(j). The services provided by the vendor are routine, non-specialized ventilation cleanings of the claimant's building and are taxable building maintenance and janitorial services. Accordingly, this objection is denied.

The claimant contends that Invoice 74702 from Climatech Inc., is exempt as HVAC maintenance. The auditor determined that the invoice was for portable units of hanging heaters. The claimant is a large retailer. As such, the specialty units benefit the claimant's businesses and not the realty. The claimant failed to provide evidence that the units are standard HVAC systems.

Therefore, the evidence suggests that because of the special considerations of the business, the claimant required more than a standard HVAC and purchased specially designed units for the claimant's operational needs. Consequently, the HVAC systems at issue benefit the specific business on the premises. The claimant purchased specialty HVAC systems that primarily benefit the claimant's business and, therefore, are taxable business fixtures under R.C. 5701.03. Accordingly, this objection is denied.

The claimant submitted Invoice 14040210 from Russell Hunt for exempt real property services for parking lot maintenance; however, the claimant failed to include the transaction in the initial refund request application received by the Department on March 9, 2017. The auditor noted during review of the invoice that the claimant failed to provide evidence that the invoice was paid in its entirety including whether sales tax was paid on the transaction. Accordingly, this objection is denied.

The claimant submitted an invoice from RMH Ventures LLC for parking lot maintenance. The auditor reviewed the invoice and was unable to determine if Ohio sales tax was charged and paid as the invoice includes a lower sales tax rate than applicable to Ohio. Additionally, the vendor was from New York. Further, the transaction was already excluded in the audit; therefore, the objection is denied.

The claimant contends that two invoices from Network Engineering Tech are exempt as real property for network cabling for registers and office machines and telephone maintenance. The auditor reviewed the invoices and determined that the invoice contained location site services and taxes listed as Bentonville, Arkansas. The auditor again noted that the claimant is allocating costs across divisions for usage. Further, the transactions were already excluded in the audit; therefore, the objection is denied.

The claimant contends that two invoices from TYCO Fire and Security US Management are exempt as real property for security repair and maintenance contracts. The auditor reviewed the invoices and determined that the security cameras were centralized purchases from a site location of the claimant's headquarters, Bentonville, Arkansas. Additionally, the purchases were for protecting the claimant's inventory and property. The auditor concluded that the transactions were tangible personal property as hardware designed to benefit the claimant's specific business in securing inventory. Accordingly, this objection is denied.

The claimant submitted Invoice 16791 from January Environmental Services and contends that the invoice is exempt as real property for plumbing maintenance. Additionally, the claimant contends that this transaction is for general plumbing services to items such as sinks, toilets, drainage, which are all a part of real property since they are either affixed to or incorporated into the building or foundation. The auditor reviewed the invoice and determined that the invoice was for an oil water separator, which is a piece of equipment used to separate oil and water mixtures into separate components. Although the claimant was given an opportunity to provide proof that its purchases qualified for exemption, no additional information was provided. Accordingly, this objection is denied.

The claimant submitted sufficient information to warrant a refund of tax for exempt real property for nine transactions from Daniel J. Ellis for Invoice 4718; Lane Valente Industries National Inc., for Invoice 464229; White Refrigeration Inc. for Invoice 30105; Mechanical Systems of Dayton for Invoice 31826; and Lippincott Plumbing, Heating, and Electrical Inc. for Invoices 156874, 160232, and 169554; and Wiring Unlimited Inc. for Invoices 1307139 and 1406132. Therefore, the objection is granted in part.

Transportation for Hire

The claimant contends that it erroneously paid tax on exempt items attached to or incorporated in motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire under R.C. 5739.02(B)(32). However, this contention is not explained, developed, or demonstrated with probative evidence. Additionally, the claimant failed to address this contention during its requested hearing. Further, the claimant failed to include or identify any transactions in its refund claim pertaining to highway transportation for hire.

Advertising Materials

The claimant contends that it erroneously paid tax on exempt advertising materials under R.C. 5739.02(B)(35) and 5739.01(O). The claimant contends that items purchased for the purpose of using or consuming the things transferred in making retail sales and consisting of newspaper inserts, catalogues, coupons, flyers, gift certificates or other advertising material are exempt as advertising materials as the items price and describe tangible personal property offered for retail sale. During the hearing, the claimant contends that carryout menus are exempt as advertising materials. However, this contention is not explained, developed, or demonstrated with probative evidence. Additionally, the claimant failed to identify any contested transactions labeled as exempt advertising materials in its appeal spreadsheets. Therefore, the objection is denied.

Warehouse and Distribution Center

The claimant contends that it erroneously paid tax on tangible personal property used in handling purchased sales inventory under R.C. 5739.02(B)(42)(j) and 5741.02(C)(2). However, this contention is not explained, developed, or demonstrated with probative evidence.

R.C. 5739.02(B)(42)(j) excepts from taxation sales where the purpose of the purchaser is:

> [T]o use or consume the thing transferred primarily in storing, transporting, mailing, or otherwise handling purchased sales inventory in a warehouse, distribution center, or similar facility to be *distributed outside this state* to retail stores of the person who owns or controls the warehouse, distribution center, or similar facility, to retail stores of an affiliated group of which that person is a member, or *by means of direct marketing*. (Emphasis added.)

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During the audit, the claimant informed the auditor that it understood it did not qualify for exemption because it did not distribute 51 percent of its inventory and equipment outside of Ohio. However, the claimant submitted an appeal contending the transactions were exempt under the warehousing exemption. The Department requested that the claimant provide additional information in the form of invoices, shipping logs, shipping details, asset and inventory listings, and any other information to demonstrate that the claimant primarily distributed its inventory outside of Ohio and shipped the inventory by means of direct marketing as defined in R.C. 5739.02(B)(35). The claimant failed to identify any transactions in its appeal spreadsheet concerning the warehouse or distribution center exemption.

To meet the requirements of "direct marketing" the taxpayer must ship items through United States mail, delivery service, or common carrier. The claimant failed to provide any shipping information to verify it utilized United States mail, delivery service, or common carrier as required by R.C. 5739.02(B)(35). The claimant did not provide transaction specific records regarding the contested transactions. The claimant failed to provide invoices or agreements between the claimant and its carrier vendors identifying a fee for transporting the claimant's inventory. Further, during the audit, the auditor noted that the claimant shipped its inventory and equipment using its own fleet of trucks rather than through United States mail, delivery service, or common carrier.

Based on this information, the Department is unable to verify that the claimant shipped its inventory by means of direct marketing. The claimant has a burden to do more than merely state an unsubstantiated assertion that it is qualifies under the warehousing exemption. Accordingly, this objection is denied.

Nontaxable Employee Expense Reimbursement

During the hearing, the claimant contends that it erroneously paid tax on nontaxable employee expense reimbursements. The Department requested that the claimant provide more information regarding this contention such as employee names, the nature of the claimed reimbursements, and invoices. Although the claimant was given an opportunity to provide proof that its purchases qualified for exemption, no additional information was provided. Since the claimant did not provide invoices, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Accordingly, the Department could not verify tax paid in error. Therefore, the objection is denied.

Tax Paid

The claimant contends that it erroneously paid tax on transactions on which the claimant already paid the tax. The claimant contends that transactions from Lexmark for toner and ink were double taxed. Further, the claimant contends that it paid tax twice on multiple transactions because it remitted use tax to account for insufficient sales tax collection by its vendors. The Department requested that the claimant provide invoices and evidence of tax twice remitted. The claimant provided insufficient evidence to warrant a refund of tax paid, as the claimant failed to identify transactions and invoices on twice taxed transactions. Therefore, this objection is denied.

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Other Nontaxable Items and Issues

The claimant contends that it erroneously paid tax on items and services which are not subject to tax. The claimant contends that the aforementioned list of exempt transactions is not inclusive, and the claimant reserves the right to include additional nontaxable items in its refund claim. However, the claimant failed to identify any additional transactions that are exempt. The claimant states it reserves the right to submit additional support for issues discovered between the date of the request for reconsideration and the issuance of the Final Determination. The Department provided the claimant with an opportunity to submit additional information following the hearing; however, the claimant failed to present any evidence to support its contentions. Therefore, the objection is denied.

Therefore, based upon the foregoing, the claim for a refund is granted in part in the amount of $1,536.64, plus applicable interest.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Walter Alexander Enterprises Inc.
2800 Jupiter Dr.
Fairfield, OH 45014

RE: Refund Claim No: 202003515
Sales Tax
Refund Amount Requested: $16,989.37
Refund Period: March 1, 2009 – May 31, 2009

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $16,989.37, in sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter. A hearing was not requested.

The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1 (1974).

The Department sent the claimant a URAT form on March 5, 2013 indicating that the taxpayer may have an overpayment on its account. The claimant filed a refund claim on February 9, 2020, and provided the URAT form, sales journals, and a collections letter from the Attorney General's Office. The claim was denied. In the letter of denial, the claimant was informed that because the refund clam was filed outside the four-year statute of limitations, the refund could not be granted.

In response to the letter of denial, the claimant provided the same documentation already received by the Department and an additional letter. The same information does not support the claimant's position. Pursuant to R.C. 5739.07(D), a request for refund must be made to the department within four years of the erroneous payment. Here the payment was made on September 14, 2009, so the claim for refund must have been filed by September 14, 2013. The claimant failed to provide information to show there was waiver to the statute of limitations or other information to support their contention. The evidence in the file does not support the claimant's refund request.

Accordingly, the claim for refund is denied.

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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Robert C. Zember
235 Lowes St.
Dayton, OH 45409

RE: Assessment No.: 100001522608
Sales Tax
Account No.: 57-149942

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 concerning the following sales tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$34,095.30	$3,069.33	$17,047.55	$54,212.18

The petitioner operates a convenience store. This assessment is the result of a mark-up audit of the petitioner's sales from April 1, 2016 through March 31, 2019. The petitioner filed a petition for reassessment seeking penalty abatement. A hearing was held as requested.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d/b/a Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983). Pursuant to R.C. 5739.13, the Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate a taxpayer's sales. Purchase mark-up audits have been approved by the Board of Tax Appeals as a reasonable means of determining the tax liability over the period covered by the audit. *Lindsey Enterprises, Inc. v. Tracy*, BTA No. 95-K-1209, 1996 WL 283944 (May 24, 1996).

Audit Methodology

The petitioner failed to keep complete and accurate records as required by R.C. 5739.11. Audit Remarks, p. 5. Therefore, a mark-up analysis was conducted using the petitioner's records and records supplied by the petitioner's suppliers. Utilizing these records, the auditor calculated the taxable sales for the categories of beer, wine, cigarettes, pop and soft drinks, energy drinks, and other alcohol. Each category was assigned a mark-up percentage based on the product checklist

completed with the taxpayer's assistance, industry standards, and state minimum requirements. A sample period of January 1, 2017 through December 31, 2017 was used to calculate taxable sales using a mark-up analysis. It was agreed that the taxpayer's activity for the sample period was representative of the business activity for the entire audit period. Audit Remarks, p. 5.

Inventory purchase invoices maintained by the petitioner were the primary documents utilized to determine the total taxable inventory purchased for sale during the sample period. Invoice dates were used to determine which inventory purchase transactions occurred within the sample period. In the instances where the taxpayer failed to maintain complete inventory purchase invoices, the amount of taxable inventory purchases was based upon records, summaries, or other information obtained directly from the distributors. In the instances when confirmation of the amount of taxable inventory purchases could not be obtained from either the taxpayer or distributors, the amount of taxable inventory purchases was estimated based upon an average of the available records for the distributor in question or a like-distributor.

The sample period purchases for each category were totaled and each category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the sample period. The remaining calculated taxable sales from all categories were totaled and divided by the sum of the gross sales reported on the sales tax returns filed by the taxpayer for the entire sample period. The resulting taxable percentage of reported gross sales was multiplied by the reported gross sales for each non-sampled month of the audit period to determine the calculated monthly taxable sales for the audit period. Tax liability for the sampled period was calculated on the actual calculated monthly taxable sales for the sample period.

The calculated taxable sales by month were then multiplied by the applicable tax rates in effect throughout the audit period to determine the gross sales tax liability by month for the entire audit period. Credits representing the tax reported and paid throughout the taxpayer's monthly sales tax returns were subtracted from the gross sales tax liability to determine any unreported sales tax liability by month for the entire audit period.

Erroneous Methodology

The petitioner contends that an erroneous audit methodology was used because the audit results included sales calculations for months in which the petitioner was closed. The audit results demonstrate that there was no sales tax liability attributed to the month of July for the years of 2016, 2017, and 2018 because the petitioner was closed during that month. The petitioner failed to present evidence that it was closed during any additional months for which sales tax liability was assessed. As a result, the petitioner has failed to prove error in the assessment. Therefore, these contentions are denied.

Mark-Up Percentages

The petitioner contends that the mark-up percentages used to calculate the taxable sales for the categories of soft drinks and other alcohol purchases were erroneous. The carryout product checklist, signed by the petitioner, failed to state the mark-up percentage for those two

categories. The petitioner did not provide any supporting documentation to substantiate its claims that the mark-up percentages were incorrect. The burden is on the petitioner to provide sufficient evidence to warrant adjusting a finalized audit. *Forest Hills*, *supra* at *4. As a result, the petitioner has failed to prove error in the assessment. Therefore, these contentions are denied.

Food Items

The petitioner contends that the audit improperly classified non-taxable food items as taxable. The petitioner failed to provide evidence to substantiate this claim. As a result, the petitioner has failed to prove error in the assessment. Therefore, this contention is denied.

Penalty

The petitioner seeks abatement of the penalty. The surrounding facts and circumstances warrant a partial abatement of the penalty.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$34,095.30	$3,069.33	$10,228.41	$47,393.04

Current records indicate that no payments have been made toward the assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 2 1 2021

Areway Acquisition, Inc.
8525 Clinton Rd.
Brooklyn, OH 44144-1014

RE: Assessment No. 100001585551
Use Tax
Account No. 97-803685

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

Tax	Pre-Assessment Interest	Penalty	Total
$235,307.40	$15,782.93	$35,296.00	$286,386.33

The petitioner operates as a metal finisher delivering coating, plating, and finishing services to the wheel industry and other metal products. The petitioner was founded in 1967 as a polishing and buffing shop. The petitioner has a corporate headquarters located in Brooklyn, Ohio. This assessment is the result of a field audit of the petitioner's purchases from July 1, 2016 through February 25, 2020. The petitioner filed a petition for reassessment. A hearing was not requested. Not directly related to the assessment at issue, the petitioner filed for bankruptcy on February 25, 2020 and the Department filed a proof of claim against the petitioner in the Department's normal course.[1]

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

The petitioner contends that the Department should re-evaluate its original assessment because the petitioner submitted missing returns filed through the Ohio Business Gateway following the

[1] For Taxpayers currently in Bankruptcy: The Ohio Department of Taxation acknowledges the jurisdiction of the federal bankruptcy courts as set forth in 11 U.S.C. Sections 101-1531, and will follow all restrictions and requirements set forth therein to resolve any balance due.

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audit. However, the petitioner did not provide sufficient evidence to support this objection. The petitioner failed to include the referenced returns or proof of payment in its petition for reassessment. Additionally, the petitioner failed to elaborate on how the assessment should be modified.

R.C. 5739.02 levies an excise tax on any retail sale made in this state. R.C. 5739.02 provides that all sales of tangible personal property are presumed taxable unless there is a specific exemption or exception from taxation listed in the statute. A similar use tax is imposed by R.C. 5741.02 upon each consumer storing, using or consuming tangible personal property in Ohio. Laws relating to exemption from taxation are to be strictly construed against exemption. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952).

During the audit, the auditor credited the petitioner with tax paid on returns in the amount of $1,559.29. The petitioner contends that it submitted missing returns that were estimated. The petitioner filed one of the returns for the period of July 1, 2019 through September 30, 2019; however, the return filed increased the obligation and the return did not cover the entire audit period. The petitioner failed to provide sufficient information to warrant an adjustment. The petitioner failed to demonstrate error in the assessment; therefore, the objection is denied.

Accordingly, the assessment is affirmed as issued.

Tax	Pre-Assessment Interest	Penalty	Total
$235,307.40	$15,782.93	$35,296.00	$286,386.33

Current records indicate that no payments have been made toward the assessment, leaving a balance of $286,386.33. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio." Any payment made within sixty (60) days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, OH 43216-2678.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

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FINAL DETERMINATION

Date: JUL 30 2021

International Paper Company
6400 Poplar Avenue
Memphis, Tennessee 38197-0100

Re: Assessment Nos. 100000508363; 100000525754
Sales & Use Tax

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals dated July 8, 2021, in Case No. 2019-2401. In that order, the Board of Tax Appeals remanded the matter to the Tax Commissioner for further proceedings.

In resolution of this matter, assessment numbers 100000508363 and 100000525754 have been adjusted and are paid in full.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:
JUL 2 1 2021

Johnson Controls Security Solutions LLC
P.O. Box 3038
Boca Raton, FL 33431-0938

Re: Assessment No. 100000821512
Use Tax
Account No. 97-126845

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

Tax	Pre-Assessment Interest	Penalty	Total
$436,869.02	$61,727.48	$21,843.24	$520,439.74

The assessment is the result of an audit of the petitioner's purchases from October 1, 2011 through September 30, 2014. A hearing was held on February 26, 2020.

As an initial matter, every sale in the State of Ohio is presumed taxable until the contrary is established. R.C. 5739.02(C). Use, storage, or consumption of any tangible personal property in the State of Ohio is presumed taxable until the contrary is established. R.C. 5741.02(G). Assessments are presumptively valid. *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. Therefore, once an assessment is made, the burden is on the taxpayer to prove error in the assessment. *Forest Hills Supermarket, Inc., dba Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing, *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983); *Automotive Warehouse, Inc. v. Limbach*, BTA No. 87-D-652, 1989 WL 82761 (Jan. 13, 1989). This places an affirmative duty upon the petitioner to provide sufficient evidence to prove their objections.

Audit Methodology

The petitioner and auditor agreed to perform a statistical sample audit. The auditor and petitioner mutually narrowed down general ledger activity to a target population comprised of transactions from accounts with sales and use tax implications. The Department reviewed the data to screen anomalous transactions which would create sampling problems. The transactions were stratified by dollar amount using the cumulative square root of the frequency method. A sample list of random invoices was generated for each stratum except the top stratum (transactions above $6,505.00), which was reviewed comprehensively. Additionally, fixed asset purchases and leases were reviewed comprehensively. The petitioner agreed to provide invoices, along with any necessary supporting documentation, for the resulting list of transactions. The sum of sampled transactions found to be tax deficient in each stratum was divided by the sum of sampled

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transactions in each stratum. This resulted in a tax deficient error percentage for each stratum. The tax deficient error percentage for each stratum was applied to the total target population dollars for that stratum during the sample period. The resulting tax deficient dollar amounts were summed and added to the tax deficient amount from the comprehensively reviewed top stratum. The auditor then factored in tax deficient transactions from the comprehensively reviewed fixed asset and lease categories. This resulted in the petitioner's assessed tax liability.

The petitioner signed a memorandum of agreement, which specified the methodology of the audit and adequacy of the sample period. The agreement is binding and enforceable. When entering into a valid, enforceable agreement, the petitioner waives any objection it may have regarding the method used to determine liability. *Markho, Inc. dba One Stop Carry Out and One Stop Mini Mart v. Tracy,* BTA No. 98-M-132, 1999 WL 513788 (July 16, 1999), citing *Akron Home Medical Services v. Lindley,* 25 Ohio St.3d 107, 495 N.E.2d 417 (1986). *See also Shaheen, Inc. dba Abe's Quick Shoppe v. Tracy*, BTA No. 96-M-1231, 1998 WL 127061 (Mar. 20, 1998), citing *Akron Home Medical Services v. Lindley,* 25 Ohio St.3d 107, 495 N.E.2d 417 (1986).

Use Tax Credit

The petitioner contends credit was not given for use tax accrued during the audit period. The petitioner's contention is not well taken. Accrued use tax was built into the sampling methodology employed by the auditor. Sampled transactions on which the taxpayer's documentation showed sales tax was paid or use tax was accrued were excluded from the assessment. The error percentage for each stratum was only comprised of tax deficient transactions. The resulting estimate would not include transactions on which the petitioner accrued use tax. In this manner, the audit methodology accounted for transactions on which the petitioner paid sales tax or accrued use tax. Additionally, the petitioner was given a chance to present documentation to demonstrate overpayments of use tax on transactions during the audit period. Statistical Methodology and Sample Plan Agreement, p. 5. The petitioner was afforded an opportunity to show use tax accrued during the audit, thus credit for use tax paid was built into the audit methodology. Additionally, the petitioner has not identified any sampled transactions on which it accrued use tax and was assessed liability. The petitioner has not presented any evidence which would speak to this contention. As noted above, the burden is on the petitioner to present evidence sufficient to show error in the assessment. The objection is denied.

Travel Expenses

The petitioner contends travel expenses were erroneously assessed as taxable. The petitioner failed to elaborate on this contention in writing or at the hearing. The petitioner has not identified any transactions erroneously assessed under this contention or presented any evidence relevant to this contention. As noted above, the burden is on the petitioner to present evidence sufficient to demonstrate error in the assessment. The petitioner has not met this burden. The objection is denied.

GE Rentals

The petitioner contends its rentals from GE included tax paid. The petitioner presented sufficient

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evidence to support this contention. The petitioner's transactions with GE Fleet Services will be removed from the assessment. The objection is allowed.

Penalty Abatement

The petitioner requests abatement of the penalty. Considering all the surrounding facts and circumstances, abatement of the penalty is granted.

Therefore, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$238,949.92	$33,764.24	$0.00	$272,714.16

Current records indicate that no payments have been applied on this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 30 2021

N.A.T. Transportation, Inc.
11101 Pemberville Road
Bradner, Ohio 43406

Re: Assessment Nos. 100000096633; 06201215737497; 06201335159773
Use Tax

This is the final determination of the Tax Commissioner following a decision and order of the Supreme Court of Ohio in Case No. 2020-0110, dated April 22, 2021. In that decision, the Supreme Court of Ohio affirmed in part and reversed in part the decision of the Ohio Board of Tax Appeals in consolidated BTA Case No. 2018-55.

In resolution of this matter consistent with the decision of the Supreme Court of Ohio, assessment numbers 100000096633 and 06201215737497 are canceled and assessment number 06201335159773 stands as issued.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER.

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 14 2021

Luis R Carrasquillo Rivera
4037 Marvin Ave.
Cleveland, OH 44109-1369

Re: Assessment No. 100001777505
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$698.77	$77.72	$104.82	$881.31

This assessment was issued based upon the conduct of a special audit of a motor vehicle title transfer. The petitioner obtained a 2015 Dodge Dart on October 20, 2018. At the time of the title transfer, the petitioner reported that he paid $0.00 for the vehicle. The Ohio Department of Taxation was unable to verify the reported purchase price. This assessment was issued for the difference between the reported purchase price and the average purchase price of vehicles matching the year, make, model, and condition of the vehicle in question. The petitioner filed a petition for reassessment. A hearing was held on June 7, 2021.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

The petitioner contends that he was given the vehicle as a gift by a friend that was moving out of state. The Department requested a notarized statement from the seller that the vehicle was a gift or other evidence to support the reported purchase price. The petitioner failed to provide any documentation to support the reported purchase price. The objections are denied.

Accordingly, the assessment shall stand as issued.

Current records indicate that no payments have been applied to this assessment. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. Any post-assessment interest will be added to the assessment as provided by law. Payments shall be made payable to "Treasurer – State of Ohio". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 2678, Columbus, Ohio 43216-2678.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Sam's East, Inc.
702 SW 8th St.
Bentonville, AR 72716

RE: Assessment No. 100000586607
Use Tax
Account No. 97-138278

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

Tax	Pre-Assessment Interest	Total
$1,019,371.98	$105,157.91	$1,124,529.89

The petitioner operates a chain of membership-only retailer warehouse clubs owned and operated by Walmart. The petitioner sells most of its merchandise in bulk and directly off pallets. The petitioner also sells products such as jewelry, designer goods, crystal and collectibles, electronics, floral, apparel, and food. Audit Remarks, p. 4. The petitioner's operations include full-service supermarkets with baked goods, pharmacies, optical centers, one-hour photo processing labs, and other amenities such as auto repair, floral departments, and cafes. This assessment is the result of a field audit of the petitioner's purchases and expenses from February 1, 2012 through January 31, 2015. The petitioner filed a petition for reassessment. A re-audit was conducted that resulted in a reduced tax liability. A hearing was requested and held in this matter.

Background

The petitioner, doing business as Sam's Club, is an American chain of membership-only retail warehouse clubs. The petitioner was founded in 1983 and named after Walmart founder Sam Walton. As of 2012, the petitioner is the 8th largest U.S. retailer. The petitioner supplies products to the following business sectors: auto, catering and restaurants, childcare and schools, construction, convenience stores, grocery, hotels and hospitality, housekeeping and janitorial, offices, religious organizations, salons and spas, specialty businesses, special orders, technology, and vending and concessions. *Id.* During the audit of the taxpayer, the petitioner maintained 29 Ohio facilities. *Id.*

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the

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burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

The Department conducted a statistical sampling audit as the petitioner had numerous purchases during the audit period. The Commissioner is authorized to issue an assessment based on a representative sample of purchases. R.C. 5741.13(A)(2). Accounts payable activity was narrowed down to a target population comprised of transactions from accounts with sales and use tax implications. The data was reviewed to screen anomalous transactions which would create sampling problems. The transactions were stratified by dollar amount using the cumulative square root of the frequency method. A sample list of random transactions was generated for each stratum except the top stratum (transactions above $3,000), which was comprehensively reviewed. The petitioner provided their available invoices, along with any available supporting documentation, for the resulting list of transactions. The tax deficient sum in each stratum was divided by the total dollar amount of sampled transactions in each stratum. This resulted in a percentage of error for each stratum. The percentage of error for each stratum was applied to the total target population dollars for that stratum. The auditor totaled the resulting estimated tax deficient amounts, plus the tax deficient amount from the comprehensively reviewed top stratum. The auditor then factored in results of examinations of certain other accounts excepted from the general statistical sample, such as fixed assets that would be reviewed on a comprehensive basis for the entire audit period. Credit was then given for use tax remitted during the audit period. This resulted in the petitioner's assessed tax liability.

The petitioner submitted an initial petition for reassessment dated February 21, 2017, merely contesting the pre-assessment interest associated with the assessment in the amount of $105,157.91. The petitioner submitted a supplemental petition for reassessment with various contentions regarding the taxability of transactions. However, the Department informed the petitioner during the initial denial that the petitioner failed to identify any transactions or provide any supporting documentation with its listing of boilerplate citations of Ohio Revised Code exceptions in its petition for reassessment.

The Department requested that the petitioner submit invoices and proof of payment of tax collected and remitted. The petitioner submitted a CD with invoices and an excel spreadsheet of contested transactions. The petitioner submitted a joint memorandum of contentions in support of a petition for reassessment requesting a reduction in the assessment and a refund request application; however, the petitioner did not submit matching transactions for both claims. Therefore, this Final Determination only addresses the petitioner's contentions and transactions that were applicable to the petition for reassessment.

After the Department requested additional information to support the petitioner's contentions, the petitioner submitted a spreadsheet of 396 contested transactions. However, the petitioner only

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provided invoices for 60 of the 396 transactions. The petitioner submitted a list of ten contentions for exemption. The petitioner contends that the Department erred in assessing tax on transactions that were exempt from sales and use tax. The petitioner contends that a reduction should be given for taxes paid and incorrectly calculated on exempt transactions. The petitioner's objections are addressed in detail below.

Food Services

The petitioner contends that its purchases of tangible personal property used by a licensed food service operator were exempt under R.C. 5739.02(B)(27). The petitioner failed to identify exempt food services transactions in its petition for reassessment; however, during the hearing, the petitioner contended that it purchased exempt food service items such as slicers, ovens, and cleaning chemicals. The petitioner contends that its food service operation and manufacturing occur in its deli and bakery.

R.C. 5739.02(B)(27) provides a sales tax exemption to persons licensed to conduct a food service operation under R.C. 3717.43 of tangible personal property primarily used directly to prepare food for human consumption, preserve food for human consumption, and to clean tangible personal property used to prepare food for sale. This exemption does not apply to tangible personal property used to display food for selection by the consumer.

The Department requested that the petitioner submit invoices and additional information to support its contention. The petitioner failed to elaborate on this contention. Additionally, the petitioner failed to include any transactions in its documentation pertaining to food service, except two transactions from Scotsman Group, LLC for food equipment maintenance. The petitioner submitted two transactions labeled as Invoices 733015 and 696837. The petitioner contends that the transactions are for services and materials to food processing equipment that are exempt as manufacturing equipment because they physically alter raw materials to produce a final good for sale under 5739.02(B)(42)(a).

However, the petitioner failed to submit invoices for the transactions at issue. Further, the petitioner did not demonstrate that the transactions were purchases of exempt food equipment maintenance or manufacturing equipment. The petitioner failed to provide any invoices to identify the exempt nature of the transactions. Since the petitioner did not provide invoices that matched the petitioner's spreadsheet, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Further, the auditor already excluded nontaxable food processing equipment to produce sale of food during the audit. Audit Remarks, p. 13. Therefore, the objection is denied.

Manufacturing

The petitioner contends that the Department erroneously assessed tax on purchases of exempt equipment and materials used primarily in Ohio manufacturing operations and processing under R.C. 5739.02(B)(42)(a). The petitioner contends that its equipment and materials were used primarily in the manufacturing operation to produce tangible personal property for sale which are

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exempt from sales and use tax. The petitioner contends that its manufacturing equipment includes services and parts for a baler that was used to compact and bale corrugated boxes for resale. However, this contention is not explained, developed, or demonstrated with probative evidence.

R.C. 5739.02 levies an excise tax on any retail sale made in this state. A similar use tax is imposed by R.C. 5741.02 upon each consumer storing, using or consuming tangible personal property in Ohio. Laws relating to exemption from taxation are to be strictly construed against exemption. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). R.C. 5739.01(B)(1) defines "sale" as all transactions *by which title or possession*, or both, of tangible personal property *is transferred for a consideration in any manner*. (Emphasis added.)

R.C. 5739.02(B)(42)(a) provides a sales tax exemption for sales where the purpose of the purchaser is to incorporate the thing transferred as a material or a part into tangible personal property to be *produced for sale* by manufacturing, assembling, processing, or refining. Further, R.C. 5739.02(B)(42)(g) provides a sales tax exemption for items used primarily in manufacturing. The manufacturing operation is defined in relevant part as the *process in which materials are changed, converted, or transformed into a different state or form* from which they previously existed. R.C. 5739.011(B)(2). The petitioner contends that parts, materials, and services used in the manufacturing operation, such as on exempt manufacturing equipment – the baler – are not taxable. Under R.C. 5739.01(B)(3)(a) and (b), repair and installation of tangible personal property subject to taxation is included in the definition of "sale" and "selling" and likewise subject to taxation. Therefore, the nature and usage of the equipment controls the taxability of any subsequent repairs or installations related to that property.

During the hearing, the petitioner contended that its manufacturing equipment concerned food service and food service equipment. The petitioner failed to elaborate on its manufacturing operation. Additionally, the petitioner submitted a spreadsheet of 396 contested transactions in its audit reduction spreadsheet, but only included invoices and support for 60 transactions. Most notably, the petitioner only provided four transactions in its spreadsheet under the exemption of manufacturing or cited R.C. 5739.02(B)(42)(a).

Two transactions were listed as services and materials to a baler. The petitioner contends that the baler is exempt as qualified manufacturing equipment because it physically alters raw materials to produce a final good for sale. The descriptions listed on the invoices for Surface Cleaning, L.C. state that the transactions were for compactor cleaning. The invoices further describe the services as Compactor/Baler Preventative Cleaning and Maintenance. The auditor reviewed the invoices submitted with the petitioner's appeal and determined that the transactions at issue were taxable janitorial services under R.C. 5739.01(B)(3)(j).

R.C. 5739.01(B)(3)(j) includes in the definition of "sale" all transactions by which building maintenance and janitorial services are provided. "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. R.C. 5739.01(II).

The invoices provided by the petitioner emphasize that the services from Surfaces Cleaning, L.C. were merely for cleaning and maintenance services, and do not consist of repairs. Further, the petitioner failed to demonstrate how the baler was exempt as manufacturing equipment. Balers for cardboard boxes are generally used to compact large amounts of carboard into a single cardboard baler which is easy to transport and reduces the cost of hauling the cardboard for recycling and disposal. A cardboard baler does not change, convert, or transform cardboard into a different state or form from which it previously existed as required by R.C. 5739.011(B)(2). Therefore, the petitioner failed to demonstrate the baler was used in the manufacturing operation.

Alternatively, the petitioner contends that its corrugated and baled cardboard boxes are exempt under the resale exemption because it resells the boxes. R.C. 5739.01(E) requires items be resold in the same form as received to qualify as "resale," whereas R.C. 5739.011(B)(2) requires the items be changed, converted, or transformed to qualify as "manufacturing." The petitioner asserts conflicting objections as the resale exemption requires the cardboard boxes to remain in the same state for sale and the manufacturing exemption requires the cardboard boxes be transformed. Since balers are generally used to compact carboard to reduce the costs of hauling for recycling and disposal, the cardboard is not changed, converted, or transformed into a different state or form from which it previously existed as required by R.C. 5739.011(B)(2). Additionally, the petitioner failed to demonstrate that it resold baled, corrugated boxes as it did not provide evidence of a transfer of title or possession, or both for consideration to a purchaser as required by R.C. 5739.01(B)(1). Accordingly, the objection is denied.

The petition submitted two additional transactions as exempt manufacturing in its spreadsheet. The petitioner listed the transactions as exempt services and materials for food processing equipment and manufacturing equipment. The transactions from Scotsman Group, LLC lacked any support in the form of invoices to demonstrate the transactions were exempt as equipment and materials used primarily in the petitioner's Ohio manufacturing operations. Further, the transactions were listed in the petitioner's spreadsheet as food equipment maintenance rather than services and parts used for the petitioner's baler. As discussed above, the petitioner failed to provide any invoices to identify the exempt nature of the transactions. Since the petitioner did not provide invoices that matched the petitioner's spreadsheet, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Further, the auditor already excluded nontaxable food processing equipment to produce sale of food during the audit. Audit Remarks, p. 13. Therefore, the objection is denied.

Nontaxable Employee Expense Reimbursement

The petitioner contends that it was erroneously assessed tax on nontaxable transactions for employee expenses. The petitioner contends that office materials and dining expenses were assessed in error when sales tax was paid to the vendor on the transactions. During the hearing, the petitioner further stated it was erroneously assessed tax for nontaxable employee expense reimbursements; however, the petitioner failed to identify specific transactions that were erroneously assessed. The Department requested that the petitioner provide more information regarding this contention such as employee names, the nature of the claimed reimbursements, and invoices. Although the petitioner was given an opportunity to provide proof that its

purchases qualified for exemption, no additional information was provided. Since the petitioner did not provide invoices, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Accordingly, the Department could not verify tax was assessed in error. The evidence submitted is insufficient to warrant a reduction in the assessment, as the petitioner failed to identify any transactions concerning employee expense reimbursements. Therefore, the objection is denied.

Nontaxable Services

The petitioner contends that the Department erroneously assessed tax on nontaxable services. The petitioner contends that it purchased exempt off duty law enforcement services and assembly services. During the hearing, the petitioner contended that delivery charges, environmental services, and similar professional and personal services are exempt under R.C. 5739.01(B)(3) and (Y)(2). This contention was not explained, developed, or demonstrated with probative evidence. During the hearing, the Department requested that the petitioner identify the contested transactions and provide invoices to support its contentions.

The petitioner submitted a spreadsheet of 31 transactions contested as nontaxable services; however, the petitioner only provided invoices for 20 transactions contested as nontaxable services. The petitioner initially failed to identify which transactions qualify for exemption under these provisions. The citations included by the petitioner do not support its contention, as R.C. 5739.01(B)(3) refers to the general listing of transactions that result in a sale. Additionally, R.C. 5739.01(Y)(2) refers to the general listing of transactions that qualify as personal and professional services. The petitioner failed to provide any evidence of transactions concerning non-enumerated services, such as invoices, contracts, and change or purchase orders for 11 transactions; therefore, the Department will not review transactions without proof of purchase.

The petitioner failed to identify any transactions or provide any invoices regarding off duty law enforcement services or assembly services. The petitioner informed the hearing officer it would submit invoices that contained the names of the officers and their status as off duty police after the hearing. The Department requested that the petitioner submit invoices to support its contention. However, the petitioner failed to provide any evidence of security or assembly service transactions. Although the petitioner was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Further, the auditor already excluded nontaxable services with proof of purchase, such as off-duty police officers, during the audit. Audit Remarks, p. 13. Therefore, the objection is denied.

The petitioner submitted nine invoices from R&R Packaging Inc. for delivery services of electronic equipment. The petitioner contends that delivery services are exempt because they are not enumerated under R.C. 5739.01(B). However, R.C. 5739.01(H)(1)(a)(iv) provides that delivery charges are taxable as part of the purchase price. Therefore, this objection lacks merit. Additionally, the auditor determined that the invoice was taxable as the installation of point-of-sale equipment. The petitioner failed to provide an objection for this determination. The petitioner also submitted two invoices for delivery services from EQ - The Environmental Quality Company. The petitioner contends that Environmental Quality provides delivery services

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for oil jugs that are exempt transportation services of a hazardous material. The petitioner contends that hazardous waste removal services are not enumerated as taxable under R.C. 5739.01(B) and, therefore, are exempt. As previously stated, delivery charges are taxable under R.C. 5739.01(H)(1)(a)(iv). Further, the petitioner's contention is not explained, developed, or demonstrated with probative evidence.

The auditor reviewed the petitioner's support a second time after the petitioner requested reconsideration and determined that the invoices were not hazardous waste removal services. The invoices provided by the petitioner merely include a description of the transactions as "[s]am's Club Oil Jug Delivery." No further information was provided regarding the ownership of the property, or the type of oil delivered to the petitioner to determine if it was hazardous waste. The auditor noted that it does not appear the petitioner had its tangible personal property transported for consideration by the vendor, but rather was receiving a delivery of tangible personal property as part of a purchase of tangible personal property. Sales of tangible personal property are taxable under R.C. 5739.01(B)(1). Based on the limited information provided by the petitioner, it is unclear that the transactions concern transportation for hire. Since the petitioner did not provide further information regarding the invoices, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture.

The petitioner failed to provide evidence that it contracted with Environmental Quality for hazardous waste removal services or that Environmental Quality maintained a hazardous waste permit issued by the Public Utility Commission of Ohio or the United States Department of Transportation authorizing it to transport personal property belonging to others for consideration in accordance with R.C. 5739.01(Z)(1). Alternatively, if the petitioner contracted for waste services, the petitioner does not elaborate on how the services were distinguishable from *Rumpke Container Service, Inc. v. Zaino*, 94 Ohio St.3d 304, 762 N.E.2d 995 (2002). The transportation of waste does not meet the requirements set out in R.C. 5739.01(Z) since waste is not "personal property belonging to others." *Rumpke Container Service, Inc. v. Zaino*. As provided in *Rumpke Container Service, Inc. v. Zaino*, even if the vendor had a permit or certificate within the meaning of R.C. 5739.01(Z)(1), it did not show that it was transporting personal property belonging to others for consideration. The evidence submitted is insufficient to warrant a reduction of the sales tax assessed, as the petitioner failed to demonstrate the invoices concerned exempt transportation for hire. The petitioner has not satisfied its burden that tax was assessed in error on the transactions. Accordingly, this objection is denied.

The petitioner submitted four transactions from Carolina Coupon Clearing Inc. The petitioner contends that the vendor provides exempt processing services for retailers' collected coupons. The petitioner contends that processing services are exempt because they are not enumerated in R.C. 5739.01(B). The petitioner failed to provide any additional information to support this contention, as the invoices merely contained a description of "claims processing fees." The auditor reviewed the transactions a second time after the petitioner requested reconsideration and determined that the invoices were fees for taxable claims processing. The auditor determined the transactions are taxable under Ohio Adm.Code 5703-9-46 as data processing, computer services, and electronic information services. The petitioner failed to provide further support to contest Therefore, the objection is denied.

The petitioner submitted sufficient information to warrant a reduction of tax assessed for exempt nontaxable services for five transactions from T&U Service Station Maintenance Inc. for Invoice 27946, Shaw Environmental, Inc. for Invoice 712808, GM Associates for Invoice 13057301, and Kay Chemical Company for Invoices 1744624 and 1658129. Therefore, the objection is granted in part.

Packaging

The petitioner contends that the Department erroneously assessed tax on exempt packaging items that became an integral part of the finished product. The petitioner contends that shrink wrap, boxes, hot dog wrappers, pizza boxes, bags, clamshells, pallets, and similar materials are exempt packaging materials. The petitioner failed to include any transactions in its spreadsheet labeled as exempt under the reason of packaging.

During the hearing, the petitioner contended that its distribution center uses shrink wrap to wrap its pallets and boxes to package products. The petitioner contends that it sends its packaged products from its distribution center to its stores. During the hearing, the Department requested that the petitioner provide photos of the contested shrink-wrapped pallets and other packaging items. Although the petitioner was given an opportunity to provide invoices, and proof that its contested purchases qualified for exemption, no additional information was provided.

Packaging as defined in R.C. 5739.02 means placing in a package. Packaging materials is not defined, but R.C. 5739.02(B)(15) includes a list of examples of packages, such as labels, bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings and parts for packages, and of machinery, equipment, and material for *use primarily in packaging* tangible personal property produced for sale. (Emphasis added). Ohio case law has further clarified the exemption of packaging. In *Custom Beverage Packers v. Kosydar*, 33 Ohio St.2d 68, 294 N.E.2d 672 (1973), the Court reviewed R.C. 5739.02(B)(15) and concluded that *packages* are enclosures or restraints which *restrain the movement of the object contained therein on more than one plane of direction.* (Emphasis added.)

The petitioner failed to elaborate on the manner and extent in which it wraps its pallets with shrink wrap. Additionally, the petitioner failed to provide any evidence that the contested items restrain movement of its products. Ohio case law has clarified that unbound pallets are not "packages" within the meaning of R.C. 5739.02(B)(15) and, therefore, are not excepted from sales and use taxation. *Newfield Publications, Inc. v. Tracy*, 87 Ohio St.3d 150, 718 N.E.2d 420 (1999); *Cole Natl. Corp. v. Collins*, 46 Ohio St.2d 336, 338, 348 N.E.2d 708 (1976). The petitioner has not satisfied its burden to demonstrate error in the amount of tax paid regarding shrink wrapped pallets and other items. Therefore, this contention lacks merit. Accordingly, the objection is denied.

Sale for Resale

The petitioner contends that tax was erroneously assessed on items purchased with the intent of reselling the items themselves or were purchased for the benefit of the customers while engaging in retail sales under R.C. 5739.01(E)(2). The petitioner contends that it purchased the following

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exempt items for resale: optical supplies such as nose pieces, screws, and hinges; photo paper, photo envelopes, and ink for use in its photo processing labs; motorized and other types of shopping carts; corrugated boxes that are baled, and consumables such as food services, cleaning materials, and packaging items identified above. The petitioner cites *Hilton Hotels Corp. d.b.a. The Netherland Hilton Hotel v. Bowers*, BTA No. 48023 (July 31, 1962) and *Hyatt Corp. v. Limbach*, 69 Ohio St.3d 537, 634 N.E.2d 995 (1994) in support of its contention. However, the petitioner failed to provide any further context on these cases. Further, this contention is not explained, developed, or demonstrated with probative evidence.

R.C. 5739.01(E) excepts from the definition of retail sale the purchase of items by a consumer whose purpose is to *resell* the thing transferred or benefit of the service provided, by a person engaging in business, *in the form in which the same is, or is to be, received by the person.* (Emphasis added.) The Supreme Court of Ohio has consistently held that when the purchaser has put property to more than one use, the purchaser's primary use of the property controls the determination as to the property's taxability under R.C. 5739.01(E)(1). *Dresser Industries, Inc. v. Lindley*, 12 Ohio St. 3d 68, 465 N.E.2d 430 (1984).

The petitioner submitted a spreadsheet of 305 contested transactions identified as exempt under the resale exemption; however, the petitioner submitted merely five invoices to support its contention. The petitioner submitted five invoices from Bunzl Distribution USA Inc. The petitioner states that Bunzl Distribution USA Inc. sells packaging for food items to be sold out of the deli, bakery, etc. The petitioner submitted sufficient information to warrant a reduction of tax assessed for packaging as part of a resale for five transactions from Bunzl Distribution USA Inc. Accordingly, the objection is granted in part.

Cardboard Boxes

The petitioner contends that corrugated boxes are baled are resold; however, the petitioner failed to provide any invoices for the sale of corrugated or baled boxes. Therefore, the objection lacks merit. The petitioner failed to demonstrate that it resold baled, corrugated boxes as it did not provide evidence of a transfer of title or possession, or both for consideration to a purchaser as required by R.C. 5739.01(B)(1). Accordingly, the objection is denied.

Photo Processing Materials

During the hearing, the petitioner stated that Walmart accrued tax on its general ledger accounts. Additionally, the petition for reassessment stated that Walmart purchases photo paper, photo envelopes, and ink used in photo processing labs. Therefore, it appears the petitioner was not assessed tax on photo processing transactions, but rather Walmart. Accordingly, the objection is denied.

McKesson and Amerisource

During the hearing, the petitioner contended that transactions with McKesson and Amerisource for pill bottles and caps are exempt as used in the petitioner's pharmacies. The Department

requested that the petitioner submit invoices to support its contention; however, the petitioner failed to provide any invoices regarding pharmaceutical supplies. Although the petitioner was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Therefore, this objection is denied.

Real Property Construction Services

The petitioner contends that the Department erroneously assessed tax on purchases that should be treated as exempt real property installation under R.C. 5739.01(B)(5) and Ohio Adm.Code 5703-9-14(D)(1). During the hearing, the petitioner contended that its purchases of HVAC repairs, electrical services, plumbing services, building repair, and similar transactions were exempt as real property construction services. Additionally, the petitioner contends that tax was erroneously assessed on exempt rent payments for mall settings with shared spaces, hallways, parking, and common areas among multiple tenants. During the hearing, the petitioner contended that it would provide its rent sheet; however, the petitioner failed to provide this information. Since the petitioner failed to provide sufficient information for rent payments, the objection is denied.

The petitioner submitted a spreadsheet with 24 transactions contested as exempt real property installation; however, the petitioner only submitted nine invoices labeled as exempt real property transactions. The Department only evaluated transactions with proof of purchase. Therefore, 15 transactions were denied because the petitioner failed to provide invoices for the transactions.

The petitioner submitted sufficient information to warrant a reduction of tax assessed for exempt real property installation for nine transactions from Bid Central Inc., for Invoice 60933, Buckeye Sweeping Inc. for Invoice 33472, Meijer Inc. for Invoice 1088589, MV-RGI Inc for Invoice 6369, RG Properties Inc. for Invoice 7445, Kleenco Maintenance for Invoice 1931, and No Extra Charge Inc. for Invoices 35310, 35267, and 35022. Therefore, the objection is granted in part.

Warehouse and Distribution Center

The petitioner contends that the Department erroneously assessed tax on exempt tangible personal property used in handling purchased sales inventory under R.C. 5739.02(B)(42)(j) and 5741.02(C)(2). However, this contention is not explained, developed, or demonstrated with probative evidence. Additionally, the petitioner failed to identify any transactions in its spreadsheet concerning the aforementioned Revised Code sections or the warehousing exemption.

Tax Paid

The petitioner contends that the Department erroneously assessed tax on transactions on which the petitioner already paid and remitted tax. Further, the petitioner contends that it paid tax twice on multiple transactions because it remitted use tax to account for insufficient sales tax collection by its vendors.

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The Department requested that the petitioner provide invoices and evidence of tax twice remitted. The petitioner submitted a spreadsheet with 32 transactions contested as tax paid to vendor or tax accrued; however, the petitioner only submitted 24 invoices. The Department only evaluated transactions with proof of sales tax payments. Therefore, eight transactions were denied because the petitioner failed to provide invoices for the transactions. Additionally, the petitioner provided ten invoices from Dresser Inc. and Gilbarco Inc.; however, the petitioner failed to demonstrate it paid the entire sales tax amount for the transactions. Therefore, the objection lacks merit as to the Dresser Inc. and Gilbarco Inc. transactions.

The petitioner submitted sufficient information to warrant a reduction of tax assessed for tax paid for 13 transactions from Door Controls Inc., for Invoice 84026, Kleenco Maintenance for Invoices 30113118, 41512118, 80113118, and 110113118, Sharp Carts Management LLC for Invoice 80478, Hattenbach Company for Invoices 93064 and 3464, and B H Budke Inc., for Invoices 120990, 122114, 130405, 130708, and 131313. Invoice 110113118 was twice listed and twice assessed. Therefore, the objection is granted in part.

Other Nontaxable Items and Issues

The petitioner contends that the Department erroneously assessed tax on transactions which are not subject to tax. The petitioner contends that the aforementioned list of exempt transactions is not inclusive, and the petitioner reserves the right to include additional nontaxable items as audit reductions. However, the petitioner failed to identify any additional transactions that are exempt. The Department provided the petitioner with an opportunity to submit additional information following the hearing; however, the petitioner failed to present any evidence to support its contentions. Therefore, the objection is denied.

Pre-Assessment Interest

The petitioner requests abatement of the pre-assessment interest associated with the assessment. The Tax Commissioner lacks jurisdiction to abate pre-assessment interest added to an assessment pursuant to R.C. 5739.133. Therefore, this request cannot be allowed.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Total
$955,163.59	$98,533.56	$1,053,697.15

Current records indicate that payments of $1,124,529.89 have been made, resulting in a refund due of $70,832.74 plus applicable interest.

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THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 1 2021

Standard Register Inc.
600 Albany St., Bldg. 2
Dayton, OH 43417

RE: Refund Claim No.: 201704622
Use Tax
Refund Period: 09/01/15 – 01/31/17
Account No.: 97-302071

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $263,111.56 of sales tax filed March 13, 2017 pursuant to R.C. 5739.07. The Department initially denied the claim. The claimant sought reconsideration of the matter. A hearing was held.

The claimant contends that they accrued and remitted use tax on exempt transactions. An auditor denied the claim for failure to provide accrual journals. The auditor further requested contracts and invoices for claimed exempt services. The claimant provided further information. The auditor allowed $213,496.41. The auditor denied $28,909.46 due to inconsistencies between what was accrued and remitted and the claimant's use tax returns. The auditor also denied $20,705.66 for failure to show exemption from tax.

A taxpayer is entitled to a refund of taxes that were paid illegally or erroneously. R.C. 5739.07(B). The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar,* 38 Ohio St.2d 135, 143, 311 N.E.2d 1, 6 (1974). This requires a claimant to provide information of undisputed facts that taxes were paid on the claimed transactions. *See AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487, *2 (June 4, 1987). The Tax Commissioner will not engage in speculation. The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. For a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018). The claimant must provide information of undisputed facts that taxes were not only paid but paid in a sum certain. *CSI Controls v. Testa,* 2018 WL 1372809, *2.

The petitioner objects to the two types of denied transactions: purchases where the amount of use tax could not be established due to improper accrual information (the "remit" issue), and purchases where the claimant failed to establish exemption from tax. The Commissioner will

review all denied transactions to determine if adjustment to the refund amount is proper. R.C. 5703.70(C)(1). The Commissioner will first address the remit objection as a review of the record reflects issues of proof of tax accrued with both the remit and claimed exempt denials. The Commissioner will then determine, independently of the claimant's accrual issues, if its exemption claims should be allowed.

Accrual Objections

The transactions denied due to failure to show properly accrued tax are from September and December 2015 along with October, November, and December 2016. The Tax Commissioner reviewed the accrual sheets (which include all transactions) for these months. The Tax Commissioner notes that some objections are allowed with regard to the availability of funds and similar accounting issues for the tax period at issue but there are some transactions within those periods that are still subject to an exemption analysis as discussed in the next section.

The claimant objects to its denial of $875.44 for September 2015. The claimant objects to the denial of $3,881.48 of tax accrued from payments made to Franklin County in October and November 2016. The record reflects this is available and the documentation corroborates a refund due. The objection is allowed.

The claimant objects to its denial for alleged payments in December 2015. The record does not reflect with certainty that this amount is due. The claimant requested a total of $12,726.08 sitused to Montgomery County for this tax period. $7,967.99 was previously refunded on claim 201800549. Two of the three transactions with CSC do not tie to the provided accrual sheets. The confusion continues with the claimant's transaction with Sogeti on invoice 345157. The schedule and invoice reflect $2,880.00 for the transaction but the tax accruals only show that $2,160.00 was accrued. The claimant is requesting more in taxes paid than the record reflects were accrued. The Tax Commissioner cannot conclude the claimant is entitled to refund as a result. Further, if the claimant could prove the amount, its request would still need to be reduced by $52.50 due to its failure to properly accrue Sogeti invoice 345157. Based upon the record, the Tax Commissioner cannot determine what, if any, further amount the claimant has paid in illegal or erroneous tax. This objection is denied.

The claimant objects to the denial of $7,975.60 for December 2016. The record does not reflect with certainty that this amount is due. The claimant previously self-credited $16,602.69 in use tax from November 2016 on December's return contrary to the reporting requirements of 5739.03(A)(2). Further, the claimant previously received $37,573.04 for this month on separate refund claim 201705803. This resulted in a negative balance for the reporting period. In addition to the negative balance, the use tax return totals do not match the accrual sheets by county. Based upon the record, the Tax Commissioner cannot determine what further, if any, amount the claimant has paid in illegal or erroneous tax. *See Netsmart Technologies v. McClain*, BTA No. 2020-755, 2021 WL 1093714, *3 (March 16, 2021). The claimant has failed to show it is entitled to a refund. This objection is denied.

Exemption Objections

The claimant objects to the denial of refund for purchases from ASI, and ConsultNet. It claims these are exempt services. The auditor previously requested invoices and applicable contracts for these transactions. The claimant noted at hearing that it was not challenging one transaction with Appleton Production, a taxable purchase of tangible personal property, though it was included on the refund schedule.

Ohio imposes use tax on the provision of certain services. R.C. 5741.02(A)(1), R.C. 5741.01(M), and 5739.01(X). R.C. 5739.01(B)(3)(e) includes sales of automated data processing, computer services, and electronic information services as taxable sales. "Personal or professional services" are excluded and not taxable. R.C. 5739.01(Y)(2). Exclusions are "strictly construed." *Cincinnati Federal Savings & Loan v. McClain*, BTA No. 2018-2247, 2020 WL 771533 (December 22, 2020), citing *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954. The taxpayer "must affirmatively establish his or her right" to the exemption. *Id.*, citing *Campus Bus Serv. v. Zaino*, 98 Ohio St.3d 463, 2003-Ohio-1915, 786 N.E.2d 889.

ASI

The claimant requests a refund for ASI and claims that this amount is due to "MPU[.]" Generally, excise taxes are imposed upon all retail sales made in Ohio (sales tax), in addition to any storage, use, or consumption in this state of any tangible personal property (use tax), unless the transaction is specifically exempted. R.C. 5739.02 and 5741.02. Exemptions from tax are strictly construed. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954. In this case, it appears the claimant is requesting a refund based on an exemption from sales tax for multiple points of use, which is defined by R.C. 5739.033. *Environmental Quality Management v. McClain*, BTA No. 2018-1194, 2019 WL 3889382, *2 (August 8, 2019). R.C. 5739.033 provides that the location of a sale for purposes of sales tax is sourced to the location where the consumer receives the property or the address for the consumer. *Id.* Generally, if a business consumer purchases a digital good, computer software, or a service available for use in more than one taxing jurisdiction, the business may report and pay the appropriate tax to each jurisdiction where concurrent use occurs. However, the claimant must provide sufficient evidence to justify the exemption. *Id.*

The claimant provided an undated list of users with handwritten notes saying that the information pertains to transactions with ASI. Evidence that is summary in nature without any further corroboration from primary records does not meet a taxpayer's burden to prove exemption. R.C. 5741.15; *Bay Mechanical & Electrical Corporation v. Levin*, BTA No. 2008-K-1687, 2011 WL 2446198, *3 (June 14, 2011), *aff'd sub nom. Bay Mechanical & Elec. Corp. v. Testa*, 133 Ohio St.3d 423, 2012-Ohio-4312, 978 N.E.2d 882, ¶ 36. Further, the primary evidence provided, invoices, reflects that both the "Bill To" and "Ship To" addresses are at the claimant's address in Dayton, Ohio. It does not appear that a contract was provided.

The Commissioner finds *Environmental Quality Management v. McClain* is instructive in this matter. In 2019, the Board of Tax Appeals ("BTA") upheld the Commissioner's denial of a

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refund based upon a theory of multiple points of use for failing to provide documentary evidence. Specifically, the appellant in *Environmental Quality Management* failed to provide contracts and a list of users with respective job titles from the time of purchase and its "Ship To" address was in Ohio. *Id.* The BTA noted the evidence submitted was insufficient to warrant exemption and refund. Based upon the evidence and relevant case law, the Commissioner cannot conclude that the claimant has demonstrated exemption from tax or entitled to a refund. This objection is denied.

Further, as noted, the claimant is seeking refund for two transactions with ASI from Montgomery County in December 2016 (Invoice 333647). The balance of available payments situsted to Montgomery County is negative due to the claimant's unique self-credit of $16,602.69 on its December return and refund of $35,573.04 on claim 201704803. As the claimant is requesting funds attributable to Montgomery County that do not exist, these objections are further denied. *See Netsmart Technologies,* 2021 WL 1093714, *3.

ConsultNet

The claimant requests refund in the amount of $12,218.74 related to purchases from ConsultNet. The claimant contends that the services are not taxable employment services because they are excluded from the definition of that service under R.C. 5739.01(JJ)(3). This objection is allowed.

Accordingly, the refund claim is further partially allowed in the amount of $16,975.66 with statutory interest as provided at law.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 2 1 2021

Standard Register, Inc.
600 Albany St., Building 2
Dayton, OH 45417

RE: Refund Claim No.: 201800549
Use Tax
Refund Periods: 09/30/2015 – 06/30/2017
Account No.: 97-302071

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $243,316.28 of use tax filed on July 19, 2017 pursuant to R.C. 5739.07. The claimant sought reconsideration of the matter. A hearing was held.

The claimant contends that it erroneously accrued and remitted use tax on exempt transactions, including exempt professional services, repairs to manufacturing equipment and transactions that occurred out of state. An auditor reviewed the claim against the petitioner's use tax filings. The auditor initially allowed $51,931.08. The auditor denied $191,385.20 due to inconsistencies in the accrual information provided. The auditor obtained additional information from the claimant and recommended that an additional $109,704.87 of tax should be refunded. After hearing, the petitioner provided a spreadsheet in support of $87,458.88 of the claim.

A taxpayer is entitled to a refund of taxes that were paid illegally or erroneously. R.C. 5739.07(B). The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar,* 38 Ohio St.2d 135, 143, 311 N.E.2d 1, 6 (1974). This requires a claimant to provide information of undisputed facts that taxes were paid on the claimed transactions. *See AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487, *2 (June 4, 1987). The Tax Commissioner will not engage in speculation. The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. For a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018). The claimant must provide information of undisputed facts that taxes were not only paid but paid in a sum certain. *CSI Controls v. Testa,* 2018 WL 1372809, *2.

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Accrual Objections

The claimant objects to its denial of $3,791.90 for September 2015. This amount was already refunded to the claimant. This objection is denied.

The claimant objects to its denial of $45,174.78 for October 2015, August 2016, and October 2016. This objection is allowed. Accordingly, this amount shall be refunded.

The claimant objects to denial of $16,459.64 requested for November 2016. The claimant requests $9,918.45 for a transaction with Miro Consulting. The claimant previously self-credited all $16,602.69 use tax accrued on this transaction on their use tax return in December 2016. The objection is denied with regard to that amount. *See Netsmart Technologies v. McClain*, BTA No. 2020-755, 2021 WL 1093714, *3 (March 16, 2021). The remaining $6,541.19 is allowed.

The claimant objects to the disallowance of $4,570.01 for December 2016. The record does not reflect with certainty that this amount is due. The claimant previously self-credited $16,602.69 in use tax from November 2016 on December's return, contrary to the requirements of R.C. 5739.03(A)(2). Further, the claimant previously received $37,573.04 for this month on separate refund claim 201705803. The use tax return totals also do not match the accrual sheets by county. Based upon the entire record, the Tax Commissioner cannot determine what, if any, amount the claimant has paid in illegal or erroneous tax. *See Netsmart Technologies v. McClain*, BTA No. 2020-755, 2021 WL 1093714, *3 (March 16, 2021). The claimant has failed to show it is entitled to a refund. This objection is denied.

The petitioner objects to the denial of payments attributable to Ohio from April 2017 in the amount of $17,462.55. However, the detailed accruals for Montgomery and Mercer County did not match the claimant's use tax return. Based upon the record, the Tax Commissioner cannot determine what further, if any, amount the claimant has paid in illegal or erroneous tax. See *Netsmart Technologies v. McClain*, BTA No. 2020-755, 2021 WL 1093714, *3 (March 16, 2021). The claimant has failed to show it is entitled to a refund. This objection is denied.

Accordingly, the refund claim is further partially allowed in the amount of $161,420.84 with statutory interest as provided at law.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation
Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:
JUL 2 1 2021

The Standard Register Company
600 Albany St., Bldg. 2
Dayton, OH 45417

RE: Refund Claim No.: 201704623
Use Tax
Refund Periods: 02/01/13 - 01/31/14
Account No. 97-110432

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $75,335.73 of sales tax filed March 13, 2017 pursuant to R.C. 5739.07. The Department of Taxation denied $48,580.61 of the claim. The claimant sought reconsideration of the matter. A hearing was held.

The claimant states it accrued tax on exempt purchases in Ohio. It also states that it accrued tax on exempt purchases upon which it paid tax in error. An auditor reviewed the claim against the petitioner's use tax filings. The initial application was denied in full for lack of supporting documentation including canceled checks, letter of usage, and invoices. In response, the claimant provided missing invoices and some usage information.

A taxpayer is entitled to a refund of taxes paid illegally or erroneously. R.C. 5739.07(B). The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar,* 38 Ohio St.2d 135, 143, 311 N.E.2d 1, 6 (1974). This requires a claimant to provide information of undisputed facts that taxes were paid on the claimed transactions. *See AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487, *2 (June 4, 1987). The Tax Commissioner will not engage in speculation. The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. For a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018). The claimant must provide information of undisputed facts that taxes were not only paid but paid in a sum certain. *CSI Controls v. Testa,* 2018 WL 1372809, *2.

Exempt Services

The claimant contends that tax was erroneously paid on the purchase of exempt services. Ohio imposes use tax on the provision of certain services. R.C. 5741.02(A)(1), 5741.01(M), and

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5739.01(X). R.C. 5739.01(B)(3)(e) includes sales of automated data processing, computer services, and electronic information services as taxable sales. "Personal or professional services" are excluded and not taxable. R.C. 5739.01(Y)(2). Exclusions are "strictly construed." *Cincinnati Federal Savings & Loan v. McClain*, BTA No. 2018-2247, 2020 WL 771533 (December 22, 2020), citing *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954. The taxpayer "must affirmatively establish his or her right" to the exemption. *Id.*, citing *Campus Bus Serv. v. Zaino*, 98 Ohio St.3d 463, 2003-Ohio-1915, 786 N.E.2d 889.

Global Healthcare Exchange ("GHX")

The claimant states that GHX provided digital advertising services that were not taxable in Ohio. The claimant cites to R.C. 5739.01(RRR) in support. The purchases with GHX were made in 2013 and 2014 – prior to the enactment of H.B. 266, which defined digital advertising as a nontaxable professional service, 5739.01(Y)(2)(k) and 5739.01(RRR), effective October 12, 2016. Nonetheless, the claimant contends that this transaction is exempt as the purpose of the purchase was digital advertising, i.e., data services "for the purpose of electronically displaying, delivering, placing, or transferring promotional advertisements to potential customers about products or services or about industry or business brands." Petitioner's "Global Healthcare Exchange Purchases: Explanation for Exemption".

As an initial matter, the claimant is requesting a refund on an exclusion that did not exist at law when it made its purchases. Refunds are only available for "illegal or erroneous" payments. The exclusion for digital advertising services did not exist at the time the payments were made and there is no indication the statute was meant to apply retroactively. Therefore, these could not have been illegal or erroneous payments. R.C. 1.58 and *Giant Tiger Drugs v. Kosydar*, 43 Ohio St.2d 103, 330 N.E.2d 917 (1975). Further, Information Release ST 1999-04 (as Updated December 2015) suggests that digital advertising services *were* taxable electronic information services prior to the enactment of H.B. 266. Therefore, its refund claim here fails on this basis alone. However, the Tax Commissioner will review this portion of the claim *arguendo*.

The taxability of a transaction is determined by the "true object of the transaction." R.C. 5739.01(B)(3)(e). The true object test asks if the purchaser's object in purchasing the services at issue the purchase of taxable services or is the true object the purchase of some other personal or professional service. *Columbus Oncology Associates, Inc. v. Testa*, BTA No. 2014-3984, 2015 WL 11005182, *3 (September 28, 2015). The issue is whether the record reflects that claimant was purchasing digital advertising services when it paid Global Healthcare Exchange's "Supplier Subscription Fee" or instead was purchasing taxable automatic data processing (ADP), computer, or electronic information services.

The claimant provided a document entitled "Global Healthcare Exchange Supplier and Distributor Terms and Conditions of Use" ("GHX Terms"). The GHX terms state that it operates an "on-line, independent electronic trading system (the "Exchange") intended to facilitate the real-time transfer of money, information, goods and services ("Products") and their customers ("Purchasers")." GHX Terms, Article 1. Specifically, "the Exchange provides Users with an automated system and services for * * * developing, maintaining and accessing information with

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respect to * * * Products from Suppliers for reference purposes and to create an accurate item master file[,] * * * conveying information between Suppliers and Purchasers relative to the purchase and sale of Products and otherwise facilitating the formation and performance of contracts between Users for the purchase of Products[,] and * * * providing information with respect to the fulfillment of orders for Products, summary information regarding the purchase and sale of Products, and other information that may be of interest to Users." GHX Terms, Section 2.1.

The true object of the subscription with GHX was not advertising services. The terms note that GHX provides an automated system for a products database for the claimant to access. It keeps track of sales and contracts. GHX is automatically processing the claimant's data, which is taxable ADP services under R.C. 5739.01(Y)(1)(a). Further, GHX is providing access to computer equipment by means of telecommunications equipment for the purpose of placing data into the computer equipment to be retrieved by claimant, which is taxable electronic information services under 5739.01(Y)(1)(c)(ii). See also Information Release ST 1999-04 (as Updated December 2015). Regardless, the claimant has failed to demonstrate entitlement to exemption. Due to the foregoing, the objection is denied.

Fahlgren Mortine ("Fahlgren")

The claimant states that Fahlgren "provided consulting services for the development of graphic images" used in its production process. It states these services were not taxable in Ohio. The claimant provided an invoice with Fahlgren for the product "Integrated Services" which is described on the line item as "Connectication Graphic Image" and an amount paid for "Agency Services." It appears that the claimant was engaged in the taxable purchase of tangible personal property. Regardless, it is the claimant's burden to justify its entitlement to refund. Without further information, the Commissioner cannot conclude that the claimant has met its burden to demonstrate a refund is due here. The objection is denied.

Logicalis

The claimant states that Logicalis provided consulting services for a Cisco ACS Migration project. It states these services were not taxable in Ohio. It provided invoices and a purchase order in support. It also provided the first two pages of the statement of work for Logicalis's ACS Migration project. Based on the information provided, it appears the claimant purchased taxable computer services under 5739.01(Y)(1)(b). However, what was provided does not provide the factual or legal rationale for why a refund is due here. The Tax Commissioner cannot conclude the claimant has met its burden as a result. This objection is denied.

Interlink Cloud

The claimant states that Interlink Cloud provided consulting services for an Office 365 migration project. The record reflects that these services consisted of specifying computer hardware configurations and evaluating technical processing characteristics, computer programming, and training of computer programmers and operators, provided in conjunction with and to support the

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sale, lease, or operation of taxable computer equipment or systems. Standard Register Office 365 Migration Scope of Work, Pages 1-3. These are taxable computer services under 5739.01(Y)(1)(b). Further, the claimant has failed to demonstrate entitlement to exemption. This objection is denied.

Digitaloprint ("DTP")

The claimant states that DTP provided variable data printing software used in its production process. It states that the purchase is not taxable in Ohio. The invoice reflects the purchase order was for "software" to the claimant in Dayton. The claimant offered no further information about why it is entitled to refund on this purchase. This objection is denied.

U! Creative

The claimant states that U! Creative provided consulting services for the development of infographic videos used in its production process. In fact, the purchase order reflects that the claimant purchased "[t]wo infographic videos" from U! Creative. This was a taxable purchase. Regardless, the claimant has failed to demonstrate entitlement to exemption. The objection is denied.

Thomasnet

The claimant states that Thomasnet provided digital advertising services through Thomasnet's supplier and purchase power customer platform. It states that its purchase is exempt as a result.

This purchase was made in 2013. As an initial matter, the claimant is requesting a refund on an exclusion that did not exist at law when it made its purchases. Refunds are only available for "illegal or erroneous" payments. The exclusion for digital advertising services did not exist at the time the payments were made and there is no indication the statute was meant to apply retroactively. Therefore, these could not have been illegal or erroneous payments. R.C. 1.58 and *Giant Tiger Drugs v. Kosydar*, 43 Ohio St.2d 103, 330 N.E.2d 917 (1975). Further, Information Release ST 1999-04 (as Updated December 2015) suggests that digital advertising services *were* taxable electronic information services prior to the enactment of H.B. 266. Therefore, its refund claim here fails on this basis alone. However, the Tax Commissioner will review this portion of the claim *arguendo*.

The claimant provided an invoice and a printout of Thomasnet's website. The invoice reflects a payment for the purchase of "Products" which were "ThomasNet.com (Internet Solutions)". The taxability is determined by the "true object of the transaction." R.C. 5739.01(B)(3)(e). The true object of the transaction appears to have been a software purchase. Regardless, the claimant has failed to demonstrate entitlement to exemption. This objection is denied.

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Gartner

The claimant states that Gartner "provided research tools for executives" that were not taxable in Ohio. It also states that it accrued the tax on the amount in error. The Tax Commissioner does not dispute that the invoice reflects tax paid. The invoice reflects these "research tools" were software purchases by the claimant. These purchases were taxable. The claimant has further failed to demonstrate exemption. The objection is denied.

CareerBuilder.Com

The claimant objects to denials of refund for purchases from CareerBuilder.Com. The claimant states CareerBuilder.Com provided job listing services through electronic information services and digital advertising services. It states this was not taxable in Ohio.

This purchase was made in 2013. As an initial matter, the claimant is requesting a refund on an exclusion that did not exist at law when it made these purchases. Refunds are only available for "illegal or erroneous" payments. The exclusion for digital advertising services did not exist at the time the payments were made and there is no indication the statute was meant to apply retroactively. Therefore, these could not have been illegal or erroneous payments. R.C. 1.58 and *Giant Tiger Drugs v. Kosydar*, 43 Ohio St.2d 103, 330 N.E.2d 917 (1975). Further, Information Release ST 1999-04 (as Updated December 2015) suggests that digital advertising services *were* taxable electronic information services prior to the enactment of H.B. 266. Therefore, its refund claim here fails on this basis alone. However, the Tax Commissioner will review this portion of the claim *arguendo*.

The taxability is determined by the "true object of the transaction." R.C. 5739.01(B)(3)(e). The purchase order was for 400 prepaid job postings as well as monthly database seats and database access. This is corroborated by the Service Activation Agreement. Sales of automated data processing, computer services, and electronic information services are taxable sales. *Id.* The claimant has not affirmatively demonstrated the application of the exemption. This objection is denied.

Shiver Security dba Sonitrol

The claimant states Sonitrol provided security equipment and services for a new security project. It states that it paid tax on an exempt transaction, and that it also accrued tax on the transaction. The purchase and installation of security equipment is taxable. *Pep Boys v. Testa*, BTA No. 2015-706, 2016 WL 3018415, *4 (April 4, 2016). Regardless, the claimant has failed to demonstrate how it is entitled to an exemption. The claimant objects to denial of refunds in the amount of $2,996.53 and $2,537.50 for tax previously paid on invoices from Shiver Securities dba Sonitrol of SW Ohio. The invoices do not indicate tax was charged and paid. The claimant's AP payment report appears to reflect payments of the invoiced and untaxed amounts. Therefore, these amounts are denied.

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Accordingly, the claim for refund is denied. JUL 2 1 2021

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 2 1 2021

The Standard Register Co.
600 Albany St., Building 2
Dayton, OH 45417

RE: Refund Claim No.: 201800563
Use Tax
Refund Period: 07/01/2013 – 05/31/2015
Account No. 97-110432

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $82,362.29 of sales tax filed July 19, 2017 pursuant to R.C. 5739.07 and R.C. 5741.10. The Department initially denied the claim in part. The claimant sought reconsideration of the matter. A hearing was held.

The claimant contends it accrued tax in error on exempt purchases. It submitted a refund schedule requesting $83,552.29. An auditor reviewed the claim. The auditor initially allowed $10,275.77 plus applicable interest and denied the remainder. The auditor requested usage and other information regarding the denied amount. The claimant provided additional information. The auditor reviewed and allowed a further $18,590.82 of the claim. The auditor denied $54,685.70 of the claim. The claimant objects to the denied transactions.

A taxpayer is entitled to a refund of taxes that were paid illegally or erroneously. R.C. 5739.07(B). The burden is on the taxpayer requesting the refund to put forth evidence that allows the Tax Commissioner to come to the conclusion that the taxpayer is entitled to a refund of tax paid to the state. *Belgrade Gardens, Inc. v. Kosydar,* 38 Ohio St.2d 135, 143, 311 N.E.2d 1, 6 (1974). This requires a claimant to provide information of undisputed facts that taxes were paid on the claimed transactions. *See AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487, *2 (June 4, 1987). The Tax Commissioner may adjust the refund amount if he finds it proper. 5703.70(C)(1). The Tax Commissioner will not engage in speculation. The Tax Commissioner will not accept a conclusion from a taxpayer that a refund is due unless the taxpayer also puts forth documentary evidence that supports not only the validity of the claim, but also the specific amount of refund that should be paid. For a claimant to obtain a refund of tax, it must put forth substantive evidence that allows the Tax Commissioner to come to the conclusion that a refund should be paid. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018). The claimant must provide information of undisputed facts that taxes were not only paid but paid in a sum certain. *CSI Controls v. Testa,* 2018 WL 1372809, *2.

Amounts Previously Refunded

As an initial matter, the claimant has already received refunds for four transactions: Rimini Street in January 2014, Miro Consulting in April 2014, and two purchases from Forsythe in April 2014. These were previously refunded on claim 201504433. Additionally, it appears that a portion of the amount the auditor marked as "allowed" to the claimant after initial denial was already refunded to the claimant on claim 201504433. The Tax Commissioner will adjust the refund to the proper amount. 5703.70(C)(1). In total, transactions in the amount of $16,973.79 were previously refunded on a separate refund claim. The remaining balance after reviewing the claimant's objections will be reduced accordingly.

CSC

The claimant objects to the denial of refund for purchases of allegedly exempt out-of-state mainframe charges. It states that CSC charged for services to hardware located in Norwich, Connecticut. The record supports its objection and refund is allowed in the amount of $3,297.85.

Halogen Software

The claimant objects to the denial of refund for Halogen Software. It states that these were two transactions with a purchase of and a credit for Enterprise Software. However, it does not appear any documentation related to these purchases was provided. Without further information, the Tax Commissioner cannot conclude a refund is due. This objection is denied.

Forsythe

The claimant objects to the denial of refund for transactions with Forsythe. It states that Forsythe provided backup servers in Connecticut, California, Texas, and North Carolina. The claimant states these transactions were not taxable in Ohio. This objection is allowed. The record reflects that $4,488.94 is due. The remaining transactions were previously refunded.

Multiple Points of Use

The claimant objects to the denial of refunds for transactions with Salesforce.com ("Salesforce"), The Software Connection, Ltd. ("Software Connection"), and WalkMe. The claimant contends that these were purchases of user licenses for software from Salesforce. The claimant argues that refund is due for unused licenses for the cloud technology. It cites R.C. 5739.01(D)(1) and a Tax Commissioner's Final Determination from 2006 for support. Specifically, on its refund schedule, it states that it miscalculated the original percentage of use of its licenses in Ohio. It also refers to the purchases as "Enterprise Software" on the refund schedule. The auditor requested contracts and an employee list with job title. The auditor also requested detail on why the taxable percentage had changed.

The claimant provided an "executive summary" for WalkMe and a partial license agreement with Ortoo E2A (presumably related to Software Connection). It did not provide a contract with

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Salesforce but did provide a list of licenses that states it was generated May 2014; its purchases were made April 2014, August 2014, and May 2015. It also provided a general list of the number of users in each location without any identifying information that was generated in August 2014. There do not appear to be any similar lists for purchases from WalkMe and Software Connection. That list did not include the location for all users, nor did it state the job description for each individual user. It does not appear the claimant has addressed why the taxable percentage of users changed from year to year other than the representation that the claimant recalculated its percentage. The invoices reflect a "Ship To" address of the claimant's offices in Dayton, Ohio.

Generally, excise taxes are imposed upon all retail sales made in Ohio (sales tax), in addition to any storage, use, or consumption in this state of any tangible personal property (use tax), unless the transaction is specifically exempted. R.C. 5739.02 and R.C. 5741.02. Exemptions from tax are strictly construed. *Satullo v. Wilkins*, 111 Ohio St.3d 399, 2006-Ohio-5856, 856 N.E.2d 954. In this case, the claimant requests a refund based on an exemption from sales tax for multiple points of use, which is defined by R.C. 5739.033. *Environmental Quality Management v. McClain*, BTA No. 2018-1194, 2019 WL 3889382, *2 (August 8, 2019). R.C. 5739.033 provides that the location of a sale for purposes of sales tax is sourced to the location where the consumer receives the property or the address for the consumer. *Id.* Generally, if a business consumer purchases a digital good, computer software, or a service available for use in more than one taxing jurisdiction, the business may report and pay the appropriate tax to each jurisdiction where concurrent use occurs. However, the claimant must provide sufficient evidence to justify the exemption. *Id.*

The claimant states that its objection is based upon a Final Determination issued by the Commissioner in 2006 without reference to what facts or law specifically apply to these transactions. The Commissioner finds *Environmental Quality Management v. McClain* is instructive in this matter. In 2019, the Board of Tax Appeals ("BTA") upheld the Commissioner's denial of a refund based upon a theory of multiple points of use for failing to provide documentary evidence. Specifically, the appellant in *Environmental Quality Management* failed to provide contracts and a list of users with respective job titles from the time of purchase and its "Ship To" address was in Ohio. *Id.* The BTA noted the evidence submitted was insufficient to warrant exemption and refund.

Here, the similar evidence submitted by the claimant is insufficient to warrant refund. While it did submit *some* more information than the appellant in *Environmental Quality Management,* the lack of key information noted by the BTA, as well as the shipping address point, is the same. The claimant requests refunds for three transactions with Salesforce. The claimant did not provide user lists for the first nor third license purchases with Salesforce. It solely provided information for the time of the second purchase. That list has some names and a general list of job titles that are not tied to any employee. Some names are not listed but instead referred to generally, such as "contractors." It also provided what it claims is a general list of numbers of users in various locations without any identifying information from August 2014. However, it did not provide its agreement with Salesforce. It did not provide user lists or full contracts for purchase from

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WalkMe and Software Connection. Finally, all invoices reflect shipping to the claimant's address in Dayton. The record is lacking to justify refund.

It is also unclear why a recalculation of user base attributable to Ohio would warrant full refunds of invoices. It is unclear why the claimant's initial calculation of the tax due was in error. Based on the record, the Tax Commissioner cannot conclude that any further refund is due. The Commissioner cannot say that the requested refund amounts here are justified with any certainty. The remaining objections are denied.

Accordingly, the refund claim is partially further allowed in the amount of $16,920.27 with statutory interest as provided at law.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date:
JUL 2 1 2021

T-Mobile Central LLC
12920 SE 38th Street
Newport 5, 7th Floor
Bellevue, WA 98006-1350

Re: Assessment No. 100000919064
Account No. 97-800413
Use Tax

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

Tax	Pre-Assessment Interest	Penalty	Total
$1,680,190.18	$233,439.11	$168,018.90	$2,081,648.19

This assessment is based on an audit of the petitioner's purchases for the period of January 1, 2012 to June 30, 2015. The petitioner is a mobile telecommunications provider that also provides internet service.

The Department conducted a re-audit of the petitioner's records which resulted in reduced tax liability. The petitioner did not dispute the recalculated tax.

Interest Abatement

The petitioner requests an abatement of post-assessment interest. The Tax Commissioner is without jurisdiction to reduce the statutory interest promulgated by the General Assembly under R.C. 5739.132. Therefore, this objection is denied.

Penalty Remission

The petitioner requests remission of the penalty in full. Based on the totality of the circumstances, full penalty remission is appropriate.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$459,195.20	$65,333.58	$0.00	$524,528.78

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Current records indicate that no payments have been applied on these assessments. However, due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Any unpaid balance bears post-assessment interest as provided by law, which is in addition to the above total.** Payments shall be made payable to "Ohio Treasurer". Any payment made within sixty days of the date of this final determination should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio 43216-1090.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 30 2021

Wal-Mart Stores East, LP
702 SW 8th St.
Mail Stop 0555
Bentonville, AR 72716

RE: Assessment No. 100000583350
Use Tax
Account No. 97-148398

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

Tax	Pre-Assessment Interest	Total
$1,627,471.15	$168,246.10	$1,795,717.25

The petitioner operates a chain of retail operations. The petitioner's operations include full-service supermarkets with baked goods, delis, pharmacies, optical centers, garden centers, one-hour photo processing labs, auto repair, and other amenities and alcove shops. This assessment is the result of a field audit of the petitioner's purchases and expenses from February 1, 2012 through January 31, 2015. The petitioner filed a petition for reassessment. A hearing was requested and held in this matter.

Background

The petitioner, doing business as Walmart, is an American multinational retail corporation that operates a chain of hypermarkets, discount department stores and grocery stores. As of 2014, the petitioner was the world's largest company by revenue, as well as the largest private employer in the world with 2.2 million employees. Audit Remarks, p. 2. During the audit of the taxpayer, the petitioner maintained 145 Ohio facilities. Audit Remarks, p. 4.

As an initial matter, an assessment is presumptively valid. *RKE Trucking Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, 787 N.E.2d 638. A taxpayer challenging an assessment has the burden to show in what manner and to what extent the Tax Commissioner's investigation and audit, and the findings and assessments based thereon, were faulty and incorrect. *Accel, Inc. v. Testa*, 152 Ohio St.3d 262, 2017-Ohio-8798, 95 N.E.3d 345, ¶ 14. This places an affirmative duty upon the petitioner to provide sufficient evidence to prove its objections. *Forest Hills Supermarket, Inc., d.b.a. Forest Hills Eagle v. Tracy*, BTA No. 97-J-1508, 1999 WL 195629 (Apr. 5, 1999), citing *Federated Dept. Stores, Inc. v. Lindley*, 5 Ohio St.3d 213, 450 N.E.2d 687 (1983).

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The Department conducted a statistical sampling audit as the petitioner had numerous purchases during the audit period. The Commissioner is authorized to issue an assessment based on a representative sample of purchases. R.C. 5741.13(A)(2). Accounts payable activity was narrowed down to a target population comprised of transactions from accounts with sales and use tax implications. The data was reviewed to screen anomalous transactions which would create sampling problems. The transactions were stratified by dollar amount using the cumulative square root of the frequency method. A sample list of random transactions was generated for each stratum except the top stratum (transactions above $10,000), which was comprehensively reviewed. The petitioner provided their available invoices, along with any available supporting documentation, for the resulting list of transactions. The tax deficient sum in each stratum was divided by the total dollar amount of sampled transactions in each stratum. This resulted in a percentage of error for each stratum. The percentage of error for each stratum was applied to the total target population dollars for that stratum. The auditor totaled the resulting estimated tax deficient amounts, plus the tax deficient amount from the comprehensively reviewed top stratum. The auditor then factored in results of examinations of certain other accounts excepted from the general statistical sample, such as fixed assets that would be reviewed on a comprehensive basis for the entire audit period. Credit was then given for use tax remitted during the audit period. This resulted in the petitioner's assessed tax liability.

The petitioner submitted an initial petition for reassessment dated February 20, 2017, merely contesting the pre-assessment interest associated with the assessment in the amount of $168,246.10. The petitioner submitted a supplemental petition for reassessment with various contentions regarding the taxability of transactions. However, the Department informed the petitioner during the initial denial that the petitioner failed to identify any transactions or provide any supporting documentation with its listing of boilerplate citations of Ohio Revised Code exceptions in its petition for reassessment.

The Department requested that the petitioner submit invoices and proof of payment of tax collected and remitted. The petitioner submitted a CD with invoices and an excel spreadsheet of contested transactions. The petitioner submitted a joint memorandum of contentions in support of a petition for reassessment requesting a reduction in the assessment and a refund request application; however, the petitioner did not submit matching transactions for both claims. Therefore, this Final Determination only addresses the petitioner's contentions and transactions that were applicable to the petition for reassessment.

After the Department requested additional information to support the petitioner's contentions, the petitioner submitted a spreadsheet of 275 contested transactions of alleged tax erroneously assessed in the amount of $44,084.11. However, the petitioner only provided invoices for 221 of the 275 transactions. The petitioner submitted a list of ten contentions for exemption. The petitioner contends that the Department erred in assessing tax on transactions that were exempt from sales and use tax. The petitioner contends that a reduction should be given for taxes paid and incorrectly calculated on exempt transactions. The petitioner's objections are addressed in detail below.

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Food Services

The petitioner contends that its purchases of tangible personal property used by a licensed food service operator were exempt under R.C. 5739.02(B)(27). The petitioner failed to identify exempt food services transactions in its petition for reassessment; however, during the hearing, the petitioner contended that it purchased exempt food service items such as slicers, ovens, and cleaning chemicals. The petitioner contends that its food service operation and manufacturing occur in its deli and bakery.

R.C. 5739.02(B)(27) provides a sales tax exemption to persons licensed to conduct a food service operation under R.C. 3717.43 of tangible personal property primarily used directly to prepare food for human consumption, preserve food for human consumption, and to clean tangible personal property used to prepare food for sale. This exemption does not apply to tangible personal property used to display food for selection by the consumer.

The Department requested that the petitioner submit invoices and additional information to support its contention. The petitioner failed to elaborate on this contention. Additionally, the petitioner failed to include any transactions in its claim pertaining to food service equipment or maintenance. The petitioner failed to identify any transactions in its appeal spreadsheet. The petitioner failed to provide any invoices to identify the exempt nature of the transactions. Since the petitioner did not identify any transactions that matched the petitioner's contention, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Further, the auditor already excluded nontaxable food processing equipment to produce sale of food during the audit. Audit Remarks, p. 13. Therefore, the objection is denied.

Manufacturing

The petitioner contends that the Department erroneously assessed tax on purchases of exempt equipment and materials used primarily in Ohio manufacturing operations and processing under R.C. 5739.02(B)(42)(a). The petitioner contends that its equipment and materials were used primarily in the manufacturing operation to produce tangible personal property for sale which are exempt from sales and use tax. The petitioner contends that its manufacturing equipment includes services and parts for a baler that was used to compact and bale corrugated boxes for resale. However, this contention is not explained, developed, or demonstrated with probative evidence.

R.C. 5739.02 levies an excise tax on any retail sale made in this state. A similar use tax is imposed by R.C. 5741.02 upon each consumer storing, using or consuming tangible personal property in Ohio. Laws relating to exemption from taxation are to be strictly construed against exemption. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). R.C. 5739.01(B)(1) defines "sale" as all transactions *by which title or possession*, or both, of tangible personal property *is transferred for a consideration in any manner*. (Emphasis added.)

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R.C. 5739.02(B)(42)(a) provides a sales tax exemption for sales where the purpose of the purchaser is to incorporate the thing transferred as a material or a part into tangible personal property to be *produced for sale* by manufacturing, assembling, processing, or refining. Further, R.C. 5739.02(B)(42)(g) provides a sales tax exemption for items used primarily in manufacturing. The manufacturing operation is defined, in relevant part, as the *process in which materials are changed, converted, or transformed into a different state or form* from which they previously existed. R.C. 5739.011(B)(2). The petitioner contends that parts, materials, and services used in the manufacturing operation, such as on exempt manufacturing equipment – the baler – are not taxable. Under R.C. 5739.01(B)(3)(a) and (b), repair and installation of tangible personal property subject to taxation is included in the definition of "sale" and "selling" and likewise subject to taxation. Therefore, the nature and usage of the equipment controls the taxability of any subsequent repairs or installations related to that property.

During the hearing, the petitioner contended that its manufacturing equipment concerned food service and food service equipment. The petitioner failed to elaborate on its manufacturing operation. Additionally, the petitioner submitted a spreadsheet of 275 contested transactions in its audit reduction spreadsheet, but only included invoices and support for 221 transactions. Most notably, the petitioner only provided four transactions in its spreadsheet under the exemption of manufacturing or cited as exempt under R.C. 5739.02(B)(42)(a). Additionally, the petitioner only included two invoices out of the four transactions cited as exempt under R.C. 5739.02(B)(42)(a).

The transactions were listed as services to and materials for a baler. The petitioner contends that the baler is exempt as qualified manufacturing equipment because it physically alters raw materials to produce a final good for sale. The descriptions listed on the invoices for Surface Cleaning, LC state that the transactions were for compactor cleaning. The invoices further describe the services as Compactor/Baler Preventative Cleaning and Maintenance. The auditor reviewed the invoices submitted with the petitioner's appeal and determined that the transactions at issue were taxable janitorial services under R.C. 5739.01(B)(3)(j).

R.C. 5739.01(B)(3)(j) includes in the definition of "sale" all transactions by which building maintenance and janitorial services are provided. "Building maintenance and janitorial service" means cleaning the interior or exterior of a building and any tangible personal property located therein or thereon, including any services incidental to such cleaning for which no separate charge is made. R.C. 5739.01(II).

The petitioner failed to provide any invoices as exempt services and materials for food processing equipment. The petitioner provided two invoices for cleaning and maintenance of a cardboard baler. The invoices provided by the petitioner emphasize that the services from Surfaces Cleaning, L.C. were merely for cleaning and maintenance services, and do not consist of repairs. Further, the petitioner failed to demonstrate how the baler was exempt as manufacturing equipment. The auditor noted during her review that balers for cardboard boxes are used to compress large amounts of carboard into a single cardboard baler which is easy to transport and reduces the cost of hauling the cardboard for recycling and disposal. A cardboard baler does not change, convert, or transform cardboard into a different state or form from which

it previously existed as required by R.C. 5739.011(B)(2). Therefore, the petitioner failed to demonstrate the baler was used in the manufacturing operation.

Alternatively, the petitioner contends that its corrugated and baled cardboard boxes are exempt under the resale exemption because it resells the boxes. R.C. 5739.01(E) requires items be resold in the same form as received to qualify as "resale," whereas R.C. 5739.011(B)(2) requires the items be changed, converted, or transformed to qualify as "manufacturing." The petitioner asserts conflicting objections as the resale exemption requires the cardboard boxes to remain in the same state for sale and the manufacturing exemption requires the cardboard boxes be transformed. More importantly, the petitioner failed to demonstrate that it resold baled, corrugated boxes as it did not provide evidence of a transfer of title or possession, or both for consideration to a purchaser as required by R.C. 5739.01(B)(1). Accordingly, the objection is denied.

The petitioner failed to provide any invoices to identify the exempt nature of the transactions. The Tax Commissioner cannot make decisions based on conjecture. Further, the auditor already excluded nontaxable food processing equipment to produce sale of food during the audit. Audit Remarks, p. 13. Therefore, the objection is denied.

Nontaxable Employee Expense Reimbursement

The petitioner contends that it was erroneously assessed tax on nontaxable transactions for employee expenses. The petitioner contends that office materials and dining expenses were assessed in error when sales tax was paid to the vendor on the transactions. During the hearing, the petitioner further stated it was erroneously assessed tax for nontaxable employee expense reimbursements. The Department requested that the petitioner provide more information regarding this contention such as employee names, the nature of the claimed reimbursements, and invoices. The petitioner submitted a spreadsheet of nine transactions listed as nontaxable employee expense reimbursements; however, the petitioner failed to provide any invoices for the transactions. Although the petitioner was given an opportunity to provide proof that its purchases qualified for exemption, no additional information was provided. Since the petitioner did not provide invoices, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Accordingly, the Department could not verify tax was assessed in error. The evidence submitted is insufficient to warrant a reduction in the assessment. Therefore, the objection is denied.

Nontaxable Services

The petitioner contends that the Department erroneously assessed tax on nontaxable services. The petitioner contends that it purchased exempt off-duty law enforcement services and assembly services. During the hearing, the petitioner contended that delivery charges, environmental services, and similar professional and personal services are exempt under R.C. 5739.01(B)(3) and (Y)(2). This contention was not explained, developed, or demonstrated with probative evidence. During the hearing, the Department requested that the petitioner identify the contested transactions and provide invoices to support its contentions.

The petitioner submitted a spreadsheet of 90 transactions contested as nontaxable services; however, the petitioner only provided invoices for 69 transactions contested as nontaxable services. The petitioner initially failed to identify which transactions qualify for exemption under these provisions. The citations included by the petitioner do not support its contention, as R.C. 5739.01(B)(3) refers to the general listing of transactions that result in a sale. Additionally, R.C. 5739.01(Y)(2) refers to the general listing of transactions that qualify as personal and professional services. The petitioner failed to provide any evidence such as invoices, contracts, and change or purchase orders for 21 transactions concerning non-enumerated services, therefore, the Department will not review transactions without proof of purchase because the exempt nature of the transactions cannot be determined.

The petitioner submitted 13 transactions for assembly services; however, the petitioner only provided ten invoices for assembly services from Bicycle One and East Coast Assemblers. The petitioner contends that assembly services are exempt because they are not enumerated as a taxable service under R.C. 5739.01(B). However, the auditor determined that the invoices for "assembly services" were for taxable repair services. R.C. 5739.01(B)(3)(a) includes in the definition of "sale" all transactions by which an item of tangible personal property is or is to be repaired, except property, the purchase of which would not be subject to the tax imposed by section 5739.02 of the Revised Code. Although the petitioner was given an opportunity to provide proof that the purchases in question qualified for exemption, no additional information was provided. Therefore, the objection is denied.

The petitioner contends that transactions from SureScripts are exempt services used to process prescription information. The petitioner submitted 14 invoices from SureScripts in which the petitioner contends are nontaxable services. However, the petitioner fails to elaborate on this contention. Further, the information provided by the petitioner confirms that SureScripts is a network provider used to transmit electronic prescriptions to pharmacies. The auditor reviewed the petitioner's support a second time after the petitioner requested reconsideration and determined that the invoices were taxable electronic information services. Electronic information services is defined in R.C. 5739.01(Y)(1)(c) as providing access to computer equipment by means of telecommunications equipment for the purpose of either: (1) examining or acquiring data stored in or accessible to the computer equipment; or (2) placing data into the computer equipment to be retrieved by designated recipients with access to the computer equipment. The petitioner's purchases meet the definition of electronic information services as it retrieves data in the form of prescriptions through telecommunications equipment. Further, the petitioner failed to provide any information to contest the auditor's determination that the transactions were electronic information services. Therefore, the objection is denied.

The petitioner contends that two invoices from Anconnect LLC are exempt as nontaxable services. The petitioner states that Anconnect LLC provides retail book distribution services which are not enumerated in R.C. 5739.01(B). However, R.C. 5739.01(H)(1)(a)(iv) provides that delivery charges are taxable as part of the purchase price. Additionally, the invoices provided include a line-item description of in-store services without further detail. The auditor determined that the invoices were marketing material kits shipped to Ohio and, therefore, taxable tangible

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personal property. R.C. 5739.01(B)(1). The petitioner failed to provide additional information to contest the auditor's determination. Therefore, this objection lacks merit.

The petitioner contends that 18 transactions are exempt as removal services which are not enumerated services under R.C. 5739.01(B). However, the petitioner only provided two invoices for the transactions from Custom Installation LLC and Fleetwash Inc. Based on the limited information provided by the petitioner, it is unclear that the transactions concerned nontaxable removal services. Since the petitioner did not provide further information regarding the transactions, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Therefore, 16 transactions from Rubicon Global LLC and Fleetwash Inc., were included in the assessment because the petitioner failed to provide invoices for the transactions.

The petitioner contends that Invoice 3884539 from Fleetwash Inc. is for exempt waste removal services. The auditor reviewed the petitioner's support a second time after the petitioner requested reconsideration and determined that the invoice was not waste removal services, but a business fixture for pump wash water for a car wash compactor. Alternatively, if the petitioner contracted for waste services, the petitioner does not elaborate on how the services were distinguishable from *Rumpke Container Service, Inc. v. Zaino*, 94 Ohio St.3d 304, 762 N.E.2d 995 (2002). The transportation of waste does not meet the requirements set out in R.C. 5739.01(Z) since waste is not "personal property belonging to others." *Rumpke Container Service, Inc. v. Zaino*. As provided in *Rumpke Container Service, Inc. v. Zaino*, even if the vendor had a permit or certificate within the meaning of R.C. 5739.01(Z)(1), it did not show that it was transporting personal property belonging to others for consideration. Therefore, this objection is denied.

The petitioner contends that Invoice 2006 from Custom Installation LLC is for exempt compactor removal services. The auditor reviewed the petitioner's support a second time after the petitioner requested reconsideration and determined that the invoice was not removal services but uninstalling a Compactor and installing a pad lock. Custom Installation LLC is a portable toilet supplier. R.C. 5739.01(B)(3)(a) provides that installation and repair of tangible personal property are taxable; therefore, this objection lacks merit.

The petitioner submitted nine invoices from Carolina Coupon Clearing Inc. The petitioner contends that the vendor provides exempt processing services for retailers' collected coupons. The petitioner contends that processing services are exempt because they are not enumerated in R.C. 5739.01(B). The petitioner failed to provide any additional information to support this contention as the invoices merely contained a description of "claims processing fees." The auditor reviewed the transactions a second time after the petitioner requested reconsideration and determined that the invoices were fees for taxable claims processing. The auditor determined the transactions are taxable under Ohio Adm.Code 5703-9-46 as data processing, computer services, and electronic information services. The petitioner failed to provide further support to contest the auditor's determination. Therefore, the objection is denied.

The petitioner contends that four transactions from Surface Cleaning LC are exempt as nontaxable services for compactor equipment cleaning services. The petitioner provided two

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invoices for cleaning and maintenance of a cardboard baler. The invoices provided by the petitioner emphasize that the services from Surfaces Cleaning, L.C. were merely for cleaning and maintenance services. The descriptions listed on the invoices for Surface Cleaning LC state that the transactions were for compactor cleaning. The invoices further describe the services as Compactor/Baler Preventative Cleaning and Maintenance. The auditor reviewed the invoices submitted with the petitioner's appeal and determined that the transactions at issue were taxable janitorial services under R.C. 5739.01(B)(3)(j). Therefore, the objection is denied.

The petitioner submitted sufficient information to warrant a reduction of tax assessed for exempt nontaxable services for 28 transactions for off-duty law enforcement services from Security Hut Inc., and exempt audit services from Kay Chemical Company for Invoice 1644175 and 1658128. Therefore, the objection is granted in part.

Packaging

The petitioner contends that the Department erroneously assessed tax on exempt packaging items that became an integral part of the finished product. The petitioner contends that shrink wrap, boxes, hot dog wrappers, pizza boxes, bags, clamshells, pallets, and similar materials are exempt packaging materials. The petitioner submitted four transactions from Sigma Supply of North America and two invoices from Sigma Stretch Corp., in its spreadsheet labeled as exempt under the reason of packaging.

During the hearing, the petitioner contended that its distribution center uses shrink wrap to wrap its pallets and boxes to package products. The petitioner contends that it sends its packaged products from its distribution center to its stores. During the hearing, the Department requested that the petitioner provide photos of the contested shrink-wrapped pallets and other packaging items.

Packaging as defined in R.C. 5739.02 means placing in a package. Packaging materials is not defined, but R.C. 5739.02(B)(15) includes a list of examples of packages, such as labels, bags, baskets, cartons, crates, boxes, cans, bottles, bindings, wrappings and parts for packages, and of machinery, equipment, and material for *use primarily in packaging* tangible personal property produced for sale. (Emphasis added). Ohio case law has further clarified the exemption of packaging. In *Custom Beverage Packers v. Kosydar*, 33 Ohio St.2d 68, 294 N.E.2d 672 (1973), the Court reviewed R.C. 5739.02(B)(15) and concluded that *packages* are enclosures or restraints which *restrain the movement of the object contained therein on more than one plane of direction.* (Emphasis added.)

The petitioner submitted two invoices from Sigma Stretch Corp. for shrink wrap that was taxed to its distribution center. However, the petitioner failed to provide sufficient information regarding the usage of the shrink wrap. The auditor noted that the wrap was simply wrapped horizontally around its products that were delivered to stores in Ohio. The petitioner failed to elaborate on the manner and extent in which it wraps its pallets with shrink wrap. Additionally, the petitioner failed to provide any evidence that the contested items restrain movement of its products. Ohio case law has clarified that unbound pallets are not "packages" within the meaning

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of R.C. 5739.02(B)(15) and, therefore, are not excepted from sales and use taxation. *Newfield Publications, Inc. v. Tracy*, 87 Ohio St.3d 150, 718 N.E.2d 420 (1999); *Cole Natl. Corp. v. Collins*, 46 Ohio St.2d 336, 338, 348 N.E.2d 708 (1976). The petitioner has not satisfied its burden to demonstrate error in the amount of tax paid regarding shrink wrapped pallets and other items.

The petitioner submitted sufficient information to warrant a reduction of tax assessed for exempt packaging for four transactions from Sigma Supply of North America. Therefore, the objection is granted in part.

Sale for Resale

The petitioner contends that tax was erroneously assessed on items purchased with the intent of reselling the items themselves or were purchased for the benefit of the customers while engaging in retail sales under R.C. 5739.01(E)(2). The petitioner contends that it purchased the following exempt items for resale: optical supplies such as nose pieces, screws, and hinges; photo paper, photo envelopes, and ink for use in its photo processing labs; motorized and other types of shopping carts; corrugated boxes that are baled, and consumables such as food services, cleaning materials, and packaging items identified above. The petitioner cites *Hilton Hotels Corp. d.b.a. The Netherland Hilton Hotel v. Bowers*, BTA No. 48023 (July 31, 1962) and *Hyatt Corp. v. Limbach*, 69 Ohio St.3d 537, 634 N.E.2d 995 (1994) in support of its contention. However, the petitioner failed to provide any further context on these cases. This contention is not explained, developed, or demonstrated with probative evidence.

R.C. 5739.01(E) excepts from the definition of retail sale the purchase of items by a consumer whose purpose is to *resell* the thing transferred or benefit of the service provided, by a person engaging in business, *in the form in which the same is, or is to be, received by the person.* (Emphasis added.) The Supreme Court of Ohio has consistently held that when the purchaser has put property to more than one use, the purchaser's primary use of the property controls the determination as to the property's taxability under R.C. 5739.01(E)(1). *Dresser Industries, Inc. v. Lindley*, 12 Ohio St. 3d 68, 465 N.E.2d 430 (1984).

The petitioner submitted a spreadsheet of 119 contested transactions identified as exempt under the resale exemption. During the hearing, the petitioner stated that Walmart accrued tax on its general ledger accounts. The petition for reassessment stated that Walmart purchases photo paper, photo envelopes, and ink used in photo processing labs. The petitioner contested tax assessed on optical supplies, motorized and other types of shopping carts; consumables, such as food services and cleaning materials. However, the petitioner failed to identify any transactions concerning the aforementioned list of items under the resale exemption. The petitioner merely submitted invoices for McKesson and Zephyr Solutions under the exemption of sale for resale. Although the petitioner was given an opportunity to provide proof that its purchases qualified for exemption, no additional information was provided. Since the petitioner did not provide invoices, the exempt nature of the transactions cannot be established. The Tax Commissioner cannot make decisions based on conjecture. Accordingly, the Department could not verify tax was assessed in error. Therefore, the objection is denied.

McKesson

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The petitioner submitted 116 invoices from McKesson. The petitioner contends that McKesson sells pharmacy labels, bottles, and caps used in the packaging of medication that is ultimately re-sold to the customer. The auditor reviewed the petitioner's support and determined that the invoices failed to provide sufficient information to determine exemption. The auditor noted that only an item stock UPC was present on the invoices and the auditor cannot determine what is being purchased. The petitioner merely provided a statement on what the vendor sells; however, the auditor noted that McKesson also sells displays and software that could be taxable. The petitioner failed to satisfy its burden to demonstrate exemption, as the invoices lacked sufficient information regarding the nature of the transactions. Accordingly, the objection is denied.

Cardboard Boxes

The petitioner contends that corrugated boxes are baled are resold; however, the petitioner failed to provide any invoices for the sale of corrugated or baled boxes. Therefore, the objection lacks merit. The petitioner failed to demonstrate that it resold baled, corrugated boxes as it did not provide evidence of a transfer of title or possession, or both for consideration to a purchaser as required by R.C. 5739.01(B)(1). Accordingly, the objection is denied.

Zephyr Solutions

The petitioner submitted three invoices from Zephyr Solutions. The petitioner contends that Zephyr sells helium that is used to inflate balloons for resale to customers and, therefore, the transactions are exempt under R.C. 5739.01(B) and *Hyatt Corp. v. Limbach*, 69 Ohio St. 3d 537 (1994). The petitioner provided sufficient information to warrant a reduction of tax assessed on the transactions. Therefore, the objection is granted in part.

Real Property Construction Services

The petitioner contends that the Department erroneously assessed tax on exempt real property transactions under R.C. 5739.01(B)(5) and Ohio Adm.Code 5703-9-14(D)(1). During the hearing, the petitioner contended that its purchases of HVAC repairs, electrical services, plumbing services, building repair, and similar transactions were exempt as real property construction services. Additionally, the petitioner contends that tax was erroneously assessed on exempt rent for mall settings with shared spaces, hallways, parking, and common areas among multiple tenants.

R.C. 5739.01(B)(5) excludes from the definition of "sale" tangible personal property incorporated into a structure or improvement and becoming a part of real property under R.C. 5739.03. Further, R.C. 5739.01(B)(5) states, in relevant part, that the construction contractor is the consumer of tangible personal property. Ohio Adm.Code 5703-9-14(D)(1) states, in relevant part, a construction contractor who purchases materials or taxable services for incorporation into real property is the consumer of those materials or services and shall pay sales or use tax on their purchase price, except as provided by paragraph (F) of this rule.

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R.C. 5701.02(C) defines a "fixture" as an item of tangible personal property that has *become permanently attached or affixed* to the land or to a building, structure, or improvement, *and that primarily benefits the realty and not the business*, if any, conducted by the occupant on the premises. (Emphasis added.) A "business fixture" is an item of tangible personal property that has become permanently attached or affixed to the land or to a building, structure, or improvement, and that primarily benefits the business conducted by the occupant on the premises and not the realty. R.C. 5701.03(B). However, even after affixed to land or a building, business fixtures retain their status as personal property. Ohio Adm.Code 5703-9-14(B). Therefore, unless a reason is provided to support an exemption, business fixtures are taxable tangible personal property. R.C. 5739.01(B)(1).

Most notably, if the tangible personal property at issue primarily benefits the business on the property it is a business fixture, not real property, and does not receive the R.C. 5739.01(B)(5) exemption. Ohio Adm.Code 5703-9-14(B); *Metamora Elevator Co. v. Fulton City Board of Education,* 143 Ohio St.3d 359, 364, 2015-Ohio-2807, 37 N.E.3d 1223; *Funtime, Inc. v. Wilkins*, 105 Ohio St.3d 74, 2004-Ohio-6890, 822 N.E.2d 781. Further, pursuant to R.C. 5739.01(B)(3)(a) and (b), repair and installation of tangible personal property subject to taxation is included in the definition of "sale" and "selling" and likewise subject to taxation. Therefore, the nature of the fixture or improvement controls the taxability of any subsequent repairs or installations related to that property.

The petitioner submitted a spreadsheet with 32 transactions contested as exempt real property; however, the petitioner only submitted 16 invoices labeled as exempt real property transactions. The Department only evaluated transactions with proof of purchase. Therefore, 16 transactions were denied because the petitioner failed to provide invoices for the transactions.

The petitioner contends that two transactions from Won-Door Corporation are exempt as real property for the installation of a dock door for the petitioner's distribution center. The petitioner states that the dock doors slide on a track that is bolted into the building and, therefore, is a real property contract service. The auditor reviewed invoices submitted with the petitioner's appeal and determined that the sliding fire doors were customized as all Won-Door FireGuard products are manufactured per application allowing for more freedom of design. Further, the auditor noted that the doors at issue were portable doors that can be moved, and the doors protect items within the facility. Therefore, the transactions for customized sliding fire doors are business fixtures because they primarily benefit the business.

The petitioner contends that Invoice 76590 from Registered Contractors Inc. is exempt as real property for stair repair. The auditor reviewed the invoice and determined the transaction was for a business fixture as the repairs were for pit steps in the automotive service department. The pit step repairs in the automotive service department primarily benefit the business. Therefore, the objection is denied as the transaction is a business fixture.

The petitioner submitted sufficient information to warrant a reduction of tax assessed for exempt real property for 13 transactions from Duff Plumbing, Quantum General Contractors Inc., Forjak Industrial, RCI Services Inc., Registered Contractors Inc., River Town Painting Company Inc.,

Severance SPE Leaseco LLC, and Steelyard Commons LLC. Therefore, the objection is granted in part.

Warehouse and Distribution Center

The petitioner contends that the Department erroneously assessed tax on exempt tangible personal property used in handling purchased sales inventory under R.C. 5739.02(B)(42)(j) and 5741.02(C)(2). However, this contention is not explained, developed, or demonstrated with probative evidence. Additionally, the petitioner failed to identify any transactions in its spreadsheet concerning the aforementioned Revised Code sections or warehousing exemption. Therefore, the objection is denied.

Tax Paid

The petitioner contends that the Department erroneously assessed tax on transactions on which the petitioner already paid and remitted tax. Further, the petitioner contends that it paid tax twice on multiple transactions because it remitted use tax to account for insufficient sales tax collection by its vendors. The Department requested that the petitioner provide invoices and evidence of tax twice remitted.

The petitioner submitted a spreadsheet with 19 transactions contested as tax paid to vendor or tax accrued; however, the petitioner only submitted 11 invoices. The Department only evaluated transactions with proof of tax payments. Therefore, eight transactions were denied because the petitioner failed to provide invoices for the transactions. Additionally, the petitioner provided eight invoices from A&M Cold Storage LLC; however, the petitioner failed to demonstrate it paid the entire sales tax amount for the transactions. Therefore, the auditor gave partial credit for sales tax paid on the transactions.

The petitioner submitted sufficient information to warrant a reduction of tax assessed for tax paid for three transactions from 101 Park Avenue Partners Inc. for Invoice 201400112014, and Fabick Power Systems for Invoice 8285. Invoice 201400112014 was twice listed and twice assessed. Therefore, the objection is granted in part.

Other Nontaxable Items and Issues

The petitioner contends that the Department erroneously assessed tax on transactions which are not subject to tax. The petitioner contends that it reserves the right to include additional nontaxable items as audit reductions. However, the petitioner failed to identify any additional transactions that are exempt. The Department provided the petitioner with an opportunity to submit additional information following the hearing; however, the petitioner failed to present any evidence to support its contentions. Therefore, the objection is denied.

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Pre-Assessment Interest

The petitioner contests the pre-assessment interest associated with the assessment. The Tax Commissioner lacks jurisdiction to abate pre-assessment interest added to an assessment pursuant to R.C. 5739.133. Therefore, this request cannot be allowed.

Accordingly, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Total
$1,303,161.97	$134,799.22	$1,437,961.19

Current records indicate that payments of $1,795,717.25 have been made resulting in a refund due of $357,756.06 plus applicable interest.

THIS IS THE TAX COMMISSIONER'S FINAL DETERMINATION WITH REGARD TO THIS MATTER. UPON EXPIRATION OF THE SIXTY (60) DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND THE FILE APPROPRIATELY CLOSED.

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

Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
30 E. Broad St., 22nd Floor • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 2 1 2021

BAE Systems Information and Electronic Systems Integration, Inc.
ATTN: Director of Tax
P.O. Box 868
NHQ1-669 / Tax
Nashua, NH 03061

Re: Assessment No. 100001013180
Commercial Activity Tax
Tax Period: July 1, 2014 through December 31, 2017

This is the final determination of the Tax Commissioner on a petition for reassessment filed pursuant to R.C. 5751.09 concerning the following commercial activity tax (CAT) assessment:

CAT	AMT	Preassessment Interest	Penalty	Total
$467,218.00	$0.00	$42,226.69	$70,082.67	$579,527.36

The Department assessed the petitioner for its quarterly CAT returns for the periods at issue because its taxable gross receipts did not reconcile to the Ohio portion of the state-by-state apportionment schedules. The petitioner timely filed a petition for reassessment and requests an abatement of the penalty assessed. The petitioner did not request a personal appearance hearing. Therefore, the matter shall be decided based upon the information available to the Tax Commissioner.

With regard to the abatement of the penalty, R.C. 5751.06(F) allows the Tax Commissioner to abate all or a portion of any penalty. Based upon the information available to the Tax Commissioner, including the petitioner's CAT compliance percentage during the audit period, CAT compliance history following the assessment, and the fact that the CAT, interest, and penalty assessed has been remitted in full, the penalty shall be abated in part.

Accordingly, the assessment is adjusted as follows:

CAT	AMT	Preassessment Interest	Penalty	Total
$467,218.00	$0.00	$42,226.69	$35,041.34	$544,486.03

Current records indicate that $579,527.36 has been paid on this assessment, as well as a credit of $23.22 applied to this assessment. Therefore, a refund of $35,064.55 plus interest is due to the petitioner.

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

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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner