Ohio | Department of Taxation
Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 8 2022

Adrien Industries Inc.
7023 Miami Ave
Madeira, OH 45243

Re: Contact ID No. 2856520167[1]
Commercial Activity Tax – 10/01/2017 – 12/31/2017

This is the final determination of the Tax Commissioner regarding the following commercial activity tax ("CAT") refund claim filed pursuant to R.C. 5751.08:

Tax Period	Refund Claimed
10/01/2017 – 12/31/2017	$6,305.17

Adrien Industries Inc. (the "claimant") filed a CAT refund claim with the Department requesting the amount paid towards a previously certified assessment. Because the amount was paid to the Office of the Ohio Attorney General ("OAG") on a certified assessment (Assessment No. 100000990741), the Department was unable to refund the amount and denied the refund claim. *See generally* R.C. 5751.08(A). The claimant objects to the Department's refund denial but did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

Department records show that the OAG refunded the claimant's overpayment at issue in this case on January 5, 2020. Thus, the refund the claimant seeks has already been granted.

Accordingly, the refund claim is dismissed as moot.

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

[1] The refund claim was also referred to by this number.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Ashland Scale Co., Inc.
2210 Rocky Lane
Ashland, OH 44805

Re: Refund Claim No. 2775010077[1]
Commercial Activity Tax - 10/01/2019 – 12/31/2019

This is the final determination of the Tax Commissioner regarding the following commercial activity tax refund claim filed pursuant to R.C. 5751.08:

Tax Period	Refund Claimed
10/01/2019 – 12/31/2019	$1,512.75

Ashland Scale Company, Inc. (the "claimant") filed its 4th quarter 2019 Ohio commercial activity tax ("CAT") return and remitted payment of $1,512.75. The claimant subsequently amended its 4th quarter 2019 return the same day the original was filed, stating it had miscalculated its taxable gross receipts, and remitted a second payment of $1,316.97 based on its amended CAT liability. The Department denied the claimant's refund because the claimant did not provide adequate documentation to support the changes reported on its amended return. However, the claimant has since provided documentation necessary for the Department to verify its amended CAT liability.

Accordingly, the claimant's refund is granted, plus applicable statutory interest.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[1] This refund was also referred to as Refund Claim No. 277501018561.

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1111000459

FINAL DETERMINATION

Date: JUL 20 2022

Bluestem Brands, Inc.
7075 Flying Cloud Dr.,
Eden Prairie, MN 55344

Re: Assessment No. 100001593380
Commercial Activity Tax: 01/01/2018 – 12/31/2019

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
$359,268.00	$17,236.69	$53,890.20	$430,394.89

The Department assessed Bluestem Brands, Inc. (the "petitioner") after conducting an audit of its CAT account for the tax periods in question.[1] The petitioner filed a petition for reassessment in response to the assessment but did not request a hearing. The petitioner objects to the assessment. Upon further review, the petitioner has presented sufficient evidence to support its contentions.

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.

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

[1] The Department records show the petitioner filed for bankruptcy on March 9, 2020.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Dakota Consulting Incorporated
1110 Bonifant St. Ste 310
Silver Spring, MD 20910-3358

Re: Assessment No.: 100001638279
Commercial Activity Tax – 01/01/2012 – 12/31/2019

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 assessment:

Tax	Interest	Penalty	Total
$84,070.00	$6,455.81	$6,305.24	$96,831.05

The Department of Taxation assessed the petitioner after performing a field audit for the periods at issue. The petitioner does not contest the tax or interest amounts assessed but requests abatement of the penalties. The petitioner has remitted the tax, interest, and penalty amounts assessed in this matter and has timely filed and remitted its CAT for the periods after the assessment. Thus, the evidence and circumstances support a full abatement of the penalty.

Accordingly, the assessment shall be adjusted as follows:

Tax	Interest	Penalty	Total
$84,070.00	$6,455.81	$0.00	$90,525.81

Current records indicate that a payment of $96,831.05 has been applied to this assessment, resulting in a refund of $6,305.24.

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

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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 2022

Freight Rite, Inc.
Attn: Brian Beerbower
527 Adams View Lane
Auburndale, FL 33823

Re: Multiple Refund Claims
Commercial Activity Tax – Multiple Periods

This is the final determination of the Tax Commissioner regarding the following commercial activity tax (CAT) refunds filed pursuant to R. C. 5751.08:

Reporting Period	Refund Claim Number	Refund Claimed
7/1/14 - 9/30/14	9505730795	$566.00
10/1/14 – 12/31/14	9505730121	$928.00
1/1/15 – 3/31/15	9505730149	$1,250.00
4/1/15 – 6/30/15	9505730414	$699.00
7/1/15 - 9/30/15	9505730735	$1,027.00
1/1/16 – 3/31/16	9505730004	$935.00
4/1/16 – 6/30/16	9505730157	$744.00
7/1/16 - 9/30/16	9505730651	$823.00
10/1/16 – 12/31/16	9505730876	$735.00
1/1/17 – 3/31/17	9505730373	$822.00
4/1/17 – 6/30/17	9505730103	$882.00
7/1/17 - 9/30/17	9505730577	$864.00
10/1/17 – 12/31/17	9505730235	$906.00
1/1/18 – 3/31/18	9505730773	$2,578.82
4/1/18 – 6/30/18	9505730781	$2,578.63

I. BACKGROUND

The claimant was a transporter and installer of appliances such as washers and dryers for both manufacturers and retailers to individuals' homes and commercial clients. It operated out of three locations: Dayton, Ohio, Toledo, Ohio and Florence, Kentucky; all three locations made deliveries both inside and outside Ohio. The claimant's assets were sold to a competitor in August 2020, and thus it ceased operations at that time.

The claimant filed refund applications for the periods at issue, contending it overpaid the Ohio CAT. Specifically, it contends the former chief financial officer paid CAT on all sales for these periods,

regardless of whether the delivery location was inside or outside of Ohio. The claimant also contends it was not in the business of providing transportation services, because it hired independent contractors to provide approximately 86% of the motor carrier services which it provided. Thus, it argues the proper situsing method for Ohio CAT should be delivery location (under R.C. 5751.033(E)) rather than mileage traveled (under R.C. 5751.033(G)). In short, the petitioner contends it should have reported taxable gross receipts for the periods at issue based upon the delivery location of each shipment.

The Department of Taxation reviewed these refund claims and denied them in full due to insufficient information. The claimant appealed the denial pursuant to R.C. 5703.70 and submitted documentation related to some of its refund claims. It also requested a hearing, which was held via telephone.

II. AUTHORITY AND ANALYSIS

A. AUTHORITY

R.C. 5751.08 provides that a taxpayer filing a CAT refund application "shall provide the amount of the requested refund along with the claimed reasons for, and documentation to support, the issuance of a refund." To that end, taxpayers must provide the Commissioner with evidence supporting their request for exclusions, refunds, and reductions to assessments; mere speculation is insufficient. *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.

It is also well established that taxpayers claiming a refund, 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). As such, exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. *See Natl. Tube Co. v. Glander* (1952), 157 Ohio St. 407, 409; *Beckwith & Assoc. v. Kosydar* (1977), 49 Ohio St.2d 277, 279, and *Canton Malleable Iron Co. v. Porterfield* (1972) 30 Ohio St.2d 163, 166. *See also Memorial Park Golf Club, Inc. v. Lawrence*, 2000 Ohio Tax LEXIS 471 (BTA No. 99-K-633). In determining whether the petitioner is entitled to the exclusion which it seeks, the facts must be determined under a strict, narrow reading of the relevant definitions.

R.C. 5751.033 contains the situsing provisions for Ohio's CAT. Specifically, R.C. 5751.033(E) situses sales of tangible personal property to Ohio:

> "[I]f the property is received in this state by the purchaser. In the case of delivery of tangible personal property by motor 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." Conversely, R.C. 5751.033(G) situses the sale of transportation services: "in proportion to the mileage traveled by the carrier during the tax period on roadways, waterways, airways, and railways in [Ohio] to the mileage traveled by the carrier during the tax period on roadways, waterways, airways, and railways everywhere."

Conversely, R.C. 5751.033(G) situses sales of transportation services by a motor carrier "in proportion to the mileage traveled by the carrier during the tax period on roadways, waterways, airways, and railways in [Ohio] to the mileage traveled by the carrier during the tax period on

roadways, waterways, airways, and railways everywhere."

B. ANALYSIS

The claimant prepared its refund claims by situsing its gross receipts using the delivery location of each shipment pursuant to R.C. 5751.033(E). However, as noted above, R.C. 5751.033(E) applies to situsing personal property sales, while R.C. 5751.033(G) applies to situsing sales of transportation services. The claimant's business is not the "sale of tangible personal property" as described in R.C. 5751.033(E), because the claimant is not selling appliances, but rather is transporting and installing appliances owned by unrelated entities. The claimant's business of transporting and installing appliances is described in R.C. 5751.033(G), which situses such transportation services based upon mileage traveled for each delivery. Even the claimant's own name "*Freight* Rite" implies its business is freight and not the sale of tangible personal property. Therefore, the claimant's refund claims, which are based on the delivery location of the shipments, rely on an inappropriate situsing method for a transportation company and thus are contrary to Ohio law. The proper situsing method for a transportation services company is mileage traveled in Ohio under R.C. 5751.033(G)

Even if the claimant's gross receipts should be sitused based upon delivery location, the refund claims still cannot be granted because the claimant failed to provide adequate documentation to support its claim. The claimant has submitted partial documentation for only 6 of the 15 refund claims. Additionally, of the summary spreadsheets submitted for these six quarters, only three quarters' worth of summary spreadsheets agree with the refund claimed. Furthermore, the details of the individual transactions do not agree with the summary spreadsheets for these quarters. As explained above, the taxpayer must provide concrete evidence supporting its request for refunds and exclusions. Without adequate documentation, the claimant fails to meet the refund requirements of R.C. 5751.08.

III. CONCLUSION

The claimant has failed to demonstrate that it is owed a CAT refund for the periods at issue. As explained above, its refund claims use the incorrect situsing method for a transportation services company. Further, even if its proposed situsing method was appropriate, it has not submitted sufficient documentation and computations substantiating the CAT refund amounts it claims.

Accordingly, the refund claims are denied.

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, THESE MATTERS WILL BE CONCLUDED AND THE FILES APPROPRIATELY CLOSED.

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/s/ Jeffrey A. McClain

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Tax Commissioner

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FINAL DETERMINATION

Date:

JUL 2 8 2022

HTH, LLC
257 West Ave.
Tallmadge, OH 44278

Re: Multiple Refund Claims
Commercial Activity Tax - Multiple Periods

This is the final determination of the Tax Commissioner regarding the following commercial activity tax ("CAT") refund claims filed pursuant to R.C. 5751.08:

Refund Claim No.	Tax Period	Refund Requested
6370731255	01/01/2016 - 12/31/2016	$1,473.96
6370731418	01/01/2018 - 03/31/2018	$1,525.00

HTH, LLC (the "claimant") filed amended returns and requested refunds for 2016 and the first quarter of 2018. After an initial review, the Department requested additional supporting documents. The claimant responded, but did not provide sufficient documentation to support the requested refunds. The Department denied the refund claims because it could not verify the amount of taxable gross receipts ("TGR") on the amended returns. In response to the denial, the claimant requested administrative review and provided additional documentation to support the refund claims. The claimant did not request a hearing; therefore, these matters are now decided based upon the evidence available to the commissioner.

The additional documentation provided with the petition supports the TGR reported on the amended filings for the periods in question.

Therefore, the claimant's contentions are well taken, and the refunds are granted plus applicable statutory interest.

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

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FINAL DETERMINATION

Date: JUL 2 8 2022

Land 'N Sea, Inc.
1375 Broadway
New York, NY 10018-7001

Re: Assessment No. 100001194507
Commercial Activity Tax- 07/01/2010 – 06/30/2017

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

Tax	Interest	Penalty	Total
$363,150.00	$59,499.32	$181,575.00	$604,224.32

I. BACKGROUND

Land 'N Sea, Inc. (the "petitioner") is headquartered in New York, New York and distributes women and children's apparel. The Department identified the petitioner had not registered for CAT, and following an audit, the Department issued the assessment here at issue. The petitioner filed a petition objecting to the assessment and requesting a hearing, which was conducted via telephone. The matter is now decided based on the evidence currently available to the Commissioner.

II. THE PETITIONER'S CONTENTIONS

The petitioner raises four objections. First, the petitioner contends its gross receipts are entitled to the exclusions under R.C. 5751.02(F)(2). Second, the petitioner claims its gross receipts should be calculated using the same method of accounting as it uses for federal income tax purposes. R.C. 5751.01(F)(4). Third, the petitioner contends approximately 97.5% of its sales to Dress Barn and 94.6% of its sales to Avenue Stores, LLC ("Avenue") should be sitused outside of Ohio pursuant to R.C. 5751.033(E). Fourth, the petitioner raises several constitutional claims. The petitioner also requests an abatement of the penalty assessed.

III. AUTHORITY & ANALYSIS

A. OHIO'S COMMERCIAL ACTIVITY TAX

The Ohio CAT is imposed on the privilege of doing business in Ohio and is measured by gross receipts. R.C. 5751.02(A). Division (F) of R.C. 5751.01 defines "gross receipts" 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 it realized, it must then "situs" those gross receipts to the appropriate location pursuant to R.C. 5751.033. If a gross receipt is situsedto Ohio pursuant to R.C. 5751.033, it is a "taxable gross receipt" subject to the CAT. R.C. 5751.01(G).

B. EXCLUSIONS FROM CAT

Only exclusions specifically delineated in chapter 5751. of the Revised Code are allowed when computing gross receipts; such exclusions are generally found in R.C. 5751.01(F)(2). In the present case, the petitioner *simply lists out* some of the exclusions in its petition without advancing any explanations or legal arguments on how the exclusions are applicable to the petitioner. Moreover, the petitioner failed to provide and present the Department with any credible evidence supporting its request for the exclusions or establish any right that it is entitled to any or all of them. *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; *see also Dayton Sash & Door Co. v. Glander*, 36 Ohio St.2d 120, 304, 304 N.E.2d 388 (1973). Since the petitioner has not provided any specific evidence or contentions related to any valid CAT exclusion, the petitioner's vague contention that it is entitled to some of the exclusions under R.C. 5751.01(F)(2) is not well-taken.

C. METHOD OF ACCOUNTING UNDER R.C. 5751.01(F)(4)

The petitioner next contends its gross receipts should be calculated the same as the petitioner's method of accounting for federal income tax purposes. The Department requested the petitioner's federal apportionment schedule, but the petitioner failed to provide it. Even in making this contention, the petitioner has not provided its federal information to show the exact inaccuracies with the assessment as opposed to its federal reporting. As such, the assessment is based on the best information available to the Commissioner. *See* R.C. 5703.36 and 5751.09(A). Thus, this contention is also not well-taken.

D. SITUS OF GROSS RECEIPTS FROM THE SALE OF TANGIBLE PERSONAL PROPERTY

The petitioner's primary contention relates to situsing gross receipts under R.C. 5751.033(E), which situses gross receipts from the sale of tangible personal property to Ohio:

> [I]f 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.

The petitioner contends that the Department can only situs a small fraction of its gross receipts to Ohio. The petitioner seems to arrive at this conclusion because approximately 97.5% of its sales to Dress Barn and 94.6% of its sales to Avenue are initially delivered to Ohio but subsequently are distributed to Dress Barn and Avenue's (its "customers'") retail locations outside of Ohio. According to the petitioner, those retail locations outside of Ohio are where its customers ultimately received the products; thus, related

receipts should not be sitused to Ohio under R.C. 5751.033(E). This contention is not well taken.

The petitioner's understanding of "ultimately received" is contrary to the statute and case law. Essentially, the petitioner suggests that a piece of property is not "received" by a person until it comes to permanent rest. The result of this interpretation is to suggest that property can be received by a purchaser in one location and then the same person can receive it again at another for purposes of the CAT. As such, the petitioner urges the Commissioner to situs its sales of this property not to the location where its customers received delivery of the property, i.e., the distribution centers in Ohio, but instead at the retail stores where its customers later sells the property.[1] The petitioner simply asserts that the property is somehow received by its customers again – from itself – when its customers move the property amongst their business locations. Because its customers later transported some of the property to locations outside Ohio, the petitioner argues that the property could not have been ultimately received by its customers in Ohio. This reading is contrary to the plain language of the statute, the relevant case law, and the overall purpose of the CAT. Additionally, the application of the petitioner's interpretation of the situsing statute would lead to absurd results that could not be the reasonably intended purpose of the law.[2]

The petitioner's interpretation of R.C. 5751.033(E) ignores the purpose of the CAT. The CAT is a privilege tax on persons engaging in commercial activities, or "doing business," in Ohio. The petitioner earns gross receipts by selling property to its customers, all of which were derived from the sales of property received by its customers in Ohio. Dress Barn and Avenue are the persons with whom the petitioner are "doing business" within the meaning of R.C. 5751.02(A) ("For the purposes of this chapter, **'doing business' means engaging in any activity** * * * that is conducted for, or results in, gain, profit, or income."). (Emphasis added.). The petitioner's "gain, profit, or income" results from the business it did with its customers – not from the business its customers did with its customers. The amount of CAT levied on a person is a reflection of that person's Ohio commercial activities, not its customers' Ohio commercial activities.

To that end, R.C. 5751.033(E) provides a means of measuring the exercise of a person's privilege in Ohio based on its sale of tangible personal property. Simply put, a person is doing business in Ohio when its sales of property are received by the purchaser in Ohio. The remaining parts of the statute provide clarity to that general rule in situations where *the sale giving rise to the gross receipts* involves delivery or transportation of the goods. The language of R.C. 5751.033(E) does not aim to account for subsequent transfers or shuffling of inventory by the customer after delivery or to shift tax away from a taxpayer's commercial activities in order to focus on the movement of products through its customer's business or the entire stream of commerce. Instead, Ohio's situsing provision aims to identify the location where a taxpayer is "doing business" by identifying where sales to its purchasers are considered complete.

Additionally, the petitioner focuses on *its customers' activities* after *its own sales* are complete. In this case, the petitioner's sales are complete when the property is received by its customers at the distribution centers in Ohio. All transportation envisioned by and related to the petitioner's sale is complete at this point. These are not mere waypoints on a longer journey from the petitioner to its purchasers. At the Ohio distribution centers, the property ceases to be freight in common carriage; the property is no longer in transit *between the petitioner and the purchasers* (i.e., Dress Barn and Avenue). Its customers are no

[1] Notably, there is an admission in this argument that the property is received by its customers in Ohio. The petitioner concedes in its petition that its customers store its products "temporarily" in the distribution centers located in Ohio before its customers ship the products to their own customers.

[2] Such readings would be contrary to the presumptions of statutes enacted by the Ohio General Assembly. *See* R.C. 1.47(C) and (D) ("A just and reasonable result * * * and [a] result feasible of execution is intended.")

longer awaiting the arrival of its purchases – they have arrived. As between the petitioner and its customers, the property's journey is complete; the delivery point evidenced by the petitioner's sales and shipping records has been reached. Dress Barn and Avenue's subsequent decisions regarding the property, including the decision to move their inventory in and out of Ohio, have no relevance to the petitioner's commercial activities or the application of R.C. 5751.033(E). Because the statute ends its inquiry with the receipt of the property by Dress Barn and Avenue, there is no need to explore what happens thereafter with respect to the *petitioner's* sale.

Regardless, the petitioner insists Ohio is not where its customers received the property from them. Instead, the petitioner believes that the Commissioner must look to where its customers ultimately use the property. Despite lacking any legal, practical, or economic nexus to the petitioner's sales activities, the petitioner believes that its business privilege is better measured not by where it is doing business with its customers, but rather where its customers are doing business with *their customers*. It does this by shifting the factual narrative, and therefore, the legal analysis, to two other focal points. First, the petitioner discusses the facts and circumstances of its customers. By focusing on its customers facts rather than its own, the petitioner seeks to attribute its customers activities to itself. Second, the petitioner attempts to shift the narrative away from *its commercial activities* in these transactions to instead focus on the *perspective of the goods*. The CAT, however, is an entity-level tax that is levied on persons for engaging in commercial activities; it is not a transactional tax on goods. By focusing instead on its customers' activities or the goods, themselves, the petitioner is attempting to introduce other non-Ohio locations into their facts and analyses. However, the petitioner sold its products to its customers who ultimately received these products in Ohio.

Additionally, the petitioner references several Ohio corporation franchise tax cases to support its argument that its customers' retail stores are the appropriate places to situs its taxable gross receipts. However, the petitioner's reliance on *Loral Corp v. Limbach*, BTA No. 85-B-914 (Feb 1988) and *House of Seagram v. Porterfield*, 27 Ohio St.2d 97, 271 N.E.2d 827, (1971) are misplaced.[3]

First, the specific facts on which *Loral Corp.* was decided are not analogous to those in this case. In *Loral Corp.,* Loral Corp's sales of tangible personal property ("TPP") were also subject to service contracts whereby Loral Corp. was responsible for installing and repairing the products onto the aircrafts at non-Ohio locations. Unlike *Loral Corp.,* in the present case, the petitioner only makes sales of TPP to its customers at the distribution centers in Ohio. Such sales are not subject to service contracts or any other agreement beyond the delivery of the products to the distribution center. Said another way, at the time the petitioner tendered its products, the petitioner only knew its products were destined for the distribution centers in Ohio; it had no future obligations with regard to the merchandise after delivery. Thus, the petitioner's reliance on *Loral Corp* is inapplicable and not well-taken. The petitioner also erroneously concluded that *House of Seagram* supports its situsing position. In its petition, the petitioner relies on the Board of Tax Appeals' decision in *House of Seagram*; however, this BTA decision was reversed by the Ohio Supreme Court. Ultimately the Court held the "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 busines done in Ohio." *House of Seagram, Inc. v. Porterfield,* 27 Ohio St.2d 97, 271 N.E.2d 827 (1971). Therefore, the petitioner's legal dependence on this reversed BTA decision for its legal premise and conclusion is unwarranted and inapplicable.

The petitioner also cites *Greenscapes Home and Garden Products, Inc. v. Testa* to support its argument

[3] It is worth noting that *Loral Corp.* and *House of Seagram* were each decided more than 30 years ago and involved Ohio's now-repealed corporation franchise tax.

that its customers' retail stores are the appropriate place to situs their taxable gross receipts. However, the petitioner's application of *Greenscapes* to its own set of facts is misconstrued. The Tenth District Court of Appeals affirmed the BTA's decision and agreed that the location where the property was ultimately received after all transportation is completed controls where the sales are sitused. *Greenscapes Home and Garden Products, Inc. v. Testa*, 10th Dist. Franklin No. 17AP-593, 2019-Ohio-384. However, Greenscapes' shipping documents and invoices indicated that the goods were shipped to warehouses in Ohio. *Id.* at ¶ 2. The court, like the Board, disagreed with Greenscapes in holding that "R.C. 5751.033(E) provides that the situs of the gross receipts from the sale of tangible personal property is the place at which such property is ultimately received after all transportation has been completed. In this case, the evidence established that [the] place is Ohio." *Id.* at ¶ 27.

In the present case, Land 'N Sea's CEO conceded during the hearing that the bills of lading and shipping invoices demonstrated the petitioner's products *were destined for the distribution centers in Ohio*. This is again an admission that its products were received by its customers in Ohio. The Department requested the bills of lading and shipping invoices; however, after multiple continuances and extensions of time, the representative stated "[W]e don't have any additional documentation to provide at this time." Thus, the Commissioner finds, as the Tenth District Court of Appeals found in *Greenscapes*, that, regardless of where title passed and the other terms of the sales, the purchased products were delivered to Ohio. The petitioner knew its products were destined for Ohio at the time the orders were placed. Accordingly, the Department's application of the situsing statute to the petitioner's gross receipts is proper and was done in a manner consistent with the relevant statutes and case law.

E. Constitutional Arguments

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 the Tax Commissioner's application of state tax law 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 (1982). Since the petitioner's objections are constitutional in nature, the Commissioner cannot make a determination on those challenges.

IV. Penalty Abatement

Finally, the petitioner seeks penalty abatement. The Department assessed an underpayment penalty pursuant to R.C. 5751.06(B)(1). The 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 penalty.

V. Conclusion

Based on the analysis above, the petitioner's CAT exclusions, method of accounting, and situsing contentions are not well taken. The evidence available to the Commissioner shows the petitioner sold its products that were ultimately received by its customers in Ohio. However, a partial abatement of the assessed penalty is warranted.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$363,150.00	$59,499.32	$127,102.50	$549,751.82

Current records indicate 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, P.O. 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
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 8 2022

Mattress Holding Corporation
ATTN: Kamal Adeni, Tax Director
10201 S. Main Street
Houston, TX 77025

Re: Assessment No. 100001328508
Commercial Activity Tax: 04/01/2015 – 09/30/2018

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
$51,546.00	$2,978.56	$0.00	$54,524.56

I. BACKGROUND

Mattress Holding Corporation, the petitioner in this appeal, owns Mattress Firm, Inc.,[1] a retail mattress and bedding chain headquartered in Houston, Texas. The majority of the Mattress Firm retail stores are corporate owned, but there are also franchise stores. Effective September 17, 2016, Stripes US Holding, Inc. became the owner of Mattress Firm Holding Corp. Stripes US Holding, Inc. is a wholly owned subsidiary of Steinhoff International Holdings, N.V., a South African international retail holding company. All subsidiaries of Steinhoff operate within the bedding and mattress industry.

The Department audited the petitioner after determining the petitioner's receipts on its sales tax returns exceeded taxable gross receipts reported on its CAT returns. Further, certain consolidated members that should have filed as part of the consolidated CAT returns were not included in these returns. Upon audit, the Department determined certain amounts received as vendor incentives or reimbursement of expenses meet the definition of taxable gross receipts and are situsable to Ohio pursuant to R.C. 5751.033(I). The petitioner objects to the assessment; specifically, it contends that certain gross receipts included in the assessment are excludable as cash discounts and/or returns and allowances. The petitioner did not request a hearing; therefore, this matter is decided based upon the information currently available to the Commissioner.

II. AUTHORITY

The CAT is imposed on the privilege of doing business in Ohio and is measured by gross receipts. 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,

[1] On October 10, 2018, Mattress Firm and its affiliates filed for Chapter 11 bankruptcy. It emerged from bankruptcy shortly thereafter.

the full identifiable value of a transaction is generally a gross receipt, absent a specified statutory exclusion.

While most amounts realized by taxpayers are gross receipts, the CAT does exclude certain amounts from the tax base. For example, R.C. 5751.01(F)(2)(bb) states that "gross receipts" exclude "[c]ash discounts allowed and taken." Former Ohio Adm.Code 5703-29-14(A)(1) and (2)(a)-(c), applicable to the periods at issue, provided that cash discounts:

> [I]nclude 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.

On June 20, 2019, Ohio Adm.Code 5703-29-14 was revised to state that cash discounts include "Unilateral or negotiated price adjustments that are not based on, or do not require, the provision of anything of material value on the part of the purchaser as consideration for the price adjustment."

Taxpayers claiming 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; exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. *See Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 409 (1952); *Beckwith & Assoc. v. Kosydar*, 49 Ohio St.2d 277, 279 (1977), and *Canton Malleable Iron Co. v. Porterfield* (1972) 30 Ohio St.2d 163, 166. *See also Memorial Park Golf Club, Inc. v. Lawrence*, 2000 Ohio Tax LEXIS 471 (BTA No. 99-K-633). 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, a taxpayer must provide the Tax Commissioner with credible evidence supporting its request for exclusions and refunds; mere speculation is insufficient. *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.

III. ANALYSIS

A. COST OF GOODS SOLD -CONTRA ACCOUNTS

The Department reviewed cost of goods sold ("COGS") contra expense accounts that were excluded from the CAT returns for the audit period. The Department reclassified COGS contra expense accounts as gross receipts under R.C. 5751.01(F). The petitioner contends that these contra expense accounts are treated as reductions in COGS for federal tax purposes, and thus are not taxable gross receipts.

However, the petitioner receives these discounts in the form of payments from bedding manufacturers; thus they are an "amount realized by a person" that "contributes to the production of gross income of the person"- i.e., a gross receipt. *See* R.C. 5751.01(F). These contra expense accounts, which reduce the expense incurred, "contribute to the production of gross income of the person" under R.C. 5751.01(F). Further, these contra expense account payments received do not qualify as cash discounts

under former Ohio Adm.Code 5703-29-14(A)(1) and (2)(a)-(c). This rule allowed an exclusion for cash discounts related to incentive-based rebates for making timely payments or for reaching certain purchase volume thresholds. Here, the petitioner has not shown that the payments at issue were received for either of these reasons. As such, this contention is not well taken.

B. CO-OP PRODUCTS RECEIPTS

The petitioner contends certain "Co-Op Products Receipts" qualify for the cash discount exclusion, arguing that these "funds are accrued based on Petitioner's purchase volume". The applicable merchandising plan agreement provides that the petitioner will receive a co-op funds payment from the manufacturer of 15% of the petitioner's purchases of certain mattresses and flat foundations each calendar month, and 19% of purchases of certain branded mattresses and foundations each calendar month.

First, the petitioner has not provided adequate documentation or explanation to show how the Co-Op Products Receipts qualify for the cash discount exclusion; it simply concludes that the exclusion applies. As explained above, it is well-established that exclusions and exemptions from taxation are strictly construed in favor of the taxing authorities and thus taxpayers claiming exemption or exclusion from taxation must affirmatively establish their right thereto. Without sufficient documentation or explanation to support its conclusion, the Commissioner cannot allow the exclusion sought.

Additionally, for a receipt to be excluded under the purchase volume aspect of the cash discount rule, the discount must be based upon reaching a certain purchase volume threshold. *See* former Ohio Adm.Code 5703-29-14(A) (applicable to the periods at issue). In this case, the discount is not based upon the petitioner making a certain volume of purchases, but rather is just a straight 15% of some purchases and 19% of other purchases. Put another way, the discount is available no matter how much is purchased, and thus does not qualify for the purchase volume discount. Thus, this contention is not well taken.

C. RETURNS ALLOWANCES ACCOUNT

The petitioner contends that receipts that it receives from a manufacturer as a returns allowance should be excluded from being taxable gross receipts pursuant to the returns and allowance exclusion of R.C. 5751.01(F)(2)(cc). This contention is well taken. The assessment shall be reduced to reflect this adjustment.

D. COST OF GOODS SOLD -CONTRA ACCOUNTS FOR PRODUCTS RECEIPTS, CREDIT MEMO TRUEUP, INVENTORY ABSORPTION, AND OTHER ACTIVITY

The petitioner contends that discounts it receives for products receipts, credit memo true-ups, inventory absorption, and other activities are based on it making a certain volume of purchases. The petitioner initially described these receipts as vendor incentives during the audit. However, after the Department denied the exclusion related to these receipts as a regular vendor incentive (which the petitioner earned by providing something of value to the manufacturers), the petitioner changed its description from vendor incentives to volume-based rebates without any explanation or evidence to support the change. Regardless, in order to qualify for the incentive-based volume purchases discount under former Ohio Adm.Code 5703-29-14(A), there is a requirement that a certain volume threshold of purchases be reached. The petitioner has not shown that these five types of COGS contra account

payments are based upon reaching certain purchase volume thresholds. Additionally, from the descriptions originally provided and the petitioner's merchandising plan agreement, there is no evidence that any of the types of receipts at issue fit within the cash discount exclusion. The petitioner has failed to submit evidence that these accounts qualify for any CAT exclusion. Therefore, this contention is denied.

E. FLOOR SAMPLE COGS DISCOUNT AND PURCHASES FOR NEW STORES COGS DISCOUNT

The petitioner contends that payments it receives from a bedding manufacturer for purchasing bedding to be used as floor samples in its stores and for purchasing products for new retail store locations should be excludable as a cash discount under Ohio Adm.Code 5703-29-14.[1]

The petitioner has not shown how the floor samples and new store purchases qualify under the former version of Ohio Adm.Code 5703-29-14, applicable to the periods at issue. Further, even if the current version of Ohio Adm.Code 5703-29-14 were applicable for these tax periods, these items would still not qualify for the cash discounts exclusion. The most recent version allows a cash discount for "[u]nilateral or negotiated price adjustments that are not based on, or do not require, the provision of anything of material value on the part of the purchaser as consideration for the price adjustment."

However, the petitioner is doing something of value to obtain these discounts. It is either buying bedding to be used as floor samples, which helps the bedding manufacturer market its products to buyers looking at the petitioner's floor models, or is buying bedding to be sold in new retail stores, which helps the bedding manufacturer market its products to a broader marketplace and in new geographic locations. As the petitioner is doing something "of material value" for the manufacturer in both instances, such payments the petitioner receives would not qualify for exclusion as a cash discount under either version of Ohio Adm.Code 5703-29-14. As such, this contention is not well taken.

IV. CONCLUSION

As explained above, most of the petitioner's contentions are denied. Its contention regarding returns and allowances is granted.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$48,923.00	$2,838.72	$0.00	$51,761.72

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 sixty days of the date of this final determination should be forwarded to: Department of Taxation Compliance Division, P.O. Box 16158, Columbus, OH 43216-6158.

[1] The petitioner relies on the latest version of Ohio Adm.Code 5703-29-14. However, the prior version of the rule, which was in effect during the audited reporting periods, governs the assessed tax periods.

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
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date:

JUL 2 8 2022

Ortho Clinical Diagnostics Inc.
1601 Trapelo Road, STE 216
Waltham, MA 02451-7333

Re: Assessment No. 100001729998
Commercial Activity Tax: 01/01/2017 – 12/31/2018

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

Tax	Interest	Penalties	Total
$31,822.00	$3,880.33	$4,773.29	$40,475.62

The Department of Taxation assessed the petitioner after an audit identified the petitioner failed to include and report all its taxable gross receipts pursuant to R.C. 5751.01(F)-(G) and R.C. 5751.033(E). In response to the assessment, the petitioner filed a petition for reassessment; it does not contest the tax and interest amount assessed but requests abatement of the penalties. R.C. 5751.06(F) allows the Commissioner to abate penalties. The evidence and circumstances in this matter support a full abatement of the penalty.

Accordingly, the assessment shall be adjusted as follows:

Tax	Interest[1]	Penalties	Total
$31,822.00	$4,100.76	$0.00	$35,922.76

Current records indicate that payments totaling $35,926.91 have been applied to this assessment, resulting in a refund of $4.15. Due to payment processing and posting time lags, payments may have been made that are not reflected in this final determination. **Post-assessment interest will be added to the assessments as provided by law.** Payments shall be made payable to "Ohio Treasurer" Payments should be forwarded to: Department of Taxation, Compliance Division, P.O. Box 1090, Columbus, Ohio, 43216-109

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

[1] This amount includes post assessment interest pursuant to R.C. 5751.09(B)(3) through the date of payment.

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd. • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 8 2022

Towing Electrical Systems Inc.
4200 W. Middletown Rd.
Canfield, OH 44406

Re: Assessment No. 100000962784
Commercial Activity Tax - 01/01/2013 – 12/31/2016

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

Tax	Interest	Penalty	Total
$35,079.00	$3,561.00	$5,262.00	$43,902.00

I. BACKGROUND

Towing Electrical Systems, Inc. ("Towing Electrical" or the "petitioner") is an Ohio-based reseller of electrical components and accessories for use in various towing applications.[1] The Department assessed the petitioner after performing an audit for the periods at issue. In particular, the Department identified that Towing Electrical should have been registered as a combined taxpayer group pursuant to R.C. 5751.012(A).[2] Second, the Department determined the petitioner had unreported taxable gross receipts for sales from Protek Automotive to the Towing Electrical that should have been sitused to Ohio under R.C. 5751.033(E). Third, the Department found the petitioner had unreported taxable gross receipts from the rental of real property that should have been sitused to Ohio per R.C. 5751.033(A).

The petitioner objected to the assessment and requested a hearing, which was conducted in accordance with the petitioner's request. The petitioner disagrees that sales from Protek to Towing Electrical should be sistued to Ohio per R.C. 5751.033(E).[3] The petitioner contends that most of its transactions with Protek should be sistued outside Ohio due to its drop shipment or resale relationship. This matter is now decided based upon the evidence currently available to the Commissioner and the evidence supplied with the petition.

[1] On March 31, 2016, the petitioner's assets were sold to Curt Manufacturing and it is no longer operating.
[2] The common owner, Donald Thomas, had a greater than 50% interest in AJ 32 LLC, Donald Thomas LLC, PGI 2, Protek Automotive, and Towing Electrical. Protek Automotive ("Protek") was based in the Philippines; however, the Department determined sales from Protek to the petitioner were greater than $500,000, and thus Protek had bright-line presence and nexus with Ohio pursuant to R.C. 5751.01(H) and (I). Protek was 100% owned by Mr. Thomas.
[3] The petitioner concedes that the combined taxpayer filing group status pursuant R.C. 5751.012(A) and the increase in taxable gross receipts related to the rental of real property

II. AUTHORITY

A. COMBINED FILING STATUS

All taxpayers having substantial nexus with Ohio and more than 50% common ownership with other entities are required to file Ohio CAT returns as a combined taxpayer, unless an election to file as a consolidated group is made. R.C. 5751.012(A).[4] Combined taxpayer groups may not exclude receipts between members of the group; however, such groups need only include in the group those members that have nexus with Ohio. R.C. 5751.012(B).

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

R. C. 5751.01(G) indicates that "taxable gross receipts" means gross receipts sitused to Ohio under R.C. 5751.033. Specifically, R.C. 5751.033(E) situses gross receipts from the sale of tangible personal property to Ohio:

> [I]f 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.

Mia Shoes, Inc. v. McClain, involved a manufacturer and wholesaler of footwear. *Id.,* BTA No. 2016-282, 2019 WL 4013504 (Aug. 8, 2019). Some of Mia Shoes' sales were to customers that owned or used distribution centers within Ohio. *Id.* at 1. The Department assessed CAT on Mia Shoe's gross receipts from sales that were shipped to Ohio distribution centers. *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.* Mia also argued that although the purchasers *initially* receive their purchases in Ohio, they *ultimately* received them at their respective retail locations. 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. *Id.* at 3. The Board of Tax Appeals ("BTA"), 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.*

[4] The petitioner does not contend, and Department records do not indicate, that Towing Electrical made a consolidated election.

Additionally, the Tenth District Court of Appeals has found that the location where the property was ultimately received after all transportation has been completed controls where the sales are sitused under R.C. 5751.033(E). *Greenscapes Home and Garden Products, Inc. v. Testa*, 2019-Ohio-384 at ¶ 27 (February 17, 2019). The Tenth District's decision affirmed a previous BTA ruling on the same situsing issue. *Greenscapes Home and Garden Products, Inc. v. Testa*, BTA No. 2016-350 (July 19, 2017).

III. ANALYSIS

The petitioner contends that it purchased products from Protek Automotive specifically for resale or drop shipment purposes and, thus, most of the products should not be sitused to Ohio. However, items for resale are not excluded from the calculation of gross receipts. The term "purchaser," as used in R.C. 5751.033(E), refers to the buyer in each and every sale. Thus, the situs of gross receipts from the sale of tangible personal property, for CAT purposes, is not contingent on the location of the ultimate purchaser. Rather, the situs depends on where the purchaser, in any given sale, ultimately receives the property. Accordingly, the petitioner does not have to sell its product to the "end user" or ultimate purchaser for it to be subject to the CAT. Here, Protek is a Philippines-based single supplier manufacturer to Towing Electrical. Protek sells products to Towing Electrical, which are shipped to the petitioner's location in Ohio as evidenced by sample invoices for the periods at issue. Thereafter, Towing Electrical resells the products. Thus, the sales should be sitused to the Protek's customer's location (i.e., the petitioner's location) not to the locations of the petitioner's customers. Since the petitioner and Protek are members of a combined taxpayer group pursuant to R.C. 5751.012(A), all receipts between entities are subject to the CAT.

The petitioner also contends that it purchased products from Protek specifically for drop shipment purposes. The petitioner states it provided Protek with a valid tax exemption certificate indicating that the purchases it made from Protek were exempt from Ohio sales tax due to their drop shipment or resale relationship. The petitioner states that when it receives an order from customers outside Ohio, it places a corresponding order with Protek. Protek then fulfills the order and ships the products to the petitioner in Ohio. After receiving the products, the petitioner then ships them to its customer (who is located outside Ohio).

First, a sales and use tax exemption certificate does not apply to Ohio's CAT. The CAT is not a sales tax; instead, it is imposed on the privilege of doing business in Ohio on persons receiving gross receipts. R.C. 5751.02(A). Nothing in chapters 5739 (Ohio sales tax), 5741 (Ohio use tax), or 5751 (the Ohio CAT) of the Revised Code allows for a sales tax exemption certificate to apply to the Ohio CAT. Thus, the purchases between the petitioner and Protek are not exempt from Ohio CAT even if they are exempt from Ohio sales tax.

Second, the petitioner relies on the portion of R.C. 5751.033(E) (cited above) relating to "direct delivery" to support its drop shipment contention. However, the direct delivery portion of R.C. 5751.033(E) pertains only to sales involving the direct delivery of tangible personal property, i.e., situations where tangible personal property is directly delivered from the seller (either via its own trucks or via a third party) to the purchaser's designee. Put another way, whenever there is a direct delivery from the seller to the purchaser's designee, the gross receipts from the sale of tangible personal property must be sitused to the location where the purchaser's designee receives the tangible

personal property. Here, the petitioner has not provided information sufficient to demonstrate the sales of its property are direct deliveries, direct shipments, or drop shipments as contemplated in R.C. 5751.033(E). Rather, the invoices provided show the products were from Protek to Towing Electrical and ultimately destined for Ohio. Like the taxpayers in *Greenscapes* and *Mia Shoes*, the petitioner's own records show the products were ultimately received in Ohio. *See Greenscapes*, 2019-Ohio-384 and *Mia Shoes*, BTA No. 2016-282. Protek sells products to the petitioner, which are shipped to the petitioner's location in Ohio. Thereafter, the petitioner *resells* and ships the products to its customers in a second transaction. Protek is in no way involved in the second transaction, nor does it know the identity of such customer at the time of sale or delivery to the petitioner. Thus, the petitioner's contention that its sales of its property involve direct delivery or drop shipment is not well taken.

The petitioner finally contends the sitused Ohio sales are de minimis on an annual basis, falling well below the $150,000 statutory threshold to file and register for the CAT. The petitioner provided spreadsheets and sample invoices showing products sold and shipped from Protek Automotive to Towing Electrical for the period at issue. Based on the information submitted by the petitioner, Protek sold and shipped goods greater than $500,000 for each calendar year at issue to Towing Electrical; this creates bright-line presence and nexus per R.C. 5751.01(H) and (I). As stated above, the sales are also situsable to Ohio per R.C. 5751.033(E) as they were received by the purchaser, Towing Electrical, in Ohio. Thus, the petitioner's contention that it did not have Ohio taxable gross receipts of $150,000 or more for each of the periods at issue is not well taken.

IV. Penalty Abatement

The 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 abatement of the penalty.

V. Conclusion

The evidence currently available to the Commissioner reflects that Protek sold property which was ultimately received in Ohio. Since the petitioner and Protek are members of a combined taxpayer group, all receipts between entities are subject to the CAT. As such, the amount assessed has been prepared with the best available information and is accurate. *See* R.C. 5751.09. However, the petitioner is entitled to a partial penalty abatement.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$35,079.00	$3,561.00	$2,631.00	$41,271.00

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 payment 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-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
4485 Northland Ridge Blvd. • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 8 2022

United Aggregates, Inc.
P.O. Box 750
Mt. Vernon, OH 43050

Re: Assessment No. 100000950970
Commercial Activity Tax - 04/01/2014 – 09/30/2017

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

Tax	Interest	Penalty	Total
$15,600.00	$1,162.00	$2,340.00	$19,102.00

I. BACKGROUND

United Aggregates, Inc. ("United Aggregates" or the "petitioner") is located in Ohio and provides a wide variety of asphalt, construction, and landscape materials. The petitioner is registered as an 80% consolidated elected taxpayer group. The petitioner and D.H. Bowman & Sons are owned 100% by United Precast, Inc. The Ellis family owns and operates a related entity, CTS Inc. (hereinafter "CTS") that provides hauling and transportation services for Ellis family entities.

The Department assessed the petitioner after performing an audit for the periods at issue. Specifically, the Department found that the petitioner's Ohio sales tax receipts exceeded its CAT taxable gross receipts. Thus, the Department determined the petitioner had unreported taxable gross receipts from hauling material that should have been sitused to Ohio in accordance with R.C. 5751.033(E) and (I).

The petitioner objected to the assessment and requested a hearing. The hearing was conducted, and this matter is now decided based upon the evidence currently available to the Commissioner and the evidence supplied with the petition.

II. PETITIONER'S CONTENTIONS

The petitioner contends the Department did not properly apply the definition of gross receipts for the periods at issue. The petitioner also contends that it acts as an agent of CTS, and therefore any receipts from hauling material should be excluded from its gross receipts. Finally, the petitioner contends it was inequitable for the Department to close the audit and then reopen it the next day.

III. AUTHORITY

A. OHIO'S COMMERCIAL ACTIVITY TAX

The Ohio CAT is imposed on the privilege of doing business in Ohio and is measured by gross receipts. R.C. 5751.02(A). Division (F) of R.C. 5751.01 defines "gross receipts" 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.

B. THE AGENCY EXCLUSION UNDER R.C. 5751.01(F)(2)(1)

There is a limited list of expressed, statutory exclusions from the CAT. One such exclusion, referred to as the "agency exclusion" provides that "[p]roperty, money, and other amounts received or acquired by an agent on behalf of another in excess of the agent's commission, fee, or other remuneration" are excluded from the definition of "gross receipts." R.C. 5751.01(F)(2)(I). An "[a]gent" is "a person authorized by another person to act on its behalf to undertake a transaction for the other," and includes "[a] person retaining only a commission from a transaction with the other proceeds from the transaction being remitted to another person," R.C. 5751.01(P). "In determining whether an agency relationship exits, the facts must be determined under a strict, narrow reading of the definition. Absent proof of an agency relationship, the entire gross receipt must be reported by the person receiving the gross receipt for purposes of the [CAT]." Ohio Adm.Code 5703-29-13(B)(l). Additionally, with respect to an agency relationship created by contractual terms, "*the agency relationship should be explicitly stated in a contract* that is available to the tax commissioner to inspect. *Absent such proof, it will be presumed that no agency relationship exists* and the person claiming the agency relationship will include the total amount received in its gross receipts." Ohio Adm.Code 5703-29-13(C)(2)(a) (Emphasis added.).

The concept of agency is also well-established by common law. Specifically, the principal of actual authority is the standard under which agency is established between entities such that they may be subject to the CAT's agency exclusion. *Cincinnati Golf Mgt., Inc. v. Testa*, 132 Ohio St.3d 299, 2012-Ohio-2846, 971 N.E.2d 929. Actual authority is "an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent." *Id.*, citing 1 Restatement of Law 3d, Agency, Section 3.01. The primacy of a putative agent's authority to act for another arises by virtue of R.C. 5751.01(P)'s definition of "agent," which uses the term "authorized" to modify "person." *Willoughby Hills Dev. & Distrib., Inc. v. Testa*, 155 Ohio St.3d 276, 2018-Ohio-4488, 120 N.E.3d 836. Stated differently, where a company is not endowed with actual authority to bind another entity, then no agency relationship is formed, and no exception may be claimed.

An agency relationship also exists where a principal actually exerts control over its agent. Ohio Adm.Code 5703-29-13(B)(1) citing *Hanson v. Kynast*, 24 Ohio St.3d 171, 173 (1986). Specifically, an agency relationship "exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks." *Id.* Thus, simply having the option or an agreement to exercise an agency relationship or failing to act

in a principal-agent capacity despite having the option to do so does not give rise to an agency relationship under Ohio law. An agent cannot make contracts on the principal's behalf without actual authority to do so. *Willoughby Hills*, *supra,* at ¶ 28. In a principal-agent relationship, the agent has the legal authority to act on behalf of the principal, and generally the principal is bound by and is liable for those actions. *N&G Construction, Inc. v. Lindley*, 56 Ohio St.2d 415, 418 (1978), citing *Gulf Oil Corp. v. Kosydar*, 44 Ohio St.2d 208 (1975) (paragraph two of the syllabus) and *Canton v. Imperial Bowling Lanes, Inc.*, 16 Ohio St.2d 47, 242 N.E.2d 566 (paragraph four of the syllabus).

IV. ANALYSIS

A. CAT GROSS RECEIPTS

The petitioner contends the money it receives on behalf of CTS is not gross receipts in accordance with R.C. 5751.01(F). The petitioner further contends the amount received is not realized by the petitioner for federal income tax purposes and does not contribute to the petitioner's gross income. However, Ohio has its own definitions of how gross receipts and gross income relate to the CAT, therefore, the petitioner's reliance on federal definitions of "gross receipts" or "gross income" is misplaced. As stated above, "gross receipts" means the total amount realized, without deduction for the costs of goods sold or other expenses incurred, that contribute to the production of gross income, except as otherwise specified in the statute. R.C. 5751.01(F). This definition broadly encompasses all receipts in money or remuneration from a taxpayer's activities.

In this case, the petitioner bills its customer for both the materials its sells and the hauling expense. After the customer remits the full amount to the petitioner, the petitioner later remits any amounts owed to CTS for its hauling services. The petitioner uses a scale program that records both the material and the haul, so it states there is no distinguishing between the taxes for the material and the taxes for the haul.[1] Although the petitioner contends the money it receives on behalf of CTS is not a gross receipt, the petitioner is the only entity that invoices the customer for the transaction (i.e., both the materials and hauling) and collects payment for both services. Therefore, the amount received contributes to the petitioner's gross income, and thus is a gross receipt pursuant to R.C. 5751.01(F). That the petitioner has a subsequent expense to CTS for CTS's part of the transaction is irrelevant for the petitioner's Ohio CAT purposes. Therefore, this contention is not well taken.

B. AGENCY EXCLUSION

The petitioner also contends that even if the Department properly applied the definition of gross receipts, such amounts should be excluded because an agency relationship existed between the petitioner and CTS in accordance with R.C. 5751.01(P). The petitioner states that as an agent for CTS, it invoiced customers, collected money, and remitted the amounts to CTS. The petitioner states that CTS bills the petitioner for the hauling portion on the invoice, so the petitioner does not include that portion of income in its CAT gross receipts. However, the petitioner has failed to provide sufficient evidence to prove that an agency relationship existed between the petitioner and CTS in accordance with R.C. 5751.01(P).

The first condition for an agency relationship is that the "agent" be a "person authorized" to act on another's behalf. R.C. 5751.01(P). As stated above, "actual authority" is "an expression of intent by the principal that the agent act on behalf of the principal, along with the understanding of the agent."

[1] The petitioner pays for the sales tax collected on both and material and haul.

Cincinnati Golf Mg, supra ¶ 24. In other words, the agent must have actual authority to act on behalf of the principal. For the periods at issue, there is no evidence of a written agreement between any of the parties involved that identified the petitioner as an agent. The petitioner states that during the periods at issue, the petitioner and CTS had a verbal agreement that CTS would provide hauling services to the petitioner's customers and the petitioner would invoice the customers for both hauling and material. The petitioner also provided minutes from a special meeting in February 2018 and a Carrier Agreement between the petitioner and CTS effective May 1, 2018. The minutes from the special meeting of the shareholders of CTS, United Precast Inc., United Aggregates, Ellis Brothers Inc., and D.H. Bowman & Sons states that each company is authorized to perform actions that would be in the best interest of each company, including any billing and collection of funds. The minutes from the special meeting, however, do not identify the petitioner as an *agent* of CTS with authority to act on its behalf. Notably, the Carrier Agreement states that the petitioner, as *principal*, will direct CTS to pick-up and deliver sand and gravel to the petitioner's customers. However, as a "principal" of CTS, the petitioner is not an agent per R.C. 5751.01(P) and thus cannot exclude its gross receipts under R.C. 5751.01(F)(2)(l).

The Carrier Agreement demonstrates that CTS performs hauling services for the petitioner and the petitioner directs CTS concerning pick-up and deliveries for its customers. As stated above, an agency relationship also exists where a principal actually exerts control over its agent. Ohio Adm.Code 5703-29-13(B)(1). Despite the petitioner's contention that CTS exercised authority over United Aggregates, the collective conduct of the parties shows it was actually *the petitioner* who had control over CTS. Thus, the petitioner has failed to demonstrate it was an agent or under the control of CTS, and therefore it is not eligible for the agency exclusion under R.C. 5751.01(F)(2)(1).

C. NOTICE OF AUDIT AND TAXPAYER RIGHTS

The petitioner also contends that it was inequitable for the Department to close the audit and then reopen it the next day. At the commencement of an audit, the Department provided a written description of the roles of the Department and of the taxpayer during an audit and a statement of the taxpayer's rights pursuant to R.C. 5703.51(B). The Department did erroneously send a letter to the petitioner stating that the audit was closed. However, the next day the Department followed up with a letter requesting invoices in conjunction with the audit; the audit then continued with the petitioner's cooperation until the issuance of the assessment at issue.

The Department's role during an audit is to review and examine the taxpayer's books, records, and other materials to determine if the taxpayer has complied with the tax laws. R.C. 5703.19. The petitioner had sufficient notice of the audit and its rights during the audit and actively participated in the audit. While the Commissioner acknowledges the erroneous closing letter, the petitioner's conduct after the letter shows the petitioner knew the audit was not actually concluded. Furthermore, regardless of the Department's error or the petitioner's subsequent conduct, the closing letter does not relieve the petitioner from paying the tax amount due. *See* R.C. 5703.51(H). Therefore, the petitioner's contention is not well taken.

V. CONCLUSION

The petitioner has provided insufficient evidence to prove that the amount it invoices its customers for both the material and haul is not a gross receipt per R.C. 5751.01(F). It has also failed to meet its burden of proof to show it acted as an agent under R.C. 5751.01(P) and Ohio Adm.Code 5703-29-

13(B)(1) and, thus that it was entitled to the exclusion in R.C. 5751.01(F)(2)(l). Finally, the petitioner has failed to establish that the Department is not permitted to recommence an audit when it was closed in error.

Accordingly, the assessment is affirmed.

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

FINAL DETERMINATION

Date: JUL 2 2 2022

Nationwide Bank
Attn: Daniel P. Eppley, Vice President of Tax
One W. Nationwide Blvd 1-3-701
Columbus, OH 43215-2220

Re: Three Applications for Refund
Corporation Franchise Tax – Tax Year 2013
Financial Institutions Tax – Multiple Periods

This is the final determination of the Tax Commissioner on the following application for refund of corporation franchise tax filed pursuant to R.C. 5733.12:

Refund Claim No.	Taxable Year	Tax Year	Refund Claimed
87234	01/01/2012 – 12/31/2012	2013	$1,432,856

This is also the final determination of the Tax Commissioner on the following applications for financial institutions tax refund filed pursuant to R.C. 5726.30:

Refund Claim No.	Taxable Year	Tax Year	Refund Initially Claimed	Partial Refund Previously Granted	Remaining Refund Claim
501261650	01/01/2013 – 12/31/2013	2014	$1,180,253	($933,479)	$246,774
501261687	01/01/2014 – 12/31/2014	2015	$1,330,100	($1,008,960)	$321,140

I. BACKGROUND

A. BACKGROUND ON NATIONWIDE BANK

During the periods in question, Nationwide Bank (hereinafter "claimant" or "NWB") was a federal savings bank located in Columbus, Ohio, which held approximately $6.3 billion in total assets as of December 31, 2014.[1] From January 1, 2012 through December 31, 2014, NWB was a wholly owned subsidiary of Nationwide Mutual Insurance Company (NMIC), one of the largest insurance and financial companies in the country, which had approximately $195 billion in total assets as of December 31, 2014. *Id.* NWB offered deposit products including certificates of deposit, savings accounts, money market accounts, individual retirement accounts, and checking accounts. *Id.* NWB generated deposits and loans nationally and attempted to reach new customers on a national basis through its website, call center, and the mail. *Id.* The most prominent concentration of customers during the periods in question was in the

[1] Office of the Comptroller of the Currency, *Community Reinvestment Act Performance Evaluation – Nationwide Bank, Charter Number: 714970*, Description of Institution. April 15, 2015.

Columbus, Ohio metropolitan area, as the city contains the corporate headquarters of both the bank and holding company and both retail offices. *Id.*

B. ORIGINALLY-FILED CORPORATION FRANCHISE TAX REPORT & TAX REMITTED

During the taxable year starting on January 1, 2012 and ending December 31, 2012, Ohio imposed a CFT on certain domestic and foreign corporations for the privilege of doing business in Ohio. For the period in question, the CFT was limited to tax financial institutions as defined in R.C. 5733.04(K), which section adopted the same meaning used in R.C. 5725.01(A). NWB was a federal savings bank chartered under 12 U.S.C. 1464, which made it a financial institution under both R.C. 5733.04(K) and 5725.01(A). The claimant calculated its tax liability according to R.C. 5733.06 and filed an annual report required by R.C. 5733.03. Records reflect that NWB remitted $1,432,586.00 in tax, which was comprised of payments totaling $905,913 and a credit carryforward from the previous taxable year of $526,943.

C. APPLICATION FOR CORPORATION FRANCHISE TAX REFUND

The claimant filed an application for refund requesting that the Tax Commissioner refund the full amount of the CFT remitted and credited for tax year 2013. R.C. 5733.12(B) governs applications for refund of CFT and states, in pertinent part, that:

> *** an application to refund to the corporation the amount of taxes imposed under section 5733.06 of the Revised Code that are overpaid, paid illegally or erroneously, or paid on any illegal, erroneous, or excessive assessment, with interest thereon as provided by section 5733.26 of the Revised Code, shall be filed with the tax commissioner, on the form prescribed by the commissioner, within three years from the date of the illegal, erroneous, or excessive payment of the tax ***.
>
> On the filing of the refund application, the commissioner shall determine the amount of refund to which the applicant is entitled. If the amount is not less than that claimed the commissioner shall certify the amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code. If the amount is less than that claimed, the commissioner shall proceed in accordance with section 5703.70 of the Revised Code.

Records reflect that the application for refund for tax year 2013 was filed within three years of the date of payment, and, as a result, is timely for the purposes of R.C. 5733.12(B).

After conducting an initial review of the application for CFT refund, the Department denied the application. Within sixty days of the initial denial, the claimant objected in writing and submitted additional evidence to support its claim in accordance with R.C. 5703.70(A). A hearing was held on the matter pursuant to R.C. 5703.70(C)(1). This matter will be decided based on the evidence currently available to the Tax Commissioner pursuant to R.C. 5703.70(C)(2), which provides, in pertinent part, that "the commissioner shall review the information, make such adjustments to the refund or compensation as the commissioner finds proper, and issue a final determination thereon."

D. ORIGINALLY FILED FIT REPORTS & TAX REMITTED

The claimant concedes that it was a federal savings bank chartered under 12 U.S.C. 1464 and, as such, a "bank organization" as defined in R.C. 5726.01(B). As a "bank organization" under R.C. 5726.01(B), the claimant was required to remit the financial institutions tax ("FIT") levied by R.C. 5726.02, was required to file an annual report in accordance with R.C. 5726.03, and was required to remit FIT as calculated pursuant to R.C. 5726.04. For both of the periods in question, tax years 2014 and 2015, the claimant timely filed its FIT annual reports (Ohio FIT Form 10 Financial Institutions Tax Report). Ultimately, based on the facts, figures, and apportionment factors reported on the annual reports, the claimant timely remitted tax amounts due of $1,146,337.00 and $1,555,874.00 for tax years 2014 and 2015, respectively.

E. APPLICATIONS FOR FIT REFUNDS

The claimant filed the applications for refund requesting that the Tax Commissioner refund the full amount of the FIT remitted for both tax year 2014 and 2015. R.C. 5726.30(A) governs applications for refund of the FIT and states, in pertinent part, that:

> The tax commissioner shall refund the amount of taxes imposed under this chapter that a person overpaid, paid illegally or erroneously, or paid on an illegal or erroneous assessment. The person shall file an application for refund with the tax commissioner, on the form prescribed by the commissioner, within four years after the date of the illegal or erroneous payment of the tax, or within any additional period allowed under division (B) of section 5726.20 of the Revised Code. The applicant shall provide the amount of the requested refund along with the claimed reasons for, and documentation to support, the issuance of a refund.

Records reflect that both the applications for refund for tax years 2014 and 2015 were filed within four years of the dates of payment, and, as a result, are timely for the purposes of R.C. 5726.30(A).

After conducting an initial review of the applications, the Department granted partial refunds of $933,479 and $1,008,960 for tax years 2014 and 2015, respectively. These partial refunds were issued after the Department determined that qualified research expense credits that NWB claimed pursuant to R.C. 5726.56 were supported by supplemental evidence submitted and consistent with the relevant authority. Upon granting these partial refunds, the Department notified the claimant that the portions of refunds that were not related to qualified research expense credits were being denied. Within sixty days of the notifications of denial, NWB filed an amendment to its initial objections in writing. A hearing on the refund denials was held pursuant to R.C. 5703.70(C)(1). This matter will be decided based on the evidence currently available to the Tax Commissioner pursuant to R.C. 5703.70(C)(2), which provides, in pertinent part, that "the commissioner shall review the information, make such adjustments to the refund or compensation as the commissioner finds proper, and issue a final determination thereon."

Finally, the claimant contends that its "R&D [qualified research expense] Credit for 2014 and 2015 of $43,330 should be carried over to the taxpayer's 2016 FIT Report…[because] the Assessment Credit [under former R.C. 5726.51] was to be claimed BEFORE the R&D credit."[2]

[2] Nationwide Bank. *Nationwide Bank Franchise and FIT Refund Claims*. Page 2. December 16, 2021.

II. THE CLAIMANT'S CONTENTIONS

In its applications for refund, administrative appeals, and supplements, NWB raises multiple arguments which can be broken out into three main categories. First, the claimant asserts that the CFT for tax year 2013 and the FIT for tax years 2014 and 2015 were invalid because the two Ohio taxes violated federal law in the form of 12 U.S.C. 1464(h) and, by extension, the Supremacy Clause of the United States Constitution. NWB's second line of argument centers on what it believes to be the right refund measurement to remedy the purported violation of federal law. The claimant asserts that, since the CFT and FIT violated federal law, it should receive a full refund of all tax remitted for the periods in question. While its preferred remedy is one which fully refunds the tax it paid, for the sake of argument, NWB states that if it "was not entitled to a full refund" its refunds should be "based on its regulatory fees paid to the Office of the Comptroller of the Currency ("OCC") and its regulatory fees paid to the Federal Deposit Insurance Corporation ("FDIC") for the corresponding year."[3] The claimant's third category of contentions are constitutional in nature and allege that the CFT and FIT violated the Due Process Clause, the Equal Protection Clause, and the Commerce Clause.

III. AUTHORITY & ANALYSIS

A. The Transition from the CFT to the FIT for Financial Institutions

The CFT was a business privilege tax that dated back to 1902. For report year 2013, the CFT applied only to financial institutions who were not required to pay the commercial activity tax (CAT). Ohio completely phased out the CFT following tax year 2013 when the CFT was replaced by the FIT and the CAT. The transition from the CFT to the FIT for financial institutions was codified when, in 2012, the Ohio General Assembly passed Amended Substitute House Bill Number 510), which levied the FIT beginning in tax year 2014.

The FIT is a business privilege tax imposed on a financial institution's "total Ohio equity capital," which is the portion of the financial institution's total equity capital apportioned to Ohio. The FIT replaced the CFT on financial institutions and represents the only state tax that financial institutions pay for the privilege of conducting business in Ohio. Records reflect that the claimant registered for the FIT effective for the taxable year beginning January 1, 2013 (tax year 2014).

Division (A) of R.C. 5726.02 indicates that the FIT is imposed "for each calendar year that the financial institution conducts business as a financial institution in this state or otherwise has nexus in or with this state under the Constitution of the United States on the first day of January of that calendar year." The FIT requires taxpayers to file an annual report in accordance with R.C. 5726.03 and to remit tax in an amount calculated in accordance with R.C. 5726.04. Reports and remittances are based on a "taxable year" which "means the calendar year preceding the year in which an annual report is required to be filed under section R.C. 5726.03 of the Revised Code." R.C. 5726.01(Q). The calendar year in which the annual report is filed and the tax is paid is referred to and defined as the "tax year." R.C. 5726.01(P).

The amount of FIT due is equal to the greater of the minimum tax ($1,000) or the amount by which the calculated tax exceeds any credits allowed against the tax. R.C. 5726.02. The tax is calculated by applying a single gross receipts apportionment factor to a financial institution's total equity capital to arrive at total Ohio equity capital. The tax rate or rates are applied to the financial institution's total Ohio

[3] Nationwide Bank. *Nationwide Bank Franchise and FIT Refund Claims*. Page 3. December 16, 2021.

equity capital. The apportionment factor is used to fairly represent the extent of a taxpayer's business activity in Ohio. The method for apportioning total equity capital is prescribed by R.C. 5726.05, which states that "[t]he physical location where the customer ultimately uses or receives the benefit of what was received shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere."

B. THE BANK ORGANIZATION CREDIT PROVIDED FOR UNDER FORMER R.C. 5733.063 & FORMER R.C. 5726.51

At issue in this matter are nonrefundable credits that existed in and were provided for in former R.C. 5733.063 and former R.C. 5726.51.

i. The Savings & Loan Assessment Tax Credit – Former R.C. 5733.063

Former R.C. 5733.063 provided qualifying taxpayers with a savings and loan assessment credit, which could be taken against the CFT, stating:

> A credit shall be allowed against the tax imposed under section 5733.06 of the Revised Code to a savings and loan association organized under Chapter 1151 of the Revised Code in an amount equal to the annual assessment the association paid during the taxable year to the division of savings and loan associations under section 1155.13 of the Revised Code less the amount the association paid in supervisory fees during the taxable year to the federal savings and loan insurance corporation pursuant to 12 C.F.R. 563.17-1, as established in accordance with a schedule of fees as published by the superintendent of savings and loan associations, or in the case of a savings and loan association not insured by the federal savings and loan insurance corporation, the amount it would have paid if insured thereby.
>
> The credit authorized by this section shall be claimed in the order required under section 5733.98 of the Revised Code. The credit shall not be allowed unless there is filed with the annual franchise tax report a document certified by the superintendent of savings and loan associations verifying the amount of state annual assessment fees and federal supervisory fees paid by the association during the taxable year.

Simply put, a taxpayer seeking to claim a tax credit against the CFT pursuant to former R.C. 5733.063 was required to be a savings and loan association that: 1) was organized under Chapter 1151 of the Revised Code; and 2) had paid assessments to the Ohio Department of Commerce's Division of Savings & Loan Associations. Moreover, the second paragraph of former R.C. 5733.063 clearly indicated that a credit "shall not be allowed unless there is filed with the annual franchise tax report a document certified by the superintendent of savings and loan associations verifying the amount of state annual assessment fees and federal supervisory fees paid by the association during the taxable year."

ii. Bank Organization Assessment Tax Credit – Former R.C. 5726.51

Former R.C. 5726.51 allowed qualifying taxpayers to claim a credit against the FIT for tax years 2014 and 2015, and provided:

> A taxpayer may claim a nonrefundable credit against the tax imposed under this chapter for each bank organization that is organized under Title XI of the Revised Code and included in the annual report of the taxpayer. The credit shall equal the sum of the annual assessments such bank organizations paid during the taxable year to the division of financial institutions pursuant to Title XI of the Revised Code and the schedule of fees published by the division. A taxpayer may claim against the tax imposed by this chapter any unused portion of the credits authorized under section 5733.063 of the Revised Code.
>
> The credit authorized by this section shall be claimed in the order required under section 5726.98 of the Revised Code. The credit shall not be allowed unless there is filed with the taxpayer's annual report a document certified by the division of financial institutions verifying the amount of state annual assessment fees and federal supervisory fees paid by the bank organizations during the taxable year.

In order to claim the tax credit against the FIT pursuant to former R.C. 5726.51, the taxpayer was required to be or to have included in its annual report a bank that 1) was organized under Title XI of the Revised Code; and 2) had paid assessments or fees to the Ohio Department of Commerce, Division of Financial Institutions ("ODFI") during the taxable year.

iii. The General Assembly's Repeal of the Credits Under R.C. 5733.063 & R.C. 5726.51

In 2015, the Ohio General Assembly passed Substitute House Bill Number 340 ("H.B. 340"), which repealed R.C. 5733.063 and R.C. 5726.51. In uncodified language, H.B. 340 Section 803.20 stated that "(t)he amendment or repeal of sections 5726.51 *** 5733.063 *** of the Revised Code shall apply to tax years beginning in or after the year in which this act takes effect." H.B. 340 went into effect on December 22, 2015, which fell within the calendar period that is the basis for the tax year 2016 report. Thus, the repeal of R.C. 5726.51 and R.C. 5733.063 was only applicable prospectively for tax years 2016 and beyond. Notably, Section 28 of Article II of the Ohio Constitution largely prohibits retroactive laws, a fact which further supports the Ohio General Assembly's prospective repeal of former R.C. 5726.51. The prohibition on retroactive laws is also codified in R.C. 1.48, which states that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective."

C. BASED ON THE PLAIN LANGUAGE OF THE STATUTES, NWB DOES NOT QUALIFY FOR EITHER THE CREDIT UNDER FORMER R.C. 5733.063 OR FORMER R.C. 5726.51

As is mandatory when evaluating all tax reduction statutes, the language of former R.C. 5733.063 and R.C. 5726.51 must be strictly construed against the claimant who is required to demonstrate a clear entitlement to the credits. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; *Westinghouse Electric Corp. v. Lindley*, 58 Ohio St.2d 137 (1979); *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102 (1990); *Dana Corp. v. Testa*, 152 Ohio St.3d 602, 2018-Ohio-1561, 99 N.E.3d 393, ¶ 25. In both cases, the language in former R.C. 5733.063 and R.C. 5726.51 was plain and unambiguous regarding which financial institutions could claim and receive the credits granted by the statutes. The claimant does not assert, and the record does not reflect, that NWB met the statutory requirements that

the General Assembly established as prerequisites for taxpayers to receive the credits. As a result, the claimant has not established it would have been entitled to claim and receive the credits under the plain language of either former R.C. 5733.063 or former R.C. 5726.51.

D. THE CLAIMANT LOOKS TO 12 U.S.C. 1464(h) TO RECEIVE THE CREDITS & REFUNDS

While the claimant clearly does not qualify for the credits in question under the plain language of Ohio law as it existed at the time, NWB nevertheless looks to federal statutory law to support its request for full refunds of CFT and FIT that it remitted. Specifically, the claimant looks to 12 U.S.C. 1464(h) because it is a federal savings bank which is organized under 12 U.S.C. 1464. 12 U.S.C. 1464(h) states:

> No State, county, municipal, or local taxing authority may impose any tax on Federal savings associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

NWB asserts that "by providing a credit for regulatory fees paid by Ohio chartered banks but not for federally chartered banks, former R.C. 5726.51 (FIT) and former R.C. 5733.063 (Franchise Tax), the FIT and the Franchise Tax discriminate against federally chartered savings banks and are therefore invalid under 12 U.S.C. Sec. 1464(h) and the Supremacy Clause of the United States Constitution."[4]

E. THE BOARD OF TAX APPEALS' DECISIONS IN *FNB, INC.*, *CINCINNATI FEDERAL SAVINGS AND LOAN, & CENTRAL OHIO BANCORP*

The Tax Commissioner previously issued Final Determinations involving administrative appeals that addressed whether federally-chartered financial institutions were entitled to receive the credit provided for under former R.C. 5726.51 by way of the National Bank Act, codified at 12 U.S.C., 1 *et seq*. In these previously-issued Final Determinations[5], the Tax Commissioner examined 12 U.S.C. 548, which states that "[f]or the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." The Tax Commissioner also looked to several cases where the Ohio Board of Tax Appeals ("Board" or "BTA") examined the credit provided for under former R.C. 5726.51. In particular, the Tax Commissioner looked to *FNB, Inc. v. McClain*, BTA No. 2018-323 (April 14, 2020) and two subsequent and substantially similar cases which the Board decided on identical grounds, i.e., *Cincinnati Federal Savings and Loan v. McClain*, BTA No. 2018-435 (June 15, 2020) and *Central Ohio Bancorp v. McClain*, BTA No. 2018-436 (June 15, 2020). All three of the Board's decisions were appealed by the taxpayers and cross-appealed by the Tax Commissioner to the Supreme Court of Ohio. Though appealed on various grounds to the Supreme Court, the matters were all separately resolved by the parties without a decision regarding either the Board's order to remand the matters to the Tax Commissioner for further review or the constitutionality of R.C. 5726.51, facially or as applied to the taxpayers in the matters.

Because the appeals in *FNB, Inc.*, *Cincinnati Federal Savings and Loan*, and *Central Ohio Bancorp*, were resolved and dismissed, the Board's decisions in those matters remain legal authority that the Tax Commissioner must examine in analyzing the legal issues raised in those appeals. Importantly, the Board

[4] Nationwide Bank. *Nationwide Bank – FIT Refunds Supplement to Petition.* Page 2. September 15, 2021.
[5] *FNB Corporation and Subsidiaries* (Mar. 30, 2021), *BNB Bancorp, Inc.* (Mar. 30, 2021), *LCNB Corp* (Mar. 30, 2021).

indicated in those decisions that it found merit to the appellants' arguments that they should receive a credit or refund equal to what the federally-chartered banks would have been entitled to had they been an Ohio-chartered bank under former R.C. 5726.51. *Id.* at page 3. The decisions in all three BTA cases cited to and relied on 12 U.S.C. 548 and remanded the matters to the Tax Commissioner to address two issues. First, the Board asked the Tax Commissioner to determine whether the federally-chartered banks in those cases would have been eligible to claim the credit under former R.C. 5726.51 had they been state-chartered institutions. Second, if the Tax Commissioner found that the federal banks would have been entitled to the FIT credit or refund had they been state-chartered, the Board of Tax Appeals ordered the Tax Commissioner to calculate and grant the credit to the extent it would have been available to a federal bank had that bank been state-chartered.

i. Should NWB Have Been Eligible for a Credit or Refund under Former R.C. 5733.063 or Former R.C. 5726.51?

Before analyzing whether NWB is entitled to claim either the credit under former R.C. 5733.063 or under former R.C. 5726.51, it is worth noting that there are two important differences between the previous BTA decisions and the current facts and law presented in this matter. The first key difference is that the previous matters analyzed and relied on 12 U.S.C. 548, whereas NWB is now relying on 12 U.S.C. 1464(h). The claimant contends that "the prohibition in 12 U.S.C. 1464(h) is broader than the prohibition in 12 U.S.C. 548."[6] To support this contention, NWB looks to letters written to the Tax Commissioner by the OCC and an amicus brief filed by the OCC with the Ohio Supreme Court in the *Central Ohio Bancorp* case. Second, the OCC never analyzed, examined, or issued any statement regarding whether or to what extent it believed the credit permitted under former R.C. 5733.063 or Ohio's CFT would be impacted by either 12 U.S.C. 548 or 12 U.S.C. 1464(h). More importantly, neither the OCC's September 15, 2015 letter nor its February 9, 2016 letter identified or actually analyzed how a federal savings bank would qualify for the credit under former R.C. 5726.51 by way of 12 U.S.C. 1464(h). Rather, the OCC analyzed how and why it believes that 12 U.S.C. 548 requires a federally-chartered bank to be treated as a bank existing under the laws of Ohio for purposes of R.C. 5726.51 and then simply asserted that 12 U.S.C. 1464(h) includes the "same prohibition on discriminatory taxation applied to FSAs [federal savings associations]"[7].

Despite the assertions from the OCC that 12 U.S.C. 548 and 12 U.S.C. 1464(h) provide the "same prohibition"[8] or, as the claimant states, a "broader" [9] prohibition, there are significant differences in the language of the two provisions. For instance, 12 U.S.C. 548 states that "[f]or the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." On the other hand, 12 U.S.C. 1464(h) bars states from imposing "any tax on federal savings associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." Aside from referencing the OCC's statement that 12 U.S.C. 548 and 12 U.S.C. 1464(h) are the "same

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[6] Nationwide Bank. *RE: Nationwide Bank Franchise and FIT Refund Claims*. Dec. 16, 2021, page 4.

[7] Office of the Comptroller of the Currency. *Merit Brief – Central Ohio Bancorp v. McClain.* Case No 2020-0855, pages 2 and 7. Sep. 15, 2020. *See also*, Office of the Comptroller of the Currency. *Interpretive Letter No. 1155, Ohio Financial Institution Tax* (Sept. 17, 2015), and OCC *Interpretative Letter, Ohio Financial Institution Tax Refunds* (Feb. 9, 2016), Footnote 2, which states "*** it is our opinion that the FIT is also inconsistent with 12 U.S.C. 1464(h), which prohibits any tax on federally chartered savings associations great than that imposed on comparable state-chartered institutions."

[8] *Id.*

[9] See footnote 6.

prohibition" or a "broader" prohibition on discriminatory taxation of federal banks, NWB did not provide a detailed explanation or analysis regarding how the nonrefundable credits provided for by former R.C. 5733.063 and former R.C. 5726.51 would result in an imposition of a tax on federal savings associations higher than that of similar local financial institutions, and therefore violate 12 U.S.C. 1464(h). The differences between the language of 12 U.S.C. 548 and 12 U.S.C. 1464(h) are undeniable, and simply asserting that the provisions result in an identical or substantially similar outcome with respect to former R.C. 5733.063 and R.C. 5726.51 without explanation is insufficient to support the claimant's assertions.

In addition to referencing the OCC's letters and amicus brief, NWB identifies several federal cases in which courts found that certain state tax schemes violated 12 U.S.C. 1464(h); however, these cases did not involve credits identical or similar to those that were provided for under former R.C. 5733.063 and former R.C. 5726.51. Furthermore, the federal appellants in those cases performed extensive factual and legal analyses of the specific state taxation schemes and explained, in detail, how they violated 12 U.S.C. 1464(h) to support their conclusion that the state laws in question were not permissible under federal law. Here, NWB has not detailed or demonstrated whether and to what extent the facts at issue in the federal cases it cites are either analogous or directly applicable to the facts and circumstances presented in this matter.

Again, it bears repeating that the language of former R.C. 5733.063 and R.C. 5726.51 must be strictly construed against the claimant, who is required to demonstrate a clear entitlement to the credits it seeks. For the reasons discussed in this section, the Tax Commissioner does not believe that NWB has provided an analysis of 12 U.S.C. 1464 as it would apply to former R.C. 5733.063 and former R.C. 5726.51 sufficient to demonstrate a clear entitlement to credits and refunds it is seeking.

However, while the Tax Commissioner does not believe that the claimant has demonstrated a clear entitlement to the credits and refunds it is seeking, he is nevertheless mindful of the Board of Tax Appeals previous decisions in *FNB, Inc.*, *Cincinnati Federal Savings and Loan*, and *Central Ohio Bancorp*, which were discussed above. Notably and most importantly, the Tax Commissioner is aware that the appellant in *Cincinnati Federal Savings and Loan* was a federal savings association organized under 12 U.S.C. 1464.[10] This is important because, in making a determination to remand the matter to the Tax Commissioner for further consideration, the Board in *Cincinnati Federal Savings and Loan* cited its analysis and application of 12 U.S.C. 548 from *FNB, Inc.* stating, in pertinent part, that:

> *** we find merit to FNB's argument that it should receive the benefit of a credit to which it would have been entitled had it been chartered under Ohio, rather than federal, law. 12 U.S.C. 548 requires that for purposes of state tax law, such as the FIT, "a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Therefore, if the credit granted by former R.C. 5626.51 [sic] applied to FNB, then it should be granted the credit to the extent it would have if it were chartered under Ohio law. The commissioner failed to make the determination as to whether FNB would be eligible for such a credit, and for that reason we must reverse his decision. Because he failed to make that determination, however, we

[10] Federal Deposit Insurance Corporation. *Institution Details – Cincinnati Federal.* Retrieved from https://banks.data.fdic.gov/bankfind-suite/bankfind/details/28346?bankfindLevelThreeView=Other%20Names&branchOffices=true&pageNumber=1&resultLimit=25 (last accessed on February 28, 2022).

must remand the matter to the commissioner in order to consider this issue. *Federal Savings and Loan v. McClain*, *supra* at page 2.

Ultimately, in *Cincinnati Federal Savings and Loan*, the Board found its decision in *FNB, Inc.* controlled stating that:

> We find our decision in FNB controls the outcome of this case. As a consequence, the final determination of the Tax Commissioner is vacated. This case is remanded to the Tax Commissioner to determine whether appellant paid any annual assessments or fees substantially similar to those paid by Ohio banks for which a credit would be allowed. If the answer is in the affirmative, then the commissioner should calculate the appropriate credit and grant the appropriate refund. *Id.* at pages 2 and 3.

Based on the Board's application of a 12 U.S.C. 548-based analysis to a federal savings association, which was organized under 12 U.S.C. 1464, and order to remand in *Cincinnati Federal Savings and Loan*, the Tax Commissioner concludes that the Board determined that 12 U.S.C. 548 and 12 U.S.C. 1464(h) are analogous and require similar applications and outcomes for federally-chartered commercial banks and federal savings association. Mainly, in applying the Board's decision in *Cincinnati Federal Savings and Loan* to this matter, the Tax Commissioner must determine whether a federal savings bank paid any annual assessments or fees substantially similar to those paid by state banks, and, if so, calculate the appropriate credit and grant the appropriate refund. The Board's holding in *Cincinnati Federal Savings and Loan* also leads the Tax Commissioner to conclude that since R.C. 5733.063 provided a nonrefundable credit to savings and loan associations organized under Chapter 1151 of the Revised Code "equal the sum of the annual assessments such bank organizations paid during the taxable year to the division of financial institutions pursuant to Title XI of the Revised Code and the schedule of fees published by the division", the BTA's holding requires a determination regarding whether a federal savings bank paid any annual assessments or fees substantially similar to those paid by state-chartered savings and loan association.

Because the Board has indicated in these previous opinions the analysis that it believes the Commissioner should apply in cases where similar claims of entitlement to the credit are asserted by federally-chartered institutions, the Tax Commissioner will address those questions and apply the analysis specified by the Board in those opinions. But, consistent with his cross appeals in the above-mentioned cases, the Commissioner reserves the right to argue (should this matter reach the Ohio Supreme Court) that neither 12 U.S.C. 548 nor 12 U.S.C. 1464(h) require any refund in the present situation because the claimant did not pay any regulatory fees to ODFI and thus was not in the same position as any bank that received a refund.

ii. <u>What is the Appropriate Credit Measurement for a Federal Savings Association Under Former R.C. 5733.063 and R.C. 5726.51?</u>

Based on the Board's decision in *Cincinnati Federal Savings and Loan*, the Tax Commissioner must now identify the appropriate credit measurement under former R.C. 5733.063 and former R.C. 5726.51 for the claimant. Specifically, as charged by R.C. 5733.12(B), R.C. 5726.30(A), and R.C. 5703.70(C)(2), the Commissioner must examine the information presented to determine the amount of tax paid by the claimant which was illegal or erroneous and then refund the proper amounts.

In this matter, NWB is seeking a full refund of the CFT and FIT that it remitted for the applicable periods. To support its request for full refunds of all of the tax that it remitted, the claimant references and relies heavily on letters written to the Tax Commissioner by the OCC and an amicus brief filed by the OCC with the Ohio Supreme Court in the *Central Ohio Bancorp* case.[11] Both of the OCC's letters to the Tax Commissioner indicated that the "FIT was inconsistent and not permissible under federal law" during the periods at issue in this matter. The second letter was issued in February 2016 following the General Assembly's repeal of R.C. 5726.51, and, after acknowledging that the repeal made the "FIT consistent with federal law going forward", the OCC indicated that it "believe[s] that the appropriate relief is a full refund".

The OCC's belief that the appropriate refund measurement would be a full refund of all of the FIT paid was rooted in the inconsistency that it saw between former R.C. 5726.51 and with 12 U.S.C. 548 and 12 U.S.C. 1464(h) during the periods in question. While its preferred remedy is one which fully refunds the tax it paid, NWB states that if it "was not entitled to a full refund" its refunds should be "based on its regulatory fees paid to the Office of the Comptroller of the Currency ("OCC") and its regulatory fees paid to the Federal Deposit Insurance Corporation ("FDIC") for the corresponding year."

Notwithstanding any inconsistency that may have existed between Ohio and federal law and notwithstanding the refund amounts that claimant seeks, the Tax Commissioner will look to the plain language of the relevant authority to identify the appropriate refund measurement 12 U.S.C. 1464(h), the federal statute relied upon by the claimant, prohibits "any tax on federal savings associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." Therefore, Ohio would be prohibited from imposing a tax on a federal savings bank greater than that imposed on a state savings and loan association chartered under Chapter 1151 of the Revised Code.

A full refund of the CFT and FIT paid by the claimant is both an inappropriate and an inaccurate measurement of the amount a federal savings association could have claimed had former R.C. 5733.063 and former R.C. 5726.51 directly applied to it. The inappropriateness of the full refund claim is apparent in that granting a full refund of the CFT and FIT paid by the claimant would provide it with the privilege of having operated a financial institution in Ohio tax-free despite the numerous benefits and business the bank received by operating in Ohio. Thus, retroactively granting what would be, in effect, tax-exempt status would cut against both the intent and application of the National Bank Act, i.e., 12 U.S.C. 548, and 12 U.S.C. 1464(h), by treating federal savings banks differently from and more favorably than state savings and loan associations.

The inaccuracy of the full refund of all FIT paid that the claimant seeks is evident in one critical fact - no state-chartered savings and loan association received a credit under either former R.C. 5733.063 or former R.C. 5726.51 that fully reduced or otherwise eliminated its total CFT or FIT liability for any tax year. Rather, state savings and loan associations received credits under former R.C. 5733.063 and former R.C. 5726.51 that amounted to a fraction of the total CFT and FIT due for a particular period. Granting the claimant a full refund of its CFT or FIT would not result in equal treatment of state and federal banks, but would instead effectively erase the claimant's CFT or FIT liability while holding state banks liable for CFT or FIT.

[11] See, footnote 7.

An appropriate remedy to rectify any defect must strike a balance to ensure that both federal savings banks and state savings and loans associations are treated comparably under the CFT and FIT. Granting a federal savings bank a full refund of CFT and FIT while requiring state savings and loan associations to pay the CFT and FIT represents an inappropriate remedial measurement, which is inconsistent with 12 U.S.C. 548 and 12 U.S.C. 1464(h) and overcorrects the purported problem. Again, the appropriate refund measurement is one which levies the CFT and FIT in the same way that it was levied on Ohio-chartered savings and loan associations during the periods in question. In particular and as it relates to this matter, that means identifying what credit a savings and loan association would have been due under former R.C. 5733.063 and former R.C. 5726.51.

The claimant's alternative refund request which would be based on the regulatory fees it paid to the OCC and to the FDIC does not achieve the objectives of either 12 U.S.C. 548 or 12 U.S.C. 1464(h) because it would provide the claimant with state-based tax credits based on dissimilar and differently-calculated federally-based assessments and fees. The regulatory fees that the claimant paid to the OCC and the assessment fees it paid to the FDIC are incompatible and are too dissimilar from those which formed the basis of the credits granted under former R.C. 5733.063 and former R.C. 5726.51. In other words, granting refunds based on the fees that federal savings banks paid would not treat them in the same manner as state savings and loan associations during the periods in question, and, due to the dissimilarity between state and federal assessments, would create an unevenness and incongruity in the credit calculations between state and federally-chartered institutions. The only way to calculate credits which truly treat the claimant as if it were an Ohio-based savings and loan association (and to ensure that a greater tax is not imposed on the federal savings bank) is to look at the credits that state savings and loans associations actually claimed and received during the periods in question.

To that end, the Tax Commissioner will examine data and statistical evidence to identify and quantify the tax impact of former R.C. 5733.063 and former R.C. 5726.51. Specifically, with respect to former R.C. 5733.063 and former R.C. 5726.51, the statistical data points that most accurately and appropriately represent the tax impact of the credit exists in the ratio of credits claimed and received by state savings and loan associations divided by the CFT and FIT liabilities of those institutions. This ratio uses data from the range of actual CFT and FIT taxpayers who claimed and received the credit in the years at issue to reach an "effective credit rate", which quantifies the average effective tax rate "discount" that each state institution claiming the credit under former R.C. 5733.063 and former R.C. 5726.51 received during tax years 2013, 2014, and 2015. The effective credit rate is a data-based and accurate depiction of the actual benefit state banks received under former R.C. 5733.063 and former R.C. 5726.51.

The Tax Commissioner examined the relevant data available to the Department and determined that state savings and loan associations received, on average, an effective credit rate equal to 20.8% of their total CFT in tax year 2013, 21.2% of their total FIT in tax year 2014, and 17.6% of their total FIT in tax year 2015. When these effective credit rates are applied against the claimant's CFT and FIT liabilities for the periods in question, the distorted nature of the claimant's full tax-paid refund measurement is particularly noticeable:

TAX TYPE	TAX YEAR	CLAIMANT'S TOTAL TAX LIABILITY	AVERAGE EFFECTIVE CREDIT RATE FOR OHIO SAVINGS & LOAN ASSOCIATIONS	CLAIMANT'S EQUIVALENT EFFECTIVE CREDIT	TOTAL REFUND SOUGHT BY THE CLAIMANT
CFT	2013	$1,432,856	20.8%	**$298,034**	**$1,432,856**
FIT	2014	$246,774	21.2%	**$52,316**	**$246,774**
FIT	2015	$321,140	17.6%	**$56,521**	**$321,140**

These effective credit rate ratios reveal that the full refund amounts that the claimant seeks are inappropriate, inaccurate, and would grant the claimant an effective credit that is approximately five-times larger than that which the average state-chartered savings and loan association received in the periods in question. At the same time, the effective credit rates allow the Tax Commissioner to calculate an accurate and appropriate credit measurement for the claimant which, in turn, treats NWB as though it were a state-chartered savings and loan association and allows for credits equal to what a state institution received, thus resulting in the imposition of the same effective tax rate. Therefore, the effective credit rate method satisfies the requirements of 12 U.S.C. 548 and 12 U.S.C. 1464(h) and the Board's instruction from *Cincinnati Federal Savings and Loan.*

F. THE FIT IS PRESUMED TO BE CONSTITUTIONAL

The claimant's remaining contentions are that the CFT and FIT violated the Constitution of the United States. It is well-established that the Tax Commissioner lacks jurisdiction to decide constitutional issues. See *Cleveland Gear Co. v. Limbach*, 35 Ohio St. 3d 229, 231, 520 N.E.2d 188 (1988). For these reasons, to the extent that the claimant raises constitutional objections regarding the Commerce Clause, Equal Protection Clause, the Supremacy Clause, and otherwise, the Tax Commissioner cannot decide them.

IV. CONCLUSION

The cases and concepts discussed in the authority and analysis section demonstrate the inaccuracy and inappropriateness of the full refunds and remedy that the claimant is seeking. However, based on the facts and circumstances presented in this matter and in accordance with the BTA's decision in *Cincinnati Federal Savings and Loan*, the Tax Commissioner determines that the appropriate remedy is to grant the claimant partial refunds in amounts equal to what they would have received under an effective credit rate calculation as laid out above.

Accordingly, pursuant to R.C. 5733.12(B) and R.C. 5703.70(C)(2), the application for CFT refund is partially granted as follows:

Refund Claim No.	Taxable Year	Tax Year	Partial Refund Amount
87234	01/01/2012 – 12/31/2012	2013	$298,034

Pursuant to R.C. 5726.30(A) and R.C. 5703.70(C)(2), the applications for FIT refund are partially granted as follows:

Refund Claim No.	Taxable Year	Tax Year	Partial Refund Amount
501261650	01/01/2013 – 12/31/2013	2014	$52,316
501261687	01/01/2014 – 12/31/2014	2015	$56,521

All three partial refund grants identified will include interest computed in accordance with R.C. 5703.47.

Finally, the claimant's contention that its "R&D [qualified research expense] Credit for 2014 and 2015 of $43,330 should be carried over to the taxpayer's 2016 FIT Report…[because] the Assessment Credit

[under former R.C. 5726.51] was to be claimed BEFORE the R&D credit" is not well taken because the partial refunds granted pursuant to this Final Determination do not produce any additional credit which could be carried forward to 2016.

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
4485 Northland Ridge • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 8 2022

John W. McCann
2965 Louise Rita Ct.
Youngstown, Ohio 44511

Re: Multiple Assessments
Employer Withholding Responsible Party - Multiple Periods

This is the final determination of the Tax Commissioner regarding the petition for reassessment filed pursuant to R.C. 5747.13 concerning the following employer withholding tax responsible party assessments:

Assessment No.	Period	Tax	Interest	Penalty	Total
100001579661	01/01/2006 – 12/31/2006	$0.00	$224.51	$455.25	$679.76
100001579667	07/01/2008 – 09/30/2008	$143.65	$275.44	$500.00	$919.09
100001579662	01/01/2008 – 12/31/2008	$247.28	$308.95	$500.00	$1,056.23

I. BACKGROUND

The Department assessed John McCann (the "petitioner") as a responsible party of Jump In Jacks Party Center (the "company") under R.C. 5747.07(G). Jump In Jacks Party Center failed to fully remit Ohio income tax withholding for the 2008 periods and failed to file an employer withholding return for the 2006 period. Under such circumstances, R.C. 5747.07(G) holds officers or employees who are responsible for the filing and payment of withholding tax returns or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. The outstanding liability of the company has been derivatively assessed against the petitioner because he was identified as a responsible party.

The petitioner objects to the assessment and contends that it is past the statute of limitations. The petitioner did not request a hearing; therefore, this matter is now decided based upon the evidence currently available to the Commissioner.

II. AUTHORITY AND ANALYSIS

If the required Ohio employer withholding returns are not filed and/or the withholding trust taxes are not timely remitted to the Department, R.C. 5747.07(G) indicates, in relevant part, that: "an officer, member, manager, or trustee of [the entity] who is responsible for the execution of [the entity's] fiscal responsibilities, shall be personally liable for failure to file the report or pay the tax due as required by this section." There is not a statute of limitations for such derivative liability. Further, Ohio Adm. Code 5703-7-15(C)(4) states, in part, that a person is responsible for the execution of the entity's fiscal responsibilities if the person performs or has the authority to perform, *or delegates or has the power to delegate* "control or supervision" over filing the required returns and making the required payments

To the extent the petitioner challenges the assessed penalty and interest against Jump In Jacks Party Center, such contention cannot be considered. The only issue that can be considered in this matter is whether the petitioner is a responsible party under R.C. 5747.07(G) for the periods assessed. *See Rowland v. Collins*, 48 Ohio St.2d 311, 358 N.E.2d 582 (1976); *see also Cruz v. Testa*, 144 Ohio St.3d 221, 2015-Ohio-3292, ¶36. Substantive arguments regarding the liabilities assessed against the company can only be raised during company assessment proceedings.

The petitioner does not provide any evidence or arguments that he is not the responsible party of Jump In Jacks Party Center under R.C. 5747.07(G) for the periods at issue. Based on information available to the Commissioner, the petitioner was the owner of the company. Additionally, according to the Application for Vendor's License to Make Taxable Sales, the petitioner was the president of the company. As the owner and president of the company, the petitioner had authority to exercise control over the corporation's financial affairs, whether he exercised that control or not. *Spithogianis v. Limbach*, 53 Ohio St.3d 55, 559 N.E.2d 449 (1990). As owner/ president, he also had the power to delegate, and apparently did delegate, the company's Ohio employer withholding responsibilities for the periods at issue. Ohio Adm.Code 5703-7-15(C)(4)(c). Therefore, the petitioner is a responsible party under R.C. 5747.08(G), and thus is personally liable for this outstanding liability of the corporation.

III. CONCLUSION

According to the information available to the Commissioner, the petitioner is a responsible party under R.C. 5747.08(G). Therefore, he is personally responsible for Jump In Jacks Party Center's failure to file Ohio employer withholding tax returns and failure to fully remit the amounts owed for the periods assessed.

Accordingly, the responsible party assessments are affirmed.

Current records indicate that payments of $53.95 have been applied towards the underlying assessments, leaving a balance due of $2,601.13. 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, P.O. Box 16158, Columbus, OH 43216-6158

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, THESE MATTERS 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
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: 07/20/2022

Linda R. Wallingford TTEE of IRREV TRUST FBO Jane M. Wallingford UTA DTD 122002
ATTN: Linda Wallingford, Trustee
2772 Clarion Ct.
Columbus, OH 43220

Re: Assessment No: 14201627716561
Refund Claim Nos: 33106201313; 61806260526
Fiduciary Income Tax – Multiple Periods

This is the final determination of the Tax Commissioner following the decision and order of the Board of Tax Appeals in Case Nos. 2021-472, 2021-473, 2021-474, dated June 6, 2022. In this order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, a refund in the amount agreed to by the taxpayer shall be 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: 07/20/2022

Linda R. Wallingford TTEE of IRREV TRUST FBO James S. Wallingford UTA DTD 122002
ATTN: Linda Wallingford, Trustee
2772 Clarion Ct.
Columbus, OH 43220

Re: Assessment No: 16201627716563
Refund Claim Nos: 33106201312; 61806260524
Fiduciary Income Tax – Multiple Periods

This is the final determination of the Tax Commissioner following the decision and order of the Board of Tax Appeals in Case Nos. 2021-472, 2021-473, 2021-474, dated June 6, 2022. In this order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, a refund in the amount agreed to by the taxpayer shall be 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: 07/20/2022

Linda R. Wallingford TTEE of IRREV TRUST FBO Cynthia L. Wallingford UTA DTD 122002
ATTN: Linda Wallingford, Trustee
2772 Clarion Ct.
Columbus, OH 43220

Re: Assessment No: 16201627816588
Refund Claim Nos: 33106201509; 61806260525
Fiduciary Income Tax – Multiple Periods

This is the final determination of the Tax Commissioner following the decision and order of the Board of Tax Appeals in Case Nos. 2021-472, 2021-473, 2021-474, dated June 6, 2022. In this order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, a refund in the amount agreed to by the taxpayer shall be 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
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: AUI 2 7 2022

Dollar Bank, Federal Savings Bank
Three Gateway Center 8 North
Pittsburgh, PA 15222

Re: Multiple Refund Claims
Financial Institutions Tax – Multiple Periods

This is the final determination of the Tax Commissioner regarding the following financial institutions tax ("FIT") refund claims filed pursuant to R.C. 5726.30:

Refund Claim No.	Tax Year	Refund Requested
9072310239	2016	$1,230,248.00
9072310982	2017	$1,327,032.00
9072310118	2018	$1,370,982.00
9072310207	2019	$1,472,595.00
9072310064	2020	$1,571,868.00

Dollar Bank, Federal Savings Bank (the "claimant"), is a financial institution with operations in Ohio. The claimant originally requested refunds of all Ohio FIT paid for the tax years at issue, contending the FIT violates the U.S. Constitution in multiple ways. The Department denied the refund claims and the claimant timely requested administrative review of the denials.

While the administrative review was pending, the claimant waived its right to a hearing and all its contentions except those regarding the "internal consistency test." The claimant also submitted new calculations for each period reducing the amount of the refunds sought in accordance with the remedy it proposes to cure the purported internal consistency issue. As such, the refund amounts now at issue are:

Refund Claim No.	Tax Year	Refund Requested
9072310239	2016	$461,732.00
9072310982	2017	$508,471.00
9072310118	2018	$537,481.00
9072310207	2019	$588,068.00
9072310064	2020	$640,158.00

The claimant contends the Ohio FIT's regressive tax rate is per se unconstitutional as it fails the "internal consistency test" developed by the Supreme Court of the United States. Specifically, the claimant contends the FIT fails the internal consistency test because "the more a bank concentrates its business in Ohio…the greater the portion of its total equity capital is taxed at lower rates." The claimant's remedy for this purported constitutional defect is to apply the FIT tax rates to a financial institution's pre-apportioned total

equity capital, then apportion the calculated tax liability using the single gross receipts apportionment factor described in R.C. 5726.05.

It is well-established that the Tax Commissioner lacks jurisdiction to determine the constitutionality of a statute. *See 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; *Swetland v. Kinney*, 69 Ohio St.2d 567, 433 N.E.2d 217 (1982). Consequently, the Commissioner is jurisdictionally required to presume that the FIT, as drafted, is constitutional and to uphold the denial of the refunds.

Accordingly, the refund claims are denied.

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, THESE MATTERS 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

FINAL DETERMINATION

Date: JUL 2 2 2022

Nationwide Bank
Attn: Daniel P. Eppley, Vice President of Tax
One W. Nationwide Blvd 1-3-701
Columbus, OH 43215-2220

Re: Three Applications for Refund
Corporation Franchise Tax – Tax Year 2013
Financial Institutions Tax – Multiple Periods

This is the final determination of the Tax Commissioner on the following application for refund of corporation franchise tax filed pursuant to R.C. 5733.12:

Refund Claim No.	Taxable Year	Tax Year	Refund Claimed
87234	01/01/2012 – 12/31/2012	2013	$1,432,856

This is also the final determination of the Tax Commissioner on the following applications for financial institutions tax refund filed pursuant to R.C. 5726.30:

Refund Claim No.	Taxable Year	Tax Year	Refund Initially Claimed	Partial Refund Previously Granted	Remaining Refund Claim
501261650	01/01/2013 – 12/31/2013	2014	$1,180,253	($933,479)	$246,774
501261687	01/01/2014 – 12/31/2014	2015	$1,330,100	($1,008,960)	$321,140

I. BACKGROUND

A. BACKGROUND ON NATIONWIDE BANK

During the periods in question, Nationwide Bank (hereinafter "claimant" or "NWB") was a federal savings bank located in Columbus, Ohio, which held approximately $6.3 billion in total assets as of December 31, 2014.[1] From January 1, 2012 through December 31, 2014, NWB was a wholly owned subsidiary of Nationwide Mutual Insurance Company (NMIC), one of the largest insurance and financial companies in the country, which had approximately $195 billion in total assets as of December 31, 2014. *Id.* NWB offered deposit products including certificates of deposit, savings accounts, money market accounts, individual retirement accounts, and checking accounts. *Id.* NWB generated deposits and loans nationally and attempted to reach new customers on a national basis through its website, call center, and the mail. *Id.* The most prominent concentration of customers during the periods in question was in the

[1] Office of the Comptroller of the Currency, *Community Reinvestment Act Performance Evaluation – Nationwide Bank, Charter Number: 714970*, Description of Institution. April 15, 2015.

Columbus, Ohio metropolitan area, as the city contains the corporate headquarters of both the bank and holding company and both retail offices. *Id.*

B. ORIGINALLY-FILED CORPORATION FRANCHISE TAX REPORT & TAX REMITTED

During the taxable year starting on January 1, 2012 and ending December 31, 2012, Ohio imposed a CFT on certain domestic and foreign corporations for the privilege of doing business in Ohio. For the period in question, the CFT was limited to tax financial institutions as defined in R.C. 5733.04(K), which section adopted the same meaning used in R.C. 5725.01(A). NWB was a federal savings bank chartered under 12 U.S.C. 1464, which made it a financial institution under both R.C. 5733.04(K) and 5725.01(A). The claimant calculated its tax liability according to R.C. 5733.06 and filed an annual report required by R.C. 5733.03. Records reflect that NWB remitted $1,432,586.00 in tax, which was comprised of payments totaling $905,913 and a credit carryforward from the previous taxable year of $526,943.

C. APPLICATION FOR CORPORATION FRANCHISE TAX REFUND

The claimant filed an application for refund requesting that the Tax Commissioner refund the full amount of the CFT remitted and credited for tax year 2013. R.C. 5733.12(B) governs applications for refund of CFT and states, in pertinent part, that:

> *** an application to refund to the corporation the amount of taxes imposed under section 5733.06 of the Revised Code that are overpaid, paid illegally or erroneously, or paid on any illegal, erroneous, or excessive assessment, with interest thereon as provided by section 5733.26 of the Revised Code, shall be filed with the tax commissioner, on the form prescribed by the commissioner, within three years from the date of the illegal, erroneous, or excessive payment of the tax ***.
>
> On the filing of the refund application, the commissioner shall determine the amount of refund to which the applicant is entitled. If the amount is not less than that claimed the commissioner shall certify the amount to the director of budget and management and treasurer of state for payment from the tax refund fund created by section 5703.052 of the Revised Code. If the amount is less than that claimed, the commissioner shall proceed in accordance with section 5703.70 of the Revised Code.

Records reflect that the application for refund for tax year 2013 was filed within three years of the date of payment, and, as a result, is timely for the purposes of R.C. 5733.12(B).

After conducting an initial review of the application for CFT refund, the Department denied the application. Within sixty days of the initial denial, the claimant objected in writing and submitted additional evidence to support its claim in accordance with R.C. 5703.70(A). A hearing was held on the matter pursuant to R.C. 5703.70(C)(1). This matter will be decided based on the evidence currently available to the Tax Commissioner pursuant to R.C. 5703.70(C)(2), which provides, in pertinent part, that "the commissioner shall review the information, make such adjustments to the refund or compensation as the commissioner finds proper, and issue a final determination thereon."

D. ORIGINALLY FILED FIT REPORTS & TAX REMITTED

The claimant concedes that it was a federal savings bank chartered under 12 U.S.C. 1464 and, as such, a "bank organization" as defined in R.C. 5726.01(B). As a "bank organization" under R.C. 5726.01(B), the claimant was required to remit the financial institutions tax ("FIT") levied by R.C. 5726.02, was required to file an annual report in accordance with R.C. 5726.03, and was required to remit FIT as calculated pursuant to R.C. 5726.04. For both of the periods in question, tax years 2014 and 2015, the claimant timely filed its FIT annual reports (Ohio FIT Form 10 Financial Institutions Tax Report). Ultimately, based on the facts, figures, and apportionment factors reported on the annual reports, the claimant timely remitted tax amounts due of $1,146,337.00 and $1,555,874.00 for tax years 2014 and 2015, respectively.

E. APPLICATIONS FOR FIT REFUNDS

The claimant filed the applications for refund requesting that the Tax Commissioner refund the full amount of the FIT remitted for both tax year 2014 and 2015. R.C. 5726.30(A) governs applications for refund of the FIT and states, in pertinent part, that:

> The tax commissioner shall refund the amount of taxes imposed under this chapter that a person overpaid, paid illegally or erroneously, or paid on an illegal or erroneous assessment. The person shall file an application for refund with the tax commissioner, on the form prescribed by the commissioner, within four years after the date of the illegal or erroneous payment of the tax, or within any additional period allowed under division (B) of section 5726.20 of the Revised Code. The applicant shall provide the amount of the requested refund along with the claimed reasons for, and documentation to support, the issuance of a refund.

Records reflect that both the applications for refund for tax years 2014 and 2015 were filed within four years of the dates of payment, and, as a result, are timely for the purposes of R.C. 5726.30(A).

After conducting an initial review of the applications, the Department granted partial refunds of $933,479 and $1,008,960 for tax years 2014 and 2015, respectively. These partial refunds were issued after the Department determined that qualified research expense credits that NWB claimed pursuant to R.C. 5726.56 were supported by supplemental evidence submitted and consistent with the relevant authority. Upon granting these partial refunds, the Department notified the claimant that the portions of refunds that were not related to qualified research expense credits were being denied. Within sixty days of the notifications of denial, NWB filed an amendment to its initial objections in writing. A hearing on the refund denials was held pursuant to R.C. 5703.70(C)(1). This matter will be decided based on the evidence currently available to the Tax Commissioner pursuant to R.C. 5703.70(C)(2), which provides, in pertinent part, that "the commissioner shall review the information, make such adjustments to the refund or compensation as the commissioner finds proper, and issue a final determination thereon."

Finally, the claimant contends that its "R&D [qualified research expense] Credit for 2014 and 2015 of $43,330 should be carried over to the taxpayer's 2016 FIT Report…[because] the Assessment Credit [under former R.C. 5726.51] was to be claimed BEFORE the R&D credit."[2]

[2] Nationwide Bank. *Nationwide Bank Franchise and FIT Refund Claims*. Page 2. December 16, 2021.

II. THE CLAIMANT'S CONTENTIONS

In its applications for refund, administrative appeals, and supplements, NWB raises multiple arguments which can be broken out into three main categories. First, the claimant asserts that the CFT for tax year 2013 and the FIT for tax years 2014 and 2015 were invalid because the two Ohio taxes violated federal law in the form of 12 U.S.C. 1464(h) and, by extension, the Supremacy Clause of the United States Constitution. NWB's second line of argument centers on what it believes to be the right refund measurement to remedy the purported violation of federal law. The claimant asserts that, since the CFT and FIT violated federal law, it should receive a full refund of all tax remitted for the periods in question. While its preferred remedy is one which fully refunds the tax it paid, for the sake of argument, NWB states that if it "was not entitled to a full refund" its refunds should be "based on its regulatory fees paid to the Office of the Comptroller of the Currency ("OCC") and its regulatory fees paid to the Federal Deposit Insurance Corporation ("FDIC") for the corresponding year."[3] The claimant's third category of contentions are constitutional in nature and allege that the CFT and FIT violated the Due Process Clause, the Equal Protection Clause, and the Commerce Clause.

III. AUTHORITY & ANALYSIS

A. The Transition from the CFT to the FIT for Financial Institutions

The CFT was a business privilege tax that dated back to 1902. For report year 2013, the CFT applied only to financial institutions who were not required to pay the commercial activity tax (CAT). Ohio completely phased out the CFT following tax year 2013 when the CFT was replaced by the FIT and the CAT. The transition from the CFT to the FIT for financial institutions was codified when, in 2012, the Ohio General Assembly passed Amended Substitute House Bill Number 510), which levied the FIT beginning in tax year 2014.

The FIT is a business privilege tax imposed on a financial institution's "total Ohio equity capital," which is the portion of the financial institution's total equity capital apportioned to Ohio. The FIT replaced the CFT on financial institutions and represents the only state tax that financial institutions pay for the privilege of conducting business in Ohio. Records reflect that the claimant registered for the FIT effective for the taxable year beginning January 1, 2013 (tax year 2014).

Division (A) of R.C. 5726.02 indicates that the FIT is imposed "for each calendar year that the financial institution conducts business as a financial institution in this state or otherwise has nexus in or with this state under the Constitution of the United States on the first day of January of that calendar year." The FIT requires taxpayers to file an annual report in accordance with R.C. 5726.03 and to remit tax in an amount calculated in accordance with R.C. 5726.04. Reports and remittances are based on a "taxable year" which "means the calendar year preceding the year in which an annual report is required to be filed under section R.C. 5726.03 of the Revised Code." R.C. 5726.01(Q). The calendar year in which the annual report is filed and the tax is paid is referred to and defined as the "tax year." R.C. 5726.01(P).

The amount of FIT due is equal to the greater of the minimum tax ($1,000) or the amount by which the calculated tax exceeds any credits allowed against the tax. R.C. 5726.02. The tax is calculated by applying a single gross receipts apportionment factor to a financial institution's total equity capital to arrive at total Ohio equity capital. The tax rate or rates are applied to the financial institution's total Ohio

[3] Nationwide Bank. *Nationwide Bank Franchise and FIT Refund Claims*. Page 3. December 16, 2021.

equity capital. The apportionment factor is used to fairly represent the extent of a taxpayer's business activity in Ohio. The method for apportioning total equity capital is prescribed by R.C. 5726.05, which states that "[t]he physical location where the customer ultimately uses or receives the benefit of what was received shall be paramount in determining the proportion of the benefit in this state to the benefit everywhere."

B. THE BANK ORGANIZATION CREDIT PROVIDED FOR UNDER FORMER R.C. 5733.063 & FORMER R.C. 5726.51

At issue in this matter are nonrefundable credits that existed in and were provided for in former R.C. 5733.063 and former R.C. 5726.51.

i. The Savings & Loan Assessment Tax Credit – Former R.C. 5733.063

Former R.C. 5733.063 provided qualifying taxpayers with a savings and loan assessment credit, which could be taken against the CFT, stating:

> A credit shall be allowed against the tax imposed under section 5733.06 of the Revised Code to a savings and loan association organized under Chapter 1151 of the Revised Code in an amount equal to the annual assessment the association paid during the taxable year to the division of savings and loan associations under section 1155.13 of the Revised Code less the amount the association paid in supervisory fees during the taxable year to the federal savings and loan insurance corporation pursuant to 12 C.F.R. 563.17-1, as established in accordance with a schedule of fees as published by the superintendent of savings and loan associations, or in the case of a savings and loan association not insured by the federal savings and loan insurance corporation, the amount it would have paid if insured thereby.
>
> The credit authorized by this section shall be claimed in the order required under section 5733.98 of the Revised Code. The credit shall not be allowed unless there is filed with the annual franchise tax report a document certified by the superintendent of savings and loan associations verifying the amount of state annual assessment fees and federal supervisory fees paid by the association during the taxable year.

Simply put, a taxpayer seeking to claim a tax credit against the CFT pursuant to former R.C. 5733.063 was required to be a savings and loan association that: 1) was organized under Chapter 1151 of the Revised Code; and 2) had paid assessments to the Ohio Department of Commerce's Division of Savings & Loan Associations. Moreover, the second paragraph of former R.C. 5733.063 clearly indicated that a credit "shall not be allowed unless there is filed with the annual franchise tax report a document certified by the superintendent of savings and loan associations verifying the amount of state annual assessment fees and federal supervisory fees paid by the association during the taxable year."

ii. Bank Organization Assessment Tax Credit – Former R.C. 5726.51

Former R.C. 5726.51 allowed qualifying taxpayers to claim a credit against the FIT for tax years 2014 and 2015, and provided:

> A taxpayer may claim a nonrefundable credit against the tax imposed under this chapter for each bank organization that is organized under Title XI of the Revised Code and included in the annual report of the taxpayer. The credit shall equal the sum of the annual assessments such bank organizations paid during the taxable year to the division of financial institutions pursuant to Title XI of the Revised Code and the schedule of fees published by the division. A taxpayer may claim against the tax imposed by this chapter any unused portion of the credits authorized under section 5733.063 of the Revised Code.
>
> The credit authorized by this section shall be claimed in the order required under section 5726.98 of the Revised Code. The credit shall not be allowed unless there is filed with the taxpayer's annual report a document certified by the division of financial institutions verifying the amount of state annual assessment fees and federal supervisory fees paid by the bank organizations during the taxable year.

In order to claim the tax credit against the FIT pursuant to former R.C. 5726.51, the taxpayer was required to be or to have included in its annual report a bank that 1) was organized under Title XI of the Revised Code; and 2) had paid assessments or fees to the Ohio Department of Commerce, Division of Financial Institutions ("ODFI") during the taxable year.

iii. The General Assembly's Repeal of the Credits Under R.C. 5733.063 & R.C. 5726.51

In 2015, the Ohio General Assembly passed Substitute House Bill Number 340 ("H.B. 340"), which repealed R.C. 5733.063 and R.C. 5726.51. In uncodified language, H.B. 340 Section 803.20 stated that "(t)he amendment or repeal of sections 5726.51 *** 5733.063 *** of the Revised Code shall apply to tax years beginning in or after the year in which this act takes effect." H.B. 340 went into effect on December 22, 2015, which fell within the calendar period that is the basis for the tax year 2016 report. Thus, the repeal of R.C. 5726.51 and R.C. 5733.063 was only applicable prospectively for tax years 2016 and beyond. Notably, Section 28 of Article II of the Ohio Constitution largely prohibits retroactive laws, a fact which further supports the Ohio General Assembly's prospective repeal of former R.C. 5726.51. The prohibition on retroactive laws is also codified in R.C. 1.48, which states that "[a] statute is presumed to be prospective in its operation unless expressly made retrospective."

C. BASED ON THE PLAIN LANGUAGE OF THE STATUTES, NWB DOES NOT QUALIFY FOR EITHER THE CREDIT UNDER FORMER R.C. 5733.063 OR FORMER R.C. 5726.51

As is mandatory when evaluating all tax reduction statutes, the language of former R.C. 5733.063 and R.C. 5726.51 must be strictly construed against the claimant who is required to demonstrate a clear entitlement to the credits. *Anderson/Maltbie Partnership v. Levin*, 127 Ohio St.3d 178, 2010-Ohio-4904, ¶ 16; *Westinghouse Electric Corp. v. Lindley*, 58 Ohio St.2d 137 (1979); *Ares, Inc. v. Limbach*, 51 Ohio St.3d 102 (1990); *Dana Corp. v. Testa*, 152 Ohio St.3d 602, 2018-Ohio-1561, 99 N.E.3d 393, ¶ 25. In both cases, the language in former R.C. 5733.063 and R.C. 5726.51 was plain and unambiguous regarding which financial institutions could claim and receive the credits granted by the statutes. The claimant does not assert, and the record does not reflect, that NWB met the statutory requirements that

the General Assembly established as prerequisites for taxpayers to receive the credits. As a result, the claimant has not established it would have been entitled to claim and receive the credits under the plain language of either former R.C. 5733.063 or former R.C. 5726.51.

D. THE CLAIMANT LOOKS TO 12 U.S.C. 1464(h) TO RECEIVE THE CREDITS & REFUNDS

While the claimant clearly does not qualify for the credits in question under the plain language of Ohio law as it existed at the time, NWB nevertheless looks to federal statutory law to support its request for full refunds of CFT and FIT that it remitted. Specifically, the claimant looks to 12 U.S.C. 1464(h) because it is a federal savings bank which is organized under 12 U.S.C. 1464. 12 U.S.C. 1464(h) states:

> No State, county, municipal, or local taxing authority may impose any tax on Federal savings associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions.

NWB asserts that "by providing a credit for regulatory fees paid by Ohio chartered banks but not for federally chartered banks, former R.C. 5726.51 (FIT) and former R.C. 5733.063 (Franchise Tax), the FIT and the Franchise Tax discriminate against federally chartered savings banks and are therefore invalid under 12 U.S.C. Sec. 1464(h) and the Supremacy Clause of the United States Constitution."[4]

E. THE BOARD OF TAX APPEALS' DECISIONS IN *FNB, INC.*, *CINCINNATI FEDERAL SAVINGS AND LOAN, & CENTRAL OHIO BANCORP*

The Tax Commissioner previously issued Final Determinations involving administrative appeals that addressed whether federally-chartered financial institutions were entitled to receive the credit provided for under former R.C. 5726.51 by way of the National Bank Act, codified at 12 U.S.C., 1 *et seq*. In these previously-issued Final Determinations[5], the Tax Commissioner examined 12 U.S.C. 548, which states that "[f]or the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." The Tax Commissioner also looked to several cases where the Ohio Board of Tax Appeals ("Board" or "BTA") examined the credit provided for under former R.C. 5726.51. In particular, the Tax Commissioner looked to *FNB, Inc. v. McClain*, BTA No. 2018-323 (April 14, 2020) and two subsequent and substantially similar cases which the Board decided on identical grounds, i.e., *Cincinnati Federal Savings and Loan v. McClain*, BTA No. 2018-435 (June 15, 2020) and *Central Ohio Bancorp v. McClain*, BTA No. 2018-436 (June 15, 2020). All three of the Board's decisions were appealed by the taxpayers and cross-appealed by the Tax Commissioner to the Supreme Court of Ohio. Though appealed on various grounds to the Supreme Court, the matters were all separately resolved by the parties without a decision regarding either the Board's order to remand the matters to the Tax Commissioner for further review or the constitutionality of R.C. 5726.51, facially or as applied to the taxpayers in the matters.

Because the appeals in *FNB, Inc.*, *Cincinnati Federal Savings and Loan*, and *Central Ohio Bancorp*, were resolved and dismissed, the Board's decisions in those matters remain legal authority that the Tax Commissioner must examine in analyzing the legal issues raised in those appeals. Importantly, the Board

[4] Nationwide Bank. *Nationwide Bank – FIT Refunds Supplement to Petition.* Page 2. September 15, 2021.
[5] *FNB Corporation and Subsidiaries* (Mar. 30, 2021), *BNB Bancorp, Inc.* (Mar. 30, 2021), *LCNB Corp* (Mar. 30, 2021).

indicated in those decisions that it found merit to the appellants' arguments that they should receive a credit or refund equal to what the federally-chartered banks would have been entitled to had they been an Ohio-chartered bank under former R.C. 5726.51. *Id.* at page 3. The decisions in all three BTA cases cited to and relied on 12 U.S.C. 548 and remanded the matters to the Tax Commissioner to address two issues. First, the Board asked the Tax Commissioner to determine whether the federally-chartered banks in those cases would have been eligible to claim the credit under former R.C. 5726.51 had they been state-chartered institutions. Second, if the Tax Commissioner found that the federal banks would have been entitled to the FIT credit or refund had they been state-chartered, the Board of Tax Appeals ordered the Tax Commissioner to calculate and grant the credit to the extent it would have been available to a federal bank had that bank been state-chartered.

i. Should NWB Have Been Eligible for a Credit or Refund under Former R.C. 5733.063 or Former R.C. 5726.51?

Before analyzing whether NWB is entitled to claim either the credit under former R.C. 5733.063 or under former R.C. 5726.51, it is worth noting that there are two important differences between the previous BTA decisions and the current facts and law presented in this matter. The first key difference is that the previous matters analyzed and relied on 12 U.S.C. 548, whereas NWB is now relying on 12 U.S.C. 1464(h). The claimant contends that "the prohibition in 12 U.S.C. 1464(h) is broader than the prohibition in 12 U.S.C. 548."[6] To support this contention, NWB looks to letters written to the Tax Commissioner by the OCC and an amicus brief filed by the OCC with the Ohio Supreme Court in the *Central Ohio Bancorp* case. Second, the OCC never analyzed, examined, or issued any statement regarding whether or to what extent it believed the credit permitted under former R.C. 5733.063 or Ohio's CFT would be impacted by either 12 U.S.C. 548 or 12 U.S.C. 1464(h). More importantly, neither the OCC's September 15, 2015 letter nor its February 9, 2016 letter identified or actually analyzed how a federal savings bank would qualify for the credit under former R.C. 5726.51 by way of 12 U.S.C. 1464(h). Rather, the OCC analyzed how and why it believes that 12 U.S.C. 548 requires a federally-chartered bank to be treated as a bank existing under the laws of Ohio for purposes of R.C. 5726.51 and then simply asserted that 12 U.S.C. 1464(h) includes the "same prohibition on discriminatory taxation applied to FSAs [federal savings associations]"[7].

Despite the assertions from the OCC that 12 U.S.C. 548 and 12 U.S.C. 1464(h) provide the "same prohibition"[8] or, as the claimant states, a "broader" [9] prohibition, there are significant differences in the language of the two provisions. For instance, 12 U.S.C. 548 states that "[f]or the purposes of any tax law enacted under authority of the United States or any State, a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." On the other hand, 12 U.S.C. 1464(h) bars states from imposing "any tax on federal savings associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." Aside from referencing the OCC's statement that 12 U.S.C. 548 and 12 U.S.C. 1464(h) are the "same

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[6] Nationwide Bank. *RE: Nationwide Bank Franchise and FIT Refund Claims*. Dec. 16, 2021, page 4.

[7] Office of the Comptroller of the Currency. *Merit Brief – Central Ohio Bancorp v. McClain.* Case No 2020-0855, pages 2 and 7. Sep. 15, 2020. *See also*, Office of the Comptroller of the Currency. *Interpretive Letter No. 1155, Ohio Financial Institution Tax* (Sept. 17, 2015), and OCC *Interpretative Letter, Ohio Financial Institution Tax Refunds* (Feb. 9, 2016), Footnote 2, which states "*** it is our opinion that the FIT is also inconsistent with 12 U.S.C. 1464(h), which prohibits any tax on federally chartered savings associations great than that imposed on comparable state-chartered institutions."

[8] *Id.*

[9] See footnote 6.

prohibition" or a "broader" prohibition on discriminatory taxation of federal banks, NWB did not provide a detailed explanation or analysis regarding how the nonrefundable credits provided for by former R.C. 5733.063 and former R.C. 5726.51 would result in an imposition of a tax on federal savings associations higher than that of similar local financial institutions, and therefore violate 12 U.S.C. 1464(h). The differences between the language of 12 U.S.C. 548 and 12 U.S.C. 1464(h) are undeniable, and simply asserting that the provisions result in an identical or substantially similar outcome with respect to former R.C. 5733.063 and R.C. 5726.51 without explanation is insufficient to support the claimant's assertions.

In addition to referencing the OCC's letters and amicus brief, NWB identifies several federal cases in which courts found that certain state tax schemes violated 12 U.S.C. 1464(h); however, these cases did not involve credits identical or similar to those that were provided for under former R.C. 5733.063 and former R.C. 5726.51. Furthermore, the federal appellants in those cases performed extensive factual and legal analyses of the specific state taxation schemes and explained, in detail, how they violated 12 U.S.C. 1464(h) to support their conclusion that the state laws in question were not permissible under federal law. Here, NWB has not detailed or demonstrated whether and to what extent the facts at issue in the federal cases it cites are either analogous or directly applicable to the facts and circumstances presented in this matter.

Again, it bears repeating that the language of former R.C. 5733.063 and R.C. 5726.51 must be strictly construed against the claimant, who is required to demonstrate a clear entitlement to the credits it seeks. For the reasons discussed in this section, the Tax Commissioner does not believe that NWB has provided an analysis of 12 U.S.C. 1464 as it would apply to former R.C. 5733.063 and former R.C. 5726.51 sufficient to demonstrate a clear entitlement to credits and refunds it is seeking.

However, while the Tax Commissioner does not believe that the claimant has demonstrated a clear entitlement to the credits and refunds it is seeking, he is nevertheless mindful of the Board of Tax Appeals previous decisions in *FNB, Inc.*, *Cincinnati Federal Savings and Loan*, and *Central Ohio Bancorp*, which were discussed above. Notably and most importantly, the Tax Commissioner is aware that the appellant in *Cincinnati Federal Savings and Loan* was a federal savings association organized under 12 U.S.C. 1464.[10] This is important because, in making a determination to remand the matter to the Tax Commissioner for further consideration, the Board in *Cincinnati Federal Savings and Loan* cited its analysis and application of 12 U.S.C. 548 from *FNB, Inc.* stating, in pertinent part, that:

> *** we find merit to FNB's argument that it should receive the benefit of a credit to which it would have been entitled had it been chartered under Ohio, rather than federal, law. 12 U.S.C. 548 requires that for purposes of state tax law, such as the FIT, "a national bank shall be treated as a bank organized and existing under the laws of the State or other jurisdiction within which its principal office is located." Therefore, if the credit granted by former R.C. 5626.51 [sic] applied to FNB, then it should be granted the credit to the extent it would have if it were chartered under Ohio law. The commissioner failed to make the determination as to whether FNB would be eligible for such a credit, and for that reason we must reverse his decision. Because he failed to make that determination, however, we

[10] Federal Deposit Insurance Corporation. *Institution Details – Cincinnati Federal.* Retrieved from https://banks.data.fdic.gov/bankfind-suite/bankfind/details/28346?bankfindLevelThreeView=Other%20Names&branchOffices=true&pageNumber=1&resultLimit=25 (last accessed on February 28, 2022).

must remand the matter to the commissioner in order to consider this issue. *Federal Savings and Loan v. McClain*, *supra* at page 2.

Ultimately, in *Cincinnati Federal Savings and Loan*, the Board found its decision in *FNB, Inc.* controlled stating that:

> We find our decision in FNB controls the outcome of this case. As a consequence, the final determination of the Tax Commissioner is vacated. This case is remanded to the Tax Commissioner to determine whether appellant paid any annual assessments or fees substantially similar to those paid by Ohio banks for which a credit would be allowed. If the answer is in the affirmative, then the commissioner should calculate the appropriate credit and grant the appropriate refund. *Id.* at pages 2 and 3.

Based on the Board's application of a 12 U.S.C. 548-based analysis to a federal savings association, which was organized under 12 U.S.C. 1464, and order to remand in *Cincinnati Federal Savings and Loan*, the Tax Commissioner concludes that the Board determined that 12 U.S.C. 548 and 12 U.S.C. 1464(h) are analogous and require similar applications and outcomes for federally-chartered commercial banks and federal savings association. Mainly, in applying the Board's decision in *Cincinnati Federal Savings and Loan* to this matter, the Tax Commissioner must determine whether a federal savings bank paid any annual assessments or fees substantially similar to those paid by state banks, and, if so, calculate the appropriate credit and grant the appropriate refund. The Board's holding in *Cincinnati Federal Savings and Loan* also leads the Tax Commissioner to conclude that since R.C. 5733.063 provided a nonrefundable credit to savings and loan associations organized under Chapter 1151 of the Revised Code "equal the sum of the annual assessments such bank organizations paid during the taxable year to the division of financial institutions pursuant to Title XI of the Revised Code and the schedule of fees published by the division", the BTA's holding requires a determination regarding whether a federal savings bank paid any annual assessments or fees substantially similar to those paid by state-chartered savings and loan association.

Because the Board has indicated in these previous opinions the analysis that it believes the Commissioner should apply in cases where similar claims of entitlement to the credit are asserted by federally-chartered institutions, the Tax Commissioner will address those questions and apply the analysis specified by the Board in those opinions. But, consistent with his cross appeals in the above-mentioned cases, the Commissioner reserves the right to argue (should this matter reach the Ohio Supreme Court) that neither 12 U.S.C. 548 nor 12 U.S.C. 1464(h) require any refund in the present situation because the claimant did not pay any regulatory fees to ODFI and thus was not in the same position as any bank that received a refund.

ii. <u>What is the Appropriate Credit Measurement for a Federal Savings Association Under Former R.C. 5733.063 and R.C. 5726.51?</u>

Based on the Board's decision in *Cincinnati Federal Savings and Loan*, the Tax Commissioner must now identify the appropriate credit measurement under former R.C. 5733.063 and former R.C. 5726.51 for the claimant. Specifically, as charged by R.C. 5733.12(B), R.C. 5726.30(A), and R.C. 5703.70(C)(2), the Commissioner must examine the information presented to determine the amount of tax paid by the claimant which was illegal or erroneous and then refund the proper amounts.

In this matter, NWB is seeking a full refund of the CFT and FIT that it remitted for the applicable periods. To support its request for full refunds of all of the tax that it remitted, the claimant references and relies heavily on letters written to the Tax Commissioner by the OCC and an amicus brief filed by the OCC with the Ohio Supreme Court in the *Central Ohio Bancorp* case.[11] Both of the OCC's letters to the Tax Commissioner indicated that the "FIT was inconsistent and not permissible under federal law" during the periods at issue in this matter. The second letter was issued in February 2016 following the General Assembly's repeal of R.C. 5726.51, and, after acknowledging that the repeal made the "FIT consistent with federal law going forward", the OCC indicated that it "believe[s] that the appropriate relief is a full refund".

The OCC's belief that the appropriate refund measurement would be a full refund of all of the FIT paid was rooted in the inconsistency that it saw between former R.C. 5726.51 and with 12 U.S.C. 548 and 12 U.S.C. 1464(h) during the periods in question. While its preferred remedy is one which fully refunds the tax it paid, NWB states that if it "was not entitled to a full refund" its refunds should be "based on its regulatory fees paid to the Office of the Comptroller of the Currency ("OCC") and its regulatory fees paid to the Federal Deposit Insurance Corporation ("FDIC") for the corresponding year."

Notwithstanding any inconsistency that may have existed between Ohio and federal law and notwithstanding the refund amounts that claimant seeks, the Tax Commissioner will look to the plain language of the relevant authority to identify the appropriate refund measurement 12 U.S.C. 1464(h), the federal statute relied upon by the claimant, prohibits "any tax on federal savings associations or their franchise, capital, reserves, surplus, loans, or income greater than that imposed by such authority on other similar local mutual or cooperative thrift and home financing institutions." Therefore, Ohio would be prohibited from imposing a tax on a federal savings bank greater than that imposed on a state savings and loan association chartered under Chapter 1151 of the Revised Code.

A full refund of the CFT and FIT paid by the claimant is both an inappropriate and an inaccurate measurement of the amount a federal savings association could have claimed had former R.C. 5733.063 and former R.C. 5726.51 directly applied to it. The inappropriateness of the full refund claim is apparent in that granting a full refund of the CFT and FIT paid by the claimant would provide it with the privilege of having operated a financial institution in Ohio tax-free despite the numerous benefits and business the bank received by operating in Ohio. Thus, retroactively granting what would be, in effect, tax-exempt status would cut against both the intent and application of the National Bank Act, i.e., 12 U.S.C. 548, and 12 U.S.C. 1464(h), by treating federal savings banks differently from and more favorably than state savings and loan associations.

The inaccuracy of the full refund of all FIT paid that the claimant seeks is evident in one critical fact - no state-chartered savings and loan association received a credit under either former R.C. 5733.063 or former R.C. 5726.51 that fully reduced or otherwise eliminated its total CFT or FIT liability for any tax year. Rather, state savings and loan associations received credits under former R.C. 5733.063 and former R.C. 5726.51 that amounted to a fraction of the total CFT and FIT due for a particular period. Granting the claimant a full refund of its CFT or FIT would not result in equal treatment of state and federal banks, but would instead effectively erase the claimant's CFT or FIT liability while holding state banks liable for CFT or FIT.

[11] See, footnote 7.

An appropriate remedy to rectify any defect must strike a balance to ensure that both federal savings banks and state savings and loans associations are treated comparably under the CFT and FIT. Granting a federal savings bank a full refund of CFT and FIT while requiring state savings and loan associations to pay the CFT and FIT represents an inappropriate remedial measurement, which is inconsistent with 12 U.S.C. 548 and 12 U.S.C. 1464(h) and overcorrects the purported problem. Again, the appropriate refund measurement is one which levies the CFT and FIT in the same way that it was levied on Ohio-chartered savings and loan associations during the periods in question. In particular and as it relates to this matter, that means identifying what credit a savings and loan association would have been due under former R.C. 5733.063 and former R.C. 5726.51.

The claimant's alternative refund request which would be based on the regulatory fees it paid to the OCC and to the FDIC does not achieve the objectives of either 12 U.S.C. 548 or 12 U.S.C. 1464(h) because it would provide the claimant with state-based tax credits based on dissimilar and differently-calculated federally-based assessments and fees. The regulatory fees that the claimant paid to the OCC and the assessment fees it paid to the FDIC are incompatible and are too dissimilar from those which formed the basis of the credits granted under former R.C. 5733.063 and former R.C. 5726.51. In other words, granting refunds based on the fees that federal savings banks paid would not treat them in the same manner as state savings and loan associations during the periods in question, and, due to the dissimilarity between state and federal assessments, would create an unevenness and incongruity in the credit calculations between state and federally-chartered institutions. The only way to calculate credits which truly treat the claimant as if it were an Ohio-based savings and loan association (and to ensure that a greater tax is not imposed on the federal savings bank) is to look at the credits that state savings and loans associations actually claimed and received during the periods in question.

To that end, the Tax Commissioner will examine data and statistical evidence to identify and quantify the tax impact of former R.C. 5733.063 and former R.C. 5726.51. Specifically, with respect to former R.C. 5733.063 and former R.C. 5726.51, the statistical data points that most accurately and appropriately represent the tax impact of the credit exists in the ratio of credits claimed and received by state savings and loan associations divided by the CFT and FIT liabilities of those institutions. This ratio uses data from the range of actual CFT and FIT taxpayers who claimed and received the credit in the years at issue to reach an "effective credit rate", which quantifies the average effective tax rate "discount" that each state institution claiming the credit under former R.C. 5733.063 and former R.C. 5726.51 received during tax years 2013, 2014, and 2015. The effective credit rate is a data-based and accurate depiction of the actual benefit state banks received under former R.C. 5733.063 and former R.C. 5726.51.

The Tax Commissioner examined the relevant data available to the Department and determined that state savings and loan associations received, on average, an effective credit rate equal to 20.8% of their total CFT in tax year 2013, 21.2% of their total FIT in tax year 2014, and 17.6% of their total FIT in tax year 2015. When these effective credit rates are applied against the claimant's CFT and FIT liabilities for the periods in question, the distorted nature of the claimant's full tax-paid refund measurement is particularly noticeable:

TAX TYPE	TAX YEAR	CLAIMANT'S TOTAL TAX LIABILITY	AVERAGE EFFECTIVE CREDIT RATE FOR OHIO SAVINGS & LOAN ASSOCIATIONS	CLAIMANT'S EQUIVALENT EFFECTIVE CREDIT	TOTAL REFUND SOUGHT BY THE CLAIMANT
CFT	2013	$1,432,856	20.8%	**$298,034**	**$1,432,856**
FIT	2014	$246,774	21.2%	**$52,316**	**$246,774**
FIT	2015	$321,140	17.6%	**$56,521**	**$321,140**

These effective credit rate ratios reveal that the full refund amounts that the claimant seeks are inappropriate, inaccurate, and would grant the claimant an effective credit that is approximately five-times larger than that which the average state-chartered savings and loan association received in the periods in question. At the same time, the effective credit rates allow the Tax Commissioner to calculate an accurate and appropriate credit measurement for the claimant which, in turn, treats NWB as though it were a state-chartered savings and loan association and allows for credits equal to what a state institution received, thus resulting in the imposition of the same effective tax rate. Therefore, the effective credit rate method satisfies the requirements of 12 U.S.C. 548 and 12 U.S.C. 1464(h) and the Board's instruction from *Cincinnati Federal Savings and Loan.*

F. THE FIT IS PRESUMED TO BE CONSTITUTIONAL

The claimant's remaining contentions are that the CFT and FIT violated the Constitution of the United States. It is well-established that the Tax Commissioner lacks jurisdiction to decide constitutional issues. See *Cleveland Gear Co. v. Limbach*, 35 Ohio St. 3d 229, 231, 520 N.E.2d 188 (1988). For these reasons, to the extent that the claimant raises constitutional objections regarding the Commerce Clause, Equal Protection Clause, the Supremacy Clause, and otherwise, the Tax Commissioner cannot decide them.

IV. CONCLUSION

The cases and concepts discussed in the authority and analysis section demonstrate the inaccuracy and inappropriateness of the full refunds and remedy that the claimant is seeking. However, based on the facts and circumstances presented in this matter and in accordance with the BTA's decision in *Cincinnati Federal Savings and Loan*, the Tax Commissioner determines that the appropriate remedy is to grant the claimant partial refunds in amounts equal to what they would have received under an effective credit rate calculation as laid out above.

Accordingly, pursuant to R.C. 5733.12(B) and R.C. 5703.70(C)(2), the application for CFT refund is partially granted as follows:

Refund Claim No.	Taxable Year	Tax Year	Partial Refund Amount
87234	01/01/2012 – 12/31/2012	2013	$298,034

Pursuant to R.C. 5726.30(A) and R.C. 5703.70(C)(2), the applications for FIT refund are partially granted as follows:

Refund Claim No.	Taxable Year	Tax Year	Partial Refund Amount
501261650	01/01/2013 – 12/31/2013	2014	$52,316
501261687	01/01/2014 – 12/31/2014	2015	$56,521

All three partial refund grants identified will include interest computed in accordance with R.C. 5703.47.

Finally, the claimant's contention that its "R&D [qualified research expense] Credit for 2014 and 2015 of $43,330 should be carried over to the taxpayer's 2016 FIT Report…[because] the Assessment Credit

[under former R.C. 5726.51] was to be claimed BEFORE the R&D credit" is not well taken because the partial refunds granted pursuant to this Final Determination do not produce any additional credit which could be carried forward to 2016.

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
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 8 2022

Republic Services of Ohio Transportation LLC
c/o Republic Services
ATTN: Geoffrey Stayer, Director of State & Local Tax
18500 N. Allied Way
Phoenix, AZ 85054

Re: Refund Claim Nos.: 3103981046 & 3103981605
Motor Fuel Tax - 1/1/2018 – 3/31/2018; 4/1/2018 – 6/30/2018

This is the final determination of the Tax Commissioner regarding the following motor fuel tax refunds filed pursuant to R.C. 5735.14:

Refund Claim No.	Reporting Period	Refund Claimed
3103981046	1/1/2018 – 3/31/2018	$21,470.05
3103981605	4/1/2018 – 6/30/2018	$21,018.07

I. BACKGROUND

The claimant provides commercial, industrial, and residential waste hauling and recycling services throughout Ohio, including curbside trash pickup and garbage collection. The claimant filed the above refund claims accompanied by limited documentation to support the claims. The Department of Taxation reviewed the refund claims and denied the claims in full. The claimant appealed the denial of these refund claims and requested a hearing. A hearing was scheduled on the matter; however, the claimant did not appear at the hearing. Therefore, this appeal will be decided based upon information currently available to the Commissioner.

II. CLAIMANT'S CONTENTIONS

The claimant contends that motor fuel used to run power take-off ("PTO") equipment on its vehicles is exempt from motor fuel tax pursuant to R.C. 5735.14. Additionally, the claimant also contends that any refund of motor fuel tax that is due should not be offset against Ohio sales and use tax it owes because the motor fuel used in its refuse collection operations is not subject to Ohio sales and use tax pursuant to R.C. 5739.01(Z).

III. AUTHORITY AND ANALYSIS

A. STATUTES

R.C. 5735.14(A) provides for reimbursement of Ohio motor fuel tax paid by a person when the motor fuel is not used in operation of a motor vehicle on Ohio's highways or waters. R.C. 5739.02(B)(32) provides a sales and use tax exemption for "motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in

highway transportation for hire". "'Highway transportation for hire' means the transportation of personal property belonging to others for consideration". R.C. 5739.01(Z).

B. TAXPAYER'S BURDEN OF PROOF FOR EXCLUSIONS

Taxpayers claiming 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; exemptions from taxation are strictly construed against the claim of exemption in favor of the taxing authorities. *See Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 409 (1952); *Beckwith & Assoc. v. Kosydar*, 49 Ohio St.2d 277, 279 (1977), and *Canton Malleable Iron Co. v. Porterfield,* 30 Ohio St.2d 163, 166 (1972). *See also Memorial Park Golf Club, Inc. v. Lawrence*, 2000 Ohio Tax LEXIS 471 (BTA No. 99-K-633). Thus, in determining whether the petitioner is entitled to the exclusion which it seeks, the facts must be determined under a strict, narrow reading of the relevant definitions. In addition, a taxpayer 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* (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.

C. MOTOR FUEL USED TO RUN PTO EQUIPMENT

R.C. 5735.14(A) exempts fuel used to run PTO equipment on vehicles from motor vehicle fuel taxes. In the claimant's business of waste hauling and disposal, examples of PTO equipment used on its vehicles include refuse compaction equipment, cart dumper power equipment, and refuse unloading equipment.

The claimant could have been eligible for a refund related to motor fuel used to run its PTO equipment had it submitted well-documented refund claims with computations showing the refunds due. Such refund claims must be submitted within one year of the date of purchase and can only be filed if at least 100 gallons of fuel was at issue. *See* R.C. 5735.14(C). However, the claimant has not submitted sufficient information to show that it is owed a refund of motor fuel tax. Specifically, the claimant needed to submit the gallons of motor fuel it purchased that were subject to Ohio motor fuel tax, compute the number of these gallons used to run PTO equipment, provide the percentage of its motor fuel used to run PTO equipment, and compute the Ohio sales and use tax owed on the motor fuel exempted from Ohio motor fuel tax.[1]

As explained above, Ohio law requires that claims for exemption are strictly construed against the taxpayer and in favor of the taxing authorities. Further, a taxpayer must provide the Commissioner with concrete evidence supporting its request for exclusions and refunds. Thus, the burden is on the claimant to show that it is owed such a refund. However, in this case the claimant has not submitted the documents or computations necessary to prove that it is entitled to a refund. Therefore, this contention is not well taken.

[1] R.C. 5739.02(B)(6) requires that an Ohio motor fuel refund be offset by any sales and use tax owed on the motor fuel that is not subject to Ohio's motor fuel tax.

E. Ohio Sales and Use Tax Owed

As discussed above, R.C. 5735.14 allows a refund for the motor fuel tax if the claimant shows it used the fuel for any purpose except operation of a vehicle on Ohio highways or waterways. However, pursuant to R.C. 5739.02(B)(6), if the purchase of motor fuel is exempt from motor fuel tax, it is generally subject to Ohio's sales and use tax (and thus the motor fuel refund must be offset by such amount). Thus, if the claimant is to receive a refund, it must demonstrate the fuel purchase is exempt from **both** Ohio's motor fuel tax under chapter 5735 *and* Ohio's sales and use tax under chapters 5739 and 5741.

Here, the claimant contends that the purchase of motor fuel herein is exempt from sales tax under R.C. 5739.02(B)(32), the transportation for hire exemption.[2] This contention is not well taken. The transportation for hire exemption only applies to "motor vehicles that are primarily used for transporting tangible personal property belonging to others". In the case at hand, the claimant did not provide sufficient information to show which party owned the trash being hauled by the claimant. Therefore, as the ownership of the trash being hauled is not established, the Commissioner cannot determine if the claimant qualifies for the transportation for hire exemption. The claimant's motor fuel usage, to the extent it was not subject to Ohio motor fuel tax, may be subject to Ohio sales and use tax. As such, the claimant's contention that it is owed a refund of Ohio motor fuel tax for the periods at issue, without a reduction in the refund claimed for Ohio sales and use tax owed, is denied.

IV. Conclusion

The claimant has failed to demonstrate that it is owed a refund of Ohio motor fuel tax for the periods at issue. As explained above, it has not submitted any documentation or computations showing the amount of a motor fuel tax refund owed. In addition, based on what information *is* available, the claimant may owe Ohio sales and use tax on the motor fuel for which it possibly would be due a motor fuel tax refund. As such, the claimant would not be entitled to the refunds sought.

Accordingly, these refund claims are denied in full.

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, THESE MATTERS 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

[2] It does not assert a sales or use tax exemption under any other theory.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Michael R. and Susan K. Back
902 Elm Court
Heath, OH 43056

Re: Refund Claim No. 0241326341
Individual Income Tax - 2019

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2019	$594.00

Michael and Susan Back (the "claimants") filed a 2019 IT 1040 reporting an overpayment of $594.00 and requested a refund of that amount.[1] The Department denied the claimants' retirement income credit and senior citizen credit, which reduced the claimants refund to $356.00. In response to the refund variance notice, the claimants submitted additional documentation related to their claim and requested administrative review of the denied portion of their refund. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

Jointly filing individuals must have a modified adjusted gross income ("MAGI") less exemptions of under $100,000.00 to claim the retirement income credit or the senior citizen credit. R.C. 5747.055(B) and (F). MAGI is defined as Ohio adjusted gross income ("OAGI") plus the business income deduction ("BID"). R.C. 5747.01(II). In tax year 2019, the claimants' OAGI was $104,691.00, their BID was $2,565.00, and their exemption amount was $3,700.00. Thus, the claimants' OAGI plus BID (aka their MAGI), less exemptions was $103,556.00. Therefore, the claimants are not eligible for the either the retirement income credit or the senior citizen credit because their MAGI less exemptions is at least $100,000.00.

Accordingly, the remainder of the refund claim is denied.

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 FILED APPROPRIATELY CLOSED.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02(A)(1).

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4485 Northland Ridge Blvd• Columbus, OH 43229
(614) 466-6750 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 2 8 2022

Richard & Vicki Birdoff
24 Trails End
Chappaqua, NY 10514

Re: Assessment No.: 02202000992823
Individual Income Tax - 2018

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

Tax	Interest	Penalty	Total
$925.00	$33.45	$66.90	$1,025.35

Richard and Vicki Birdoff (the "petitioners") filed their 2018 Ohio individual income tax return claiming $7,619.00 in pass-through entity ("PTE") credits and requesting a refund of that amount. The Ohio Department of Taxation denied a portion of the petitioners' PTE credit[1] because the underlying PTE from which the credit was claimed had neither filed nor paid the underlying tax. Nevertheless, the petitioners contend the Department erroneously denied that portion of their credit and request that the PTE credit be allowed as claimed on their 2018 Ohio tax return. The petitioners requested a hearing; however, because the petitioners' contentions are well taken, the hearing is waived.

R.C. 5747.059 allows a refundable credit to certain PTE investors equal to the investor's proportionate share of the lesser of tax paid by the PTE or the tax liability of the PTE. The PTE has since filed and paid its Ohio tax liability for the relevant period. The petitioners are thus allowed their PTE credit as requested.

Accordingly, the assessment is cancelled and a refund of $787.00[2] is granted plus applicable statutory 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

[1] The Department previously granted $5,907.00 in PTE credits claimed by the petitioners.
[2] The petitioners had a tax liability of $6,832 and total PTE credits of $7,619.

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4485 Northland Ridge Blvd, Columbus • Columbus, OH 43229
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FINAL DETERMINATION

Date: JUL 2 8 2022

Timothy G. Biro & Deborah Allen
12900 Lake Ave. PH 23
Lakewood, OH 44107

Re: Assessment No.: 02201934478915
Individual Income Tax - 2017

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

Tax	Interest	Penalty	Total
$1,207.00	$90.90	$181.80	$1,479.70

I. BACKGROUND

Timothy G. Biro and Deborah Allen (the "petitioners") timely filed their 2017 Ohio individual income tax return claiming an Ohio Business Income Deduction ("BID") of $24,162.00. The Department later determined the petitioners did not include all of their businesses' losses reported on federal Schedule E when calculating their BID on Ohio Schedule IT BUS, and adjusted the petitioners' return; this adjustment resulted in the assessment at issue. The petitioners contend that the Department erroneously denied their BID as claimed. The petitioners did not request a hearing; therefore, the matter is now decided based on the information currently in the Commissioner's possession.

II. AUTHORITY

R.C. 5747.01(A)(31) allows jointly filing taxpayers to deduct up to $250,000 of their business income. "Business income" is defined, in part, as "income, including *gain or loss*, arising from transactions, activities, and sources in the regular course of a trade or business". R.C. 5747.01(B) (Emphasis added). By contrast, nonbusiness income is defined as "all income other than business income." R.C. 5747.01(C). Pursuant to R.C. 5747.231, income reported by a pass-through entity ("PTE"), such as a partnership or S corporation, retains its character as business income or nonbusiness income when passing through to PTE investors. *See also Agley v. Tracy*, 87 Ohio St.3d 265, 1999-Ohio-61.

Ohio law provides for two tests to determine if income is business income for the purpose of Ohio's Business Income Deduction.[1] The transactional test is used to determine if income generated in the course of a trade or business "arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages." *Kemppel* at 422. Similarly, the functional test determines that income not generated in the *regular* course of a trade or business is business income if the "use of the [property or other asset of the business that generated the income] constituted an integral part of the regular course of a trade or business operation." *Id.* at 423.

[1] *See Kemppel v. Zaino*, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001)

III. ORDINARY BUSINESS INCOME AS BUSINESS INCOME

The petitioners were entitled to deduct $250,000 their *net* business income on their 2017 Ohio tax return. Here, the petitioners deducted their gain reported on their federal Schedule C without netting it against the losses reported on their federal Schedule E.[2] The petitioners first contend that $68,378.00 of their federal Schedule E loss, reported on a K-1 as ordinary business income/loss from a PTE[3], is not business income. However, the petitioners do not assert *why* this amount, which in accordance with Ohio law retains its character as business income, is nonbusiness income. This income resulted from the ordinary business operations of the PTE, evidenced by its being reported on the K-1 as ordinary business income. Under *Kemppel*, the income satisfies the transactional test because income generated in the ordinary course of business necessarily "arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages." Under *Agley*, the income then retains its character as business income when it flows from the PTE to the petitioners. Thus, the petitioners' contention that the ordinary business income reported on their K-1 is not business income is not well taken. The petitioners provided no evidence to support their assertion it is not business income.[4]

IV. OTHER INCOME AS NONBUSINESS INCOME

The petitioners next contend that, if the $68,378.00 "ordinary business income" loss is business income, then that loss is nullified by $68,297.00 of "other income" reported in box 11 on their K-1. However, the petitioners do not explain why that "other income" is business income or provide evidence to support their contention. They do not even explain exactly what type of income was reported as "other" income.[5] Because the petitioners do not explain the genesis of their "other income", or support their contention that the "other income" amount is business income under R.C. 5747.01(B), their contention is not well taken.[6]

V. PASSIVE PRIOR-YEAR CARRYOVERS

The petitioners finally contend that $14,359.00 of their federal Schedule E losses were from passive prior-year carryovers, and should not be included in their BID calculation. However, 5747.01(A)(31) allows taxpayers to deduct the "portion of an individual's *adjusted gross income* that is business income, *to the extent not otherwise deducted or excluded* in computing federal or Ohio adjusted gross income" ("FAGI" and "OAGI" respectively) for the taxable year. *Id.* (Emphasis added). Thus, any business gain

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[2] The record indicates the petitioners included $24,162.00 in business income from their Schedule C business gains and losses, but did not include the $82,737.00 in net loss from PTEs reported on their federal Schedule E. The petitioners do not successfully assert how the Schedule E losses are nonbusiness income under Ohio law. *See* R.C. 5747.01(B) and 5747.01(C) (defining nonbusiness income).

[3] The petitioners submitted a K-1 form labelled for tax period 2016, but indicates that it is for the 2017 individual income tax year, specifically reporting for the period 1/1/2017 through 7/31/2017. No K-1 was provided for the remainder of the 2017 tax year, but Department records indicate that the PTE that issued the K-1 ceased filing tax returns in Ohio after its 2016 tax period ended. There is no other indication that the K-1 provides incomplete information for the tax year at issue.

[4] R.C. 5703.36 requires the Commissioner "inform himself as best he can" when a taxpayer fails to furnish information sufficient to support their contentions. Under *Agley*, the fact that the PTE reported the $68,378.00 loss as "ordinary business income" on the K-1 it issued to the petitioners is therefore the best evidence of whether that income is business income..

[5] The box 11 income is coded "E", which, according to IRS guidelines, indicates that income resulted from the PTE's discharge of debt owed to it by the petitioners. The petitioners do not argue that the underlying PTE is in the trade or business of discharging their debt. *Kemppel v. Zaino* (2001).

[6] The Commissioner acknowledges this income was reported on a K-1. However, without knowing exactly how the income was earned, the Commissioner cannot determine it meets either the transactional or functional test of R.C. 5747.01(B).

or loss included in FAGI for the taxable year must be included on the IT BUS when calculating the Ohio BID; to put it another way, the reported business loss must be netted against the reported gain when calculating BID. *See* R.C. 5747.01(A)(31) and (B). Here, the petitioners reported a $14,359.00 loss on their federal Schedule E for 2017, and that loss is included in their FAGI for that year. The petitioners assert it should not be included in their BID calculation because it represents a prior-year business income loss, but do not assert that the amount is not business income. Under R.C. 5747.01(A)(31) the petitioners are required to include that loss in their BID calculation because it is included in their 2017 FAGI and it is business income; whether that income was left out of FAGI and OAGI in prior years and carried forward to 2017 is immaterial.

VI. CONCLUSION

For the reasons stated, the petitioners' contentions that their federal Schedule E losses should not have been used to calculate their BID is not well taken. Additionally, the petitioners have not shown the "other income" at issue was business income under R.C. 5747.01(B). The petitioners' net business income, when taking into account all proven business gains or losses included in their FAGI for 2017, was less than zero for the tax year. Thus, under these facts, they were not entitled to a BID for tax year 2017.

Accordingly, the assessment is affirmed.

Current records indicate that the assessment has been paid in full. 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

Ohio | Department of Taxation

Office of the Tax Commissioner
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FINAL DETERMINATION

Date: JUL 2 8 2022

Mario Blue
4212 E. 186th St.
Cleveland, OH 44122

Re: Assessment No. 02202007026720
Individual Income Tax –2018

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

Tax	Interest	Penalty	Total
$783.00	$34.31	$68.62	$885.93

Mario Blue (the "petitioner") timely filed his 2018 Ohio individual income tax return, indicating $783.00 in tax due. The Ohio Department of Taxation later assessed the petitioner the above amounts because it did not receive payment for the tax due when the petitioner filed his return. The petitioner contends he paid his 2018 Ohio individual income tax with a money order. He requested a hearing, however, he failed to appear on two separate occasions. The matter is now decided based on the information currently in the Commissioner's possession.

R.C. 5747.13(A) allows the Commissioner to assess taxpayers the amount of tax due, interest, and penalties if they fail to remit full payment of the tax due when they file their Ohio individual income tax return. Here, the petitioner contends that he paid his 2018 Ohio individual income tax with a money order, but states in his petition that he no longer possesses a receipt for that money order. The Department has no record of receiving his payment. Because the Department has no record of the petitioner remitting payment of his 2018 individual income tax, and because the petitioner has not provided evidence to support his contention, the contention is not well taken.

Accordingly, the assessment is affirmed.

Current records indicate that no payment has been applied on this assessment, 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." 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.

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

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FINAL DETERMINATION

Date: JUL 2 8 2022

Dennis Carberry III & Jill Carberry
2206 Ashbrook Dr.
Ashtabula, OH 44004

Re: Assessment No.: 02201908198690
Individual Income Tax - 2014

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

Tax	Interest	Penalty	Total
$5,360.00	$807.60	$1,615.20	$7,783.65

Dennis and Jill Carberry (the "petitioners") timely filed their 2014 Ohio individual income tax return claiming an Ohio Small Business Investor Income Deduction ("SBD") of $122,582.00 and $1,161.00 in tax due. The Department later adjusted the petitioners' return because it could not verify the income included on Schedule SBD was business income; this adjustment resulted in the assessment at issue. The petitioners responded to the assessment by providing additional documentation but did not advance any specific contentions regarding how the Department erred in calculating their SBD or the assessment at issue. The petitioners did not request a hearing; therefore, the matter is now decided based on the information currently in the Commissioner's possession.

Former R.C. 5747.01(A)(31) allowed taxpayers to deduct 75% of their Ohio business income, to the extent not otherwise deducted or excluded in the computation of their federal or Ohio adjusted gross income. "Business income" is defined in R.C. 5747.01(B) as:

> [I]ncome, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, and intangible property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation. "Business income" includes income, including gain or loss, from a partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill.

On multiple occasions, the Department requested supporting documentation and an explanation of how the $122,582.00 at issue was earned so that it could determine if it is business income, but the petitioners did not respond to those requests.[1] Because the petitioners have not provided specific contentions related

[1] The record indicates the examiner requested copy of the petitioners' full federal return, K-1s, a narrative explaining how the $122,582.00 qualified for the SBD, and other supporting documents in letters dated 2/13/2019 and 11/26/2019. Though the petitioners responded to the assessment by providing a copy of their Ohio Schedule SBD, that schedule alone is not

to the assessment or explained why the $122,582.00 is business income, the Department's adjustment to their SBD is proper. *See generally* R.C. 57403.36 and 5747.13(A) (requiring assessments to be made based on the best information available to the Commissioner).

Accordingly, the assessment is affirmed.

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." 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.

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

sufficient for the Department to determine whether the petitioners included all income, gain or loss, eligible for the SBD in their calculation, or if all income included in their calculation was eligible for the SBD.

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FINAL DETERMINATION

Date:

JUL 2 8 2022

Philip S. & Denise E. Cooke
22937 Port Royal Lane
Cudjoe Key, FL 33042

Re: Refund Claim No.: 0335352841
Individual Income Tax – 2015

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2015	$170.00

Philip and Denise Cooke (the "claimants") filed their Ohio individual income tax return for 2015 claiming the above refund amount.[1] The Ohio Department of Taxation denied the claimants' refund because the refund claim was filed outside the four-year statute of limitations. *See* R.C. 5747.11. The claimants do not contest the dates relevant to this matter but requested administrative review. They did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner's possession.

R.C. 5747.11 requires the Commissioner to refund any overpayment of tax if a taxpayer files a refund claim within four years of "the illegal, erroneous, or excessive *payment* of the tax." R.C. 5747.11(B) (Emphasis added). Here, the claimants are seeking a refund of Ohio income tax withheld from their wages; such amounts are deemed paid on the unextended due date for filing the 2015 return, which was April 18, 2016. *See* R.C. 5747.11(C)(1); *see also Lee v. Tracy*, 71 Ohio St. 3d 572 (1995). The claimants filed their refund claim in November of 2020,[2] more than four years after their taxes became due and were considered paid for 2015.[3] Thus, the claimants' contention is not well taken.

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02.
[2] While the return was dated October 16, 2020, it was postmarked November 23, 2020.
[3] The claimants indicate they suffered a series of hardships that delayed the filing of their refund claim in their request for administrative review. However, Ohio law does not allow for dispensation of the applicable four-year statute of limitations for refund claims due to hardship. *See* R.C. 5747.11.

Accordingly, their refund claim is denied.

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 2022

John G. & Ruth E. Cooper
208 Woodchuck Dr.
Sunbury, OH 43074

Re: Refund Claim No. 0183300816
Individual Income Tax –2019

This final determination of the Tax Commissioner hereby vacates the final determination issued on June 30, 2022, pertaining to this refund claim and replaces it with the following:

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2019	$1,561.00

John and Ruth Cooper (the "claimants") filed their 2019 Ohio individual income tax return claiming a refund amount of $1,561.00.[1] The Department later denied the claimants' senior citizen, retirement income, and Ohio earned income tax[2] credits, and adjusted the claimants' refund to $1,324.00. The claimants contend the Department erroneously denied their credits. The claimants did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner's possession.

Individuals jointly filing their Ohio individual income tax return must have a modified adjusted gross income ("MAGI") less exemptions of under $100,000.00 to claim the retirement income credit and/or the senior citizen credit. R.C. 5747.055(B) and (F). MAGI is defined as Ohio adjusted gross income ("OAGI") plus the business income deduction ("BID"). R.C. 5747.01(II). Here, the claimants had a MAGI, less exemptions, of $102,119.00 for 2019,[3] which is more than $100,000. Therefore, they were not entitled to a retirement income credit under R.C. 5747.055(B) or the senior citizen credit under R.C. 5747.055(F). However, the record shows that they were entitled to a recalculated joint filing credit, which was granted when the Department adjusted their return.

Accordingly, the claimants' additional refund is denied.[4]

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[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02.
[2] The claimants accidentally requested their joint filing credit on the "Ohio earned income tax" credit line of the Ohio Schedule of Credits, so they were given the joint filing credit in calculating the refund variance. To be eligible for an Ohio earned income tax credit, the claimants would have had to have claimed an earned income credit on their 2019 federal return, and the available evidence indicates they did not take an earned income tax credit on their 2019 federal return. *See* R.C. 5747.71
[3] The claimants took a BID of $7,313, exemptions totaling $3,700, and had an OAGI of $98,506.
[4] Department records show the previously refunded amount was allowed as a credit carry-forward against future Ohio individual income tax liability.

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

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Tax Commissioner

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FINAL DETERMINATION

Date: JUL 2 8 2022

Arthur and Mary A. Cordova
10621 S. 8th Street
Schoolcraft, MI 49087

Re: Assessment No. 02202030154396
Individual Income Tax – 2018

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

Tax	Interest	Penalty	Total
$6,011.00	$457.12	$457.12	$6,925.24

The Department assessed Arthur and Mary Cordova (the "petitioners") after adjusting their 2018 Ohio individual income tax return to reduce the income tax withheld reported by the petitioners.[1] The petitioners object to the corrected assessment and request a full penalty abatement. The Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). Upon review, the evidence and circumstances support a full abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$6,011.00	$457.12	$0.00	$6,468.12

Current records indicate that payments totaling $6,468.12 have been applied to this assessment, leaving no balance due.

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

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[1] The Department made this adjustment after receiving a corrected W-2 statement from Danone US LLC that showed the Ohio withholding amount corrected to $0.00.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Carl L. Crawford
878 Hawk Ave.
Tipp City, OH 45371

Re: Multiple Refund Claims
Individual Income Tax – Multiple Periods

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claims filed pursuant to R.C. 5747.11:

Refund Claim	Tax Year	Refund Claimed
0247351515	2011	$294.00
0247351517	2012	$336.00
0247351516	2013	$353.00
0252327218	2014	$559.00

Carl Crawford (the "claimant") filed Ohio individual income tax returns for the tax years at issue claiming the above refund amounts.[1] The Ohio Department of Taxation denied the claimant's refunds because the refund claims were filed outside the four-year statute of limitations. The claimant does not contest the dates relevant to this matter but has requested administrative review, asserting his failure to timely file his refund claims was due to hardship. The claimant did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner's possession.

R.C. 5747.11(B) requires taxpayers to file refund claims within four years of the date an illegal, erroneous or excessive payment was made; payments made prior to the date tax returns must be filed are deemed paid on that date. *See* R.C. 5747.11. The claimant filed his refund claims in 2020, more than four years after his taxes became due and were considered paid for the tax years at issue.[2] Ohio law does not allow the Department to dispense with the applicable statute of limitations due to hardship on the

[1] Department records indicate the claimant filed his original returns for 2013 and 2014 on August 5, 2020, and for 2011 and 2012 on August 6, 2020 respectively. These returns meet the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02.

[2] The petitioner's withholdings were considered a payment deemed made on the date each year's Ohio returns were due. Thus, the statute of limitations expired on April 17, 2016 for 2011, April 15, 2017 for 2012, April 15, 2018 for 2013 and April 15, 2019 for 2014. The claimant also requested review of his 2009 wages and withholdings; the claimant did not file a refund application for that year, so it is not at issue in this final determination. Regardless, any refund claim for that year would also be outside the applicable statute of limitation. *See* R.C. 5747.11.

part of the taxpayer. *See* R.C. 5747.11. Based on the evidence available to the Commissioner, the claimants' contention that he is entitled to his claimed refunds is not well taken.[3]

Accordingly, the refund claims are denied.

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, THESE MATTERS WILL BE CONCLUDED, AND THE FILE APPROPRIATELY CLOSED.

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/s/ Jeffrey A. McClain

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Tax Commissioner

[3] The petitioner requests the refunds be applied to amounts owed for other tax years rather than issued to him as refunds. The same statute of limitations applies regardless of whether a refund is issued to a taxpayer or if that amount is used to offset tax liability for other years. *See* R.C. 5747.12 *and* R.C. 5747.11.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Leslie Dunaye
4042 ½ Wadsworth Rd
Norton, Ohio 44203

Re: Multiple Assessments
Individual Income Tax – Multiple Periods

This is the final determination of the Tax Commissioner regarding petitions for reassessment filed pursuant to R.C. 5747.13 concerning the following individual income tax assessments:[1]

Assessment	Year	Tax	Interest	Penalties	Total
02201936585704	2013	$4,174.49	$885.89	$1,461.07	$6,521.45
02201936585705	2014	$3,689.59	$668.96	$1,291.35	$5,649.90

The Department assessed Leslie Dunaye (the "petitioner"), as an Ohio resident, for failing to file individual income tax returns for the tax years in question. The petitioner responded to the assessment, but did not advance any specific contentions regarding how the Department erred in calculating the assessment. Importantly, the petitioner did not pay the assessed amounts, claim lack of nexus with Ohio, or claim that her correctly calculated tax liability was less than $1.01. The petitioner requested a hearing, which was held via telephone.

Ohio's income tax is levied on individuals residing in Ohio, earning or receiving income in Ohio, or otherwise having nexus with or in Ohio. R.C. 5747.01, R.C. 5747.02(A). Every taxpayer who is liable for Ohio income tax is required to file an annual return. R.C. 5747.08. R.C. 5747.13(E)(3) requires a petitioner who fails to file an Ohio income tax return to pay the total amount of the assessment within time period for filing a petition for reassessment unless the basis for not filing the return is either: (1) a lack of nexus with Ohio; or (2) the taxpayer's correctly calculated tax liability is less than $1.01.

In this case, the petitioner has not filed the required Ohio income tax returns and has not paid the full amount of the assessments. Additionally, the petitioner did not assert in her petition for reassessment or at the hearing either a lack of nexus with Ohio, or that her correctly calculated tax liability for each year is less than $1.01. As a result, the Commissioner must dismiss the petition.

Accordingly, these matters are dismissed for lack of jurisdiction, and the assessments stand as issued.

[1] The petitioner also filed a petition for reassessment for assessment number 02201936585703 for 2015. However, a corrected assessment was subsequently issued by the Department on 6/15/2020. This corrected assessment was not appealed, and thus is not addressed in this final determination. *See* R.C. 5703.60(A)(1).

Current records indicate that no payments have been applied towards these assessments, leaving the full balances 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.

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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FINAL DETERMINATION

Date: JUL 2 8 2022

Ruben S. & Maria O. Escuro
2667 Wyndgate Ct.
Westlake, OH 44145

Re: Refund Claim No. 1230302411
Individual Income Tax –2016

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2016	$11,696.00

Ruben and Maria Escuro (the "claimants") filed an amended 2016 Ohio individual income tax return in June 2021 seeking the above refund based on claiming an increased business income deduction ("BID").[1] The Ohio Department of Taxation denied the claimants' refund because the request was outside of the four-year statute of limitations. *See* R.C. 5747.11. The claimants contend the Department erroneously denied their refund because they did not file their original 206 Ohio IT 1040 until 2019; thus, they contend they have four years from the date of that return to file a refund claim. The claimants did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner's possession.

R.C. 5747.11 requires the Commissioner to refund any overpayment of tax if a taxpayer files a refund claim within four years of "the illegal, erroneous, or excessive *payment* of the tax." R.C. 5747.11(B) (Emphasis added). Here, the claimants are seeking a refund of Ohio income tax withheld from their wages; such amounts are deemed paid on the unextended due date for filing the 2016 return, which was April 17, 2017. *See* R.C. 5747.11(C)(1); *see also Lee v. Tracy*, 71 Ohio St. 3d 572 (1995). That the claimants filed their original 2016 return two years late does not change when the payment at issue was deemed made; therefore, the four-year statute of limitations for claiming a refund ran from April 17, 2017 to April 17, 2021. Because the claimants' amended return was filed in June of 2021, it was outside the four-year window provided for in R.C. 5747.11.

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02.

Accordingly, the claimant's refund is denied.

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

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(614) 466-6750 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 2 8 2022

Amber Farrell
7595 Havens Rd.
Blacklick, OH 43004

Re: Refund Claim No.: 2008631177
Individual Income Tax - 2019

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2019	$1,005.00

Amber Farrell (the "claimant") timely filed her 2019 Ohio individual income tax return claiming a refund of $1,005.00.[1] The Department adjusted the claimant's refund to $213.00 after increasing the claimant's federal adjusted gross income and denying her "unreimbursed medical and health care expenses" deduction.[2] The claimant alleges that the Department erroneously denied her refund as claimed based on her assertion that the federal government accepted her 2019 federal return as filed. However, she provided no evidence to support her federal Schedule C deductions and other deductions taken on her Ohio return. The claimant did not request a hearing; therefore, the matter is now decided based on the information currently available to the Commissioner.

Ohio's individual income tax is levied on OAGI less exemptions. R.C. 5747.02(A)(3). R.C. 5747.01(A) defines OAGI as "federal adjusted gross income, as defined and used in the Internal Revenue Code, adjusted as provided in" that division. While the petitioner used the FAGI from her federal returns when completing her Ohio returns, the Commissioner determined the FAGI was not computed in accordance with applicable federal laws.[3] Specifically, the claimant deducted $14,402.00 in net business losses when computing her FAGI on her 2019 federal 1040. She claims she realized this substantial loss due to $20,318 in expenses she incurred as an Uber driver. However, the claimant has not provided a form 1099 or other income statement supporting her contention that she operated a business as an Uber driver in 2019. She has also failed to provide evidence to substantiate her business expenses as claimed on her federal Schedule C.[4] Absent this evidence, the Commissioner must inform himself "as best he can" when

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02.
[2] The Department also adjusted her exemption amount based on changes to her Ohio adjusted gross income ("OAGI"). *See* R.C. 5747.025. The claimant does not address the denied deduction or the change to her exemption in her request for administrative review. Thus, they are not at issue in this final determination.
[3] The Commissioner "is not confined to follow a taxpayer's statement that certain income should be excluded from the taxpayer's federal adjusted gross income," and may adjust FAGI in accordance with federal law on a taxpayer's Ohio individual income tax return. *Knust v. Wilkens*, 111 Ohio St.3d 331 (2006) (Internal quotation marks omitted).
[4] Instead, evidence available to the Commissioner shows the petitioner was an employee of another company and reported compensation from a W-2 during the tax year.

determining the appropriate refund due. *See* R.C. 5703.36. Because the claimant has not provided evidence to substantiate her claim to have operated a business or her claimed business expenses,[5] her contention that the Department erred in adjusting her FAGI is not well taken.

Accordingly, the claimant's remaining refund is denied.

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

[5] It is also worth noting that the claimant's claimed expenses not only far exceed her sales ($20,318 in expenses versus $5,916 in sales), but are quite substantial for a part-time Uber driver (including $7,922 in "Supplies", $1,160 in "Deductible meals", and $2,935 in Utilities).

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FINAL DETERMINATION

Date: JUL 2 8 2022

Judith A. Faulkner
34556 Gromley Rd.
Salem, OH 44460

Re: Refund Claim No. 2004807057
Individual Income Tax –2019

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2019	$750.00

Judith Faulkner (the "claimant") timely filed her 2019 Ohio individual income tax return claiming a refund of $750.00.[1] The Department denied the claimant's refund because it could not verify receipt of the payments reported on the claimant's 2019 Ohio return. The claimant responded to the Department's refund adjustment by providing copies of three checks made payable to the U.S. Treasury.[2] The claimant did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner's possession.

R.C. 5747.11 requires the Tax Commissioner to refund any overpayment of tax. However, payments the claimant provided in response to the Department's refund adjustment were made to the federal government, not the Ohio Department of Taxation. The Department did not receive those payments and thus did not apply them toward the claimant's 2019 Ohio tax liability. The Department does not otherwise have record of receiving $750.00 from the claimant for 2019. Thus, it correctly adjusted the claimant's 2019 refund to $0.

Accordingly, the claimant's refund is denied.

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

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02.
[2] The claimant appears to contend that she made three payments of $250.00 in 2019 by providing copies of cashed checks made out to the U.S. Treasury (not Ohio) totaling the amount by which her 2019 return was adjusted.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Len A. and Jakki L. Haussler
2308 Bay Drive
Pompano Beach, FL 33062

Re: Refund Claim No. 2029027554
Individual Income Tax - 2019

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2019	$47,976.00

Len and Jakki Haussler (the "claimants") filed a 2019 IT 1040 reporting an overpayment of $47,976.00[1] and requesting a credit carry-forward of $27,976.00 and a refund of $20,000.00. The Department denied $9,424.00 of pass-through entity ("PTE") credit reported by the claimants because it could not verify the credit amount, which reduced the claimants' refund to $10,576.00.[2] In response to the refund variance notice, the claimants submitted additional documentation related to the claim and requested administrative review. The claimants did not request a hearing; therefore, this matter is now decided based upon the evidence available to the Commissioner.

R.C. 5747.059(B) and 5747.08(I) allow a refundable credit to certain PTE investors equal to the investor's proportionate share of the lesser of the tax due or tax paid by the PTE on behalf of the investor. In this case, the claimants are claiming indirect pass-through entity credit from US SBA Rcvr for Adena Ventures LP via Adena Partners LLC. However, US SBA Rcvr for Adena Ventures LP *did not pay the tax due* with its entity level filing (form IT 1140), and therefore the claimants are not entitled to a PTE credit for that entity (i.e., the lesser of the tax due or **tax paid** is $0).

However, in response to an assessment, Adena Partners LLC paid $11,288.00 in tax for 2019. Since Ms. Haussler owns a 21.08% interest in Adena Partners LLC, she can receive credit for her proportionate share of the lesser of the tax due or tax paid by Adena Partners LLC. Therefore, the claimants are entitled to a PTE credit of $2,379.51.

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02(A)(1).
[2] The credit carry-forward was unchanged and was applied to tax year 2020 as requested.

Accordingly, an additional refund of $2,379.51, plus applicable statutory interest, is granted. The remainder of the outstanding refund claim is denied.

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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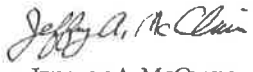

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

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Tax Commissioner

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FINAL DETERMINATION

Date: JUL 2 8 2022

Joseph P. and Pamela A. Hoetker
5604 Wynnburne Ave
Cincinnati, OH 45238

Re: Individual Income Tax - 2017
Assessment No. 02202000994965

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

Tax	Interest	Penalty	Total
$61.00	$4.84	$9.68	$75.52

I. BACKGROUND

The Department assessed Joseph and Pamela Hoetker (the "petitioners") after adjusting their 2017 Ohio individual income tax return (form IT 1040) to reduce the business income deduction ("BID") claimed on Ohio Schedule IT BUS. Specifically, the BID did not include the petitioners' rental losses reported on their federal Schedule E. The petitioners objected to the assessment and provided evidence related to their contention. The petitioners claim the rental losses they reported on their federal Schedule E are not business income and therefore should not be included in the BID calculation.[1] The petitioners did not request a hearing; therefore, this matter is decided upon information currently available to the Commissioner.

II. AUTHORITY

Individuals jointly filing the Ohio IT 1040 can deduct up to $250,000 of business income to the extent such income is included in federal adjusted gross income. R.C. 5747.01(A)(28).[2] In R.C. 5747.01(B), business income is defined as:

> [I]ncome, including gain or loss, arising from transactions, activities, and sources in the regular course of a trade or business and includes income, gain, or loss from real property, tangible property, and intangible property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation. "Business income" includes income, including gain or loss, from a

[1] The petitioners also contend that they did not need to include their federal Schedule E loss when calculating their BID because the rental property is located outside of Ohio. However, the BID is calculated using all business income, regardless of the location of the source.
[2] Formerly R.C. 5747.01(A)(31).

partial or complete liquidation of a business, including, but not limited to, gain or loss from the sale or other disposition of goodwill.

By contrast, R.C. 5747.01(C) defines nonbusiness income as:

> [A]ll income other than business income and may include, but is not limited to, compensation, rents, and royalties from real or tangible property, capital gains, interest, dividends and distributions, patent or copyright royalties, or lottery winnings, prizes, and awards.

In *Kemppel v. Zaino*, the Ohio Supreme Court reviewed the two tests used to classify business income. *Kemppel v. Zaino*, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001):

> "Part I: '"Business income" means income arising from transactions, activities, and sources in the regular course of a trade or business,'" and
>
> "Part II: 'includes income from tangible and intangible personal property if the acquisition, rental, management, and disposition of the property constitute integral parts of the regular course of a trade or business operation.'"

Kemppel at 422. (internal citations omitted).

The Court determined that income is classified as business income under the transactional test if "it arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages." *Id.* The Court then described the functional test finding that income is classified as business income if "use of the property constituted an integral part of the regular course of a trade or business operation." *Id.* at 423.

III. ANALYSIS

In this case, the rental losses the petitioners reported on their federal Schedule E are business income under either the transactional test or the functional test. R.C. 5747.01(B) contemplates gain or loss from real property as potential business income. Loss from real property is business income under the "transactional test" if it is derived from a transaction in which the taxpayer regularly engages. *Kemppel* at 422. The petitioners' federal Schedule E shows the petitioners rented out the property throughout the entirety of tax year 2017. They accepted rent for the property and failed to report any personal use days of the property. The federal Schedule E also shows that the petitioners deducted expenses consistent with the operation of a business, including legal and other professional fees. Because the petitioners regularly engaged in the business of renting out the property, the losses related to the property are business income under the transactional test and R.C. 5747.01(B).

Additionally, income is business income under the "functional test" "if the acquisition, *rental*, management, and disposition of the property constitute integral parts of the taxpayer's regular trade or business operations." R.C. 5747.01(B) (emphasis added) and *Kemppel* at 423. In this case, the petitioners maintain the property on which they collect rent. Such real property is actively managed, which is essential to the petitioners' operation of the rental property.[3] Therefore, the rental losses are also business income using the functional test under R.C. 5747.01(B).

[3] So essential that the petitioners outsource this function and pay management fees to do so.

IV. CONCLUSION

The rental losses the petitioners reported on their federal Schedule E are business income using either the transactional or functional test under R.C. 5747.01(B). As such, the losses should have been included as part of their BID calculation.

Accordingly, the petitioners' contention is not well taken, and the assessment stands as issued.

Current records indicate no payments have been applied to 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 (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-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THIS MATTER WILL BE CONCLUDED AND FILED 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 8 2022

Shaaban B. Ibrahim & Fatuma O. Dahir
4929 Lion Dr.
Columbus, OH 43228

Re: Refund Claim No. 0118302801
Individual Income Tax – 2019

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2019	$515.00

Shaaban Ibrahim and Fatuma Dahir (the "claimants") timely filed their 2019 Ohio individual income tax return claiming a refund of $515.00.[1] The Ohio Department of Taxation reduced the claimants' exemptions from five to two and adjusted their return accordingly, resulting in a refund of $306.00. The claimants responded by providing additional documentation. The claimants did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner's possession.

The Department has since been able to verify the claimants' exemptions.

Accordingly, their remaining refund is granted plus applicable statutory 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

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Tax Commissioner

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Glenn and Juli King
6701 Crosse Road
Amherst, OH 44001

Re: Individual Income Tax - 2017
Assessment No. 02201934479868

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

Tax	Interest	Penalty	Total
$1,099.00	$82.77	$165.54	$1,347.31

The Department assessed Glenn and Juli King (the "petitioners") after adjusting their 2017 Ohio individual income tax return to reduce the business income deduction ("BID") claimed on Ohio Schedule IT BUS because the BID did not include the petitioners' rental real estate and partnership losses reported on their federal Schedule E. The petitioners initially objected to the assessment and requested a hearing; however, the petitioners' waived the hearing and withdrew their appeal in a written correspondence dated July 7, 2022. Thus, no further action is required.

Accordingly, the assessment stands as issued.

Current records indicate no payment has been applied to the assessment, 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 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.

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Jeffrey A. McClain
JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
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FINAL DETERMINATION

Date: JUL 2 8 2022

Peter F. Levin & Elizabeth Jacobs
309 Oregon St. Apt. 502
Cincinnati, OH 45202

Re: Assessment No.: 02202027346980
Individual Income Tax – 2019

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
$3,958.00	$45.96	$91.92	$4,095.88

Peter Levin and Elizabeth Jacobs (the "petitioners") filed their 2019 Ohio individual income tax return as Ohio residents, claiming a resident credit of $78,469.00 based on taxes paid to Massachusetts and thus a refund of $74,511.00. The Department denied their resident credit, which resulted in a denial of their refund and the assessment at issue. The petitioners object to the assessment, contending that the Department erred in denying their resident credit. The petitioners requested a hearing; however, because the petitioners' contentions are well taken, the hearing is waived.

Ohio residents may generally take a nonrefundable credit for the lesser of the tax liability owed to Ohio, or the amount of tax actually paid to another state, on the Ohio adjusted gross income and taxable business income of an Ohio resident who is "subjected to an income tax" in another state or the District of Columbia. R.C. 5747.05(B).

Here, the petitioners maintained an Ohio domicile during tax year 2019, and correctly filed as Ohio residents. The petitioners where also considered Massachusetts residents under Massachusetts law. The petitioners have shown their income was subject to tax in Massachusetts, and they lawfully paid tax on said income in Massachusetts. Thus, they are entitled to their resident credit as claimed.

Accordingly, the assessment is cancelled, and their refund claim of $74,511.00 is granted plus applicable statutory 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

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FINAL DETERMINATION

Date: JUL 2 8 2022

Robert L. Powell Jr. and Svetlana A. Iakovenko
11726 Frost Rd.
Tipp City, OH 45371

Re: Assessment No. 02202001797245
Individual Income Tax – 2017

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

Tax	Interest	Penalty	Total
$3,630.00	$292.24	$584.48	$4,506.72

The Department assessed Robert Powell and Svetlana Iakovenko (the "petitioners") for reporting the incorrect federal adjusted gross income ("FAGI") on their 2017 Ohio individual income tax return. This information was reported to Ohio by the Internal Revenue Service ("IRS") under authorization of IRC 6103(d). The petitioners objected to the assessment and requested a hearing, which was held via telephone. This matter is decided based upon the evidence available to the Commissioner and supplied at the hearing.

Ohio's tax base for individuals is Ohio adjusted gross income less exemptions. *See* R.C. 5747.02(A). As the petitioners noted in their petition, Ohio adjusted gross income starts with "federal adjusted gross income, as defined and used in the Internal Revenue Code * * *." R.C. 5747.01(A). In this case, the petitioners filed their Ohio individual income tax return reporting a federal adjusted gross income of negative $1,001.00, which is less than the $119,820.00[1] reported to Ohio by the IRS. The petitioners' Ohio adjusted gross income was adjusted to reflect the FAGI reported by the IRS, which resulted in the assessment. Although the petitioners contest the assessed amount, the information currently available to the Commissioner indicates that the assessed tax and interest are accurate based on the FAGI reported by the IRS.

Accordingly, the petitioners' contention is not well taken, and the assessment stands as issued.

Current records indicate that no payments have been made on this assessment, leaving the full balance due. 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,**

[1] Although the petitioners filed their 2017 federal 1040 reporting a FAGI of negative $1,001.00 and subsequently filed their amended federal 1040 reporting a FAGI of negative $16,886.00, the IRS did not accept those amounts as the petitioners' FAGI. The IRS reports the petitioners' FAGI as $119,820.00 for tax year 2017.

which is in addition to the above total. Payments shall be made payable to the "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 FILED APPROPRIATELY CLOSED.

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TAX COMMISSIONER

/s/ Jeffrey A. McClain

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FINAL DETERMINATION

Date: JUL 2 8 2022

Robert L. Powell Jr. and Svetlana A. Iakovenko
11726 Frost Rd.
Tipp City, OH 45371

Re: Refund Claim No. 16350200
Individual Income Tax - 2018

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2018	$5,186.00

I. BACKGROUND

Robert Powell and Svetlana Iakovenko (the "claimants") filed a 2018 Ohio individual income tax return reporting an overpayment of $5,186.00 and requested a refund of that amount.[1] The Department granted $2,349.00 of the requested refund but denied the remainder after disallowing the claimants' nonresident credit. The claimants objected to the refund denial and requested a hearing, which was held via telephone. This matter is decided based upon the evidence available to the Commissioner and supplied at the hearing.

II. RELEVANT AUTHORITY

A. OHIO RESIDENTS AND THE INDIVIDUAL INCOME TAX

An Ohio resident is always subject to the individual income tax, regardless of where the individual earns or receives income.[2] 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. A "nonresident" is an individual who is not a resident. R.C. 5747.01(J).

The tests set forth in divisions (B), (C) and (D) of R.C. 5747.24 examine the number of Ohio contact periods to arrive at a presumption of whether the individual is an Ohio resident for the tax year. Division (A)(1) of R.C. 5747.24 indicates that a person has a contact period if the person is overnight away from their abode located outside of Ohio and while away spends at least some portion, however minimal, of

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02(A)(1).
[2] 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 and taxable business income of a resident taxpayer that is taxed by other states or (2) the actual amount of income tax paid to other states.

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.

Under R.C. 5747.24(B)(1), an individual is presumed not to be domiciled in Ohio (i.e., the individual is presumed to be a nonresident) if the individual satisfies the five requirements listed in that division and files the nonresident statement on or before October 15th of the year following the tax year (in this case, by October 15, 2019). If the statement is not timely filed, or the statement is false in any way, the burden shifts to the individual to prove that they were not domiciled in Ohio during the taxable year. R.C. 5747.24(C) states that an individual who has less than 213 contact periods with Ohio, who has an abode in Ohio and who is not irrebuttably presumed to be a nonresident is *presumed to be domiciled in Ohio* for the entire taxable year. An individual can rebut the presumption set forth in R.C. 5747.24(C) with a preponderance of evidence to the contrary. Preponderance of the evidence means "evidence which is of a greater weight or more convincing than the evidence which is offered in opposition to it." *In re A.F.*, 2018-Ohio-310, 103 N.E.3d 1260, ¶ 53 (2nd Dist. 2018), quoting *In re Starks*, 2d Dist. Darke No. 1646, 2005-Ohio-1912 [2005 WL 939851], ¶ 15, quoting Black's Law Dictionary 1182 (6th Ed. 1998).

B. 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. In addition, R.C. 5747.24(B) "distinguishes verification of domicile from verification of contact periods and abode; it does not conflate them." *Id.* ¶25. While the Ohio Revised Code does not define "domicile," the definition of domicile has been set forth in previous Ohio court decisions.

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 abandons it with 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,* ¶ 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).

III. ANALYSIS

In this case, Mr. Powell submitted an untimely nonresident statement for the tax year at issue.[3] Additionally, Mr. Powell's nonresident statement contains a false statement because the claimants did in fact receive an Ohio owner-occupancy tax reduction during the taxable year.[4] Therefore, Mr. Powell is not entitled to an irrebuttable presumption of nonresidency; instead, Mr. Powell is presumed to be an Ohio resident for all of tax year 2018.

The claimants have provided evidence showing Mr. Powell had less than 213 contact periods for the tax year. Thus, the claimants must rebut the presumption of Ohio domicile with a preponderance of the evidence to the contrary. R.C. 5747.24(C). Irrespective of the claimants' argument that Mr. Powell spent much of 2018 in West Virginia, physical presence is not, in and of itself, a determinative factor for the purpose of determining domicile. Residents of Ohio are subject to the individual income tax, regardless of where the individual earns or receives income.

In support of the claimants' assertion that Mr. Powell was not domiciled in Ohio in 2018, the claimants submitted Mr. Powell's 2018 W-2 statement, a lease for a property located in West Virginia, utility bills, a North Carolina driver's license, and a statement of Mr. Powell's expenditures. It is important to note that Mr. Powell's 2018 W-2 statement lists his address as 11726 Frost Road Tipp City, Ohio 45371 and shows Ohio withholding. These facts suggest that Mr. Powell did not establish a new domicile in West Virginia because his residence in West Virginia was temporary in nature and tied to his employment.

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. Although the claimants contend Mr. Powell was not an Ohio resident in 2018, his actions during 2018 show he maintained significant connections with Ohio. He also reinforced his connection to Ohio and continued to enjoy the rights and privileges afforded to Ohio residents during 2018. The claimants used an Ohio mailing address, 11726 Frost Road Tipp City, Ohio 45371, on their 2018 Federal and Ohio individual income tax returns. Department records reflect Mr. Powell had multiple vehicles registered to that address and the vehicle registrations were renewed in July of 2018.

Information available from the Montgomery County Auditor's website shows the claimants owned a home during the period in question located at 11726 Frost Road Tipp City, Ohio 45371 and that the

[3] The nonresident statement was dated "9/16/2020", which is almost a year after it was due.
[4] Montgomery County Auditor, Property Search, https://www.mcrealestate.org/datalets/datalet.aspx?mode=profileall&sIndex=0&idx=1&LMparent=20 (last accessed July 26, 2022).

claimants utilized the owner-occupancy credit for the property in 2018. This reduction is authorized by R.C. 323.152(B) and is only available to those properties that are "owned and occupied as a home by an individual whose domicile is in this state." *See* R.C. 323.151(A)(1) (relating to a "homestead"). Notably, the Ohio Supreme Court's decision in *Cunningham* found that the appellees' verification of non-Ohio domicile was false considering a contradictory statement made under penalty of perjury on a homestead exemption application for Ohio property occupied as their principal place of residence. *Cunningham*, ¶ 29-30. In this case, the claimants continue to own and live in the above home. The fact that the claimants received the owner-occupancy tax reduction during 2018 is a substantial basis for a finding that the claimants were domiciled in Ohio for the tax year at issue. Mr. Powell's spouse also lived in Ohio during the tax year and Mr. Powell returned to Ohio every other weekend during the tax year. *See* Ohio Adm. Code 5703-7-16(A)(13). Weighing these facts, Mr. Powell has failed to meet his burden to show it was more likely than not that he was a nonresident of Ohio. Simply put, he did not intend to abandon his Ohio domicile but rather he was working in another state while maintaining an Ohio domicile.

Since Mr. Powell was a resident of Ohio in 2018, the claimants are ineligible to claim the Ohio nonresident credit for any of Mr. Powell's income. Consequently, the claimants' contentions relating to residency and the taxability of Mr. Powell's income are not well taken. Mr. Powell is presumed to have been domiciled in Ohio for the 2018 tax year, and thus all his income is subject to Ohio's income tax. The claimants are not eligible for the Ohio nonresident credit as a matter of law, and they have not proven they are entitled to any amount of Ohio resident credit.[5]

IV. CONCLUSION

The claimants have failed to rebut the presumption that Mr. Powell was domiciled in Ohio for the entirety of tax year 2018 by a preponderance of the evidence as required by R.C. 5747.24(C). Although the claimants have provided evidence of Mr. Powell's physical presence in West Virginia for much of the tax year, they have not provided any evidence indicating that Mr. Powell took affirmative steps to establish a new domicile in West Virginia. Consequently, the claimants' contention is not well taken, and Mr. Powell is presumed to have been domiciled in Ohio for the tax year at issue.

Accordingly, the remainder of the refund claim is denied.

THIS IS THE TAX COMISSIONER'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 FILED 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

[5] Having found Mr. Powell is an Ohio resident, his wages are not subject to tax in West Virginia, but instead are subject to tax in Ohio based on a reciprocal agreement between West Virginia and Ohio. *See* R.C. 5747.05(A)(2). Such wage amounts are not eligible for the Ohio resident credit due to this agreement. *See* R.C. 5747.05(B)(4)(b).

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FINAL DETERMINATION

Date: JUL 2 8 2022

Jerry Rable
3589 Sugar Creek Rd
Elida, Ohio 45807

Re: Assessment No. 02202023840947
Individual Income Tax – 2019

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

Tax	Interest	Penalty	Total
$0.00	$0.00	$1,500.00	$1,500.00

The Department assessed Jerry Rable (the "petitioner") for making a false and frivolous claim for refund on his 2019 Ohio individual income tax return. The petitioner filed his 2019 Ohio return reporting a federal adjusted gross income ("FAGI") of $0.00. Based on the evidence currently available to the Commissioner, the petitioner falsified his FAGI and claimed a frivolous refund. The petitioner objected to the assessment. This matter is now decided based upon the evidence available to the Commissioner.

Department records demonstrate that the petitioner earned income while residing in Ohio in tax year 2019 and therefore was subject to the Ohio individual income tax.[1] *See* R.C. 5747.02(A). The petitioner does not dispute being an Ohio resident. The petitioner has failed to comply with Ohio tax law for multiple years despite repeated assessments issued in response to incomplete or false Ohio income tax returns filed.[2] Because of this continued noncompliance, the Department assessed the penalty allowed under R.C. 5747.15(A)(7) for making a "false or fraudulent claim for a refund".[3] The petitioner is still required to comply with the established Ohio tax law despite his disagreement with it.

Pursuant to R.C. 5747.13(E)(2), an individual filing a petition for reassessment "shall pay the assessed amount, including assessed interest and assessed penalties," on or before the last day a petition for reassessment may be filed, if "[t]he person files a tax return that the Tax Commissioner determines to be incomplete, false, fraudulent, or frivolous". *Id.* Here, the Commissioner has determined that the petitioner's 2019 Ohio individual income tax return and claim for refund was false and frivolous. The petitioner did not pay the total assessed penalty with the petition. Unless the petitioner makes the required payment, the Commissioner must dismiss the petition.

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[1] Records available to the Department show the petitioner was employed by the State of Ohio and earned $94,343.57 in 2019.
[2] Department records reflect that the petitioner has failed to correctly report income taxable to Ohio for tax years 2000, 2003, 2004, 2005, 2007, 2009, 2015, 2016, 2017 and 2018.
[3] Such penalty may be imposed up to the greater of $1,000 or 100% of the refund claimed for each year at issue. *Id.* For tax year 2019, the petitioner requested a refund of $3,008.

Accordingly, this matter is dismissed for lack of jurisdiction, and the assessment stands as issued.

Current records indicate that no payments have been applied to this assessment, 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." 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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FINAL DETERMINATION

Date: JUL 2 8 2022

Frank J. & Rose M. Remesch
6905 Acres Dr.
Independence, OH 44131

Re: Assessment No.: 02201936585985
Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$32,315.00	$3,819.21	$0.00	$36,134.21

I. BACKGROUND

The Department of Taxation contacted Frank and Rose Remesch (the "petitioners") because they failed to file Ohio individual income tax returns for a period of years. The petitioners responded by filing Ohio individual income tax returns for the years indicated in the Notice, including the tax year at issue. Specifically, the 2016 return was filed as a full-year Ohio resident return and claimed a resident credit of $21,559.00 for taxes paid to Michigan. Upon reviewing the return, the Department denied their claimed resident credit. The petitioners object to the corrected assessment,[1] alleging that the Department erred in denying their resident credit. The petitioners did not request a hearing; therefore, the matter is decided based on the information currently in the Commissioner's possession.

II. RESIDENCY

An individual is a resident of Ohio if they are "domiciled in this state subject to R.C. 5747.24." R.C. 5747.01(I). A resident of Ohio is always subject to the individual income tax, regardless of where the individual earns or receives income. R.C. 5747.02(A). Here, the petitioners filed their 2016 Ohio individual income tax return as Ohio residents. The evidence available to the Commissioner indicates that they were domiciled in Ohio during the 2016 tax year, and the petitioners do not assert otherwise.[2] Thus, the petitioners are Ohio residents for tax year 2016.

III. RESIDENT CREDIT

Generally, Ohio residents may take a nonrefundable credit for the lesser of the tax liability owed to Ohio, or the amount of tax actually paid to another state, "on such portion of the combined adjusted gross income and business income of a resident taxpayer that in another state or in the District of Columbia is

[1] The petitioners received two corrected assessments. The first incorporated portions of the return they filed in response to the Department's failure to file a return notice. The second corrected assessment removed a late filing penalty.

[2] In support of their 2016 Ohio return as filed, the petitioners submitted a copy of their most recent amended 2016 Michigan individual income tax return, in which they claimed to be nonresidents of Michigan. The petitioners had previously claimed to be Michigan residents on their original 2016 Michigan individual income tax return.

subjected to an income tax." Former R.C. 5747.05(B)(1) and (2) (Emphasis added). There are exceptions to Ohio's resident credit. For example, former R.C. 5747.05(B)(4)(b) disallows the resident credit "[f]or compensation that is not subject to the income tax of another state or the District of Columbia as the result of an agreement entered into by the tax commissioner under division (A)(3) of this section."

Former R.C. 5747.05(A)(2) allows the Commissioner to enter into agreements with other states whereby a resident of Ohio is taxed on compensation (i.e. wages) earned in another state by Ohio exclusively, and vice versa.[3] Additionally, federal law prohibits a state from imposing an income tax on "retirement income" of an individual who is neither a resident of nor a domiciliary of such state, as determined under the laws of such state when the income is received. 4 U.S.C. §114(a). *See also* former R.C. 5747.20(A).

Here, the petitioners timely filed a 2016 Michigan individual income tax return claiming to be residents of Michigan and reporting tax due on all of their income, including their wage and retirement income. The petitioners later filed an amended 2016 Michigan individual income tax return claiming to be nonresidents of Michigan. The Department determined that the petitioners were domiciled in Ohio for tax year 2016 and assessed them based on that fact. The petitioners affirmed their Ohio residency and domicile by filing a 2016 Ohio individual income tax return as Ohio residents and claiming a resident credit for their taxes paid to Michigan.

As Ohio residents and as nonresidents of Michigan, the petitioners' retirement income was lawfully taxable to Ohio, and not to Michigan. *See* 4 U.S.C. §114. Federal law prohibits a state from taxing retirement benefits unless it is the taxpayer's state of domicile or residence, and the petitioners are not allowed to claim a resident credit for tax paid or allegedly owed to Michigan on their retirement income because that income was not legally *subject* to tax in Michigan. *See id.*[4]

Additionally, the petitioners are similarly not allowed to claim an Ohio resident credit for tax paid to Michigan on their wages earned in 2016. Ohio and Michigan have a reciprocity agreement by which an Ohio resident's wages earned in Michigan are taxable exclusively to Ohio, and vice versa. *See* former R.C. 5747.05(A)(2). Therefore, Ohio law prohibits the petitioners from taking a resident credit for tax paid to Michigan on their wage income. *See* former R.C. 5747.05(B)(4)(b).

IV. CONCLUSION

As Ohio residents, the petitioners were not allowed to take the Ohio resident credit for amounts subject to reciprocity agreements under former R.C. 5747.05(A)(2). Because Ohio had such an agreement with Michigan related to compensation, former R.C. 5747.05(B)(4)(b) prohibits the resident credit for such amounts. Additionally, federal law prohibits Michigan from legally taxing retirement income earned by a nonresident; such amounts can only be taxed by the taxpayer's state of domicile (in this case, Ohio). As such, Ohio does not have to allow the resident credit for the retirement income taxed by Michigan either. However, the petitioners had other income reported as part of their FAGI and OAGI that was lawfully taxed by Michigan. The petitioners are therefore entitled to some of their claimed resident credit.[5]

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[3] Ohio and Michigan have such an agreement (commonly referred to as "reciprocity agreements") and had such an agreement in 2016.

[4] The petitioners assert that they are not Michigan residents and do not assert that they were "domiciliary" in Michigan under Michigan law; they do not assert why their retirement income or wage income would have been legally taxable in Michigan in 2016.

[5] After removing the petitioners' wages and retirement income, the petitioners had income of $314,823.00 subject to tax in Michigan and a Michigan tax liability of $13,203.00. The petitioners owed $14,549.00 in Ohio tax on that portion of their

Accordingly, the assessment is adjusted as follows:

Tax	Interest	Penalty	Total
$19,335.00	$2,391.52	$0.00	$21,726.52

Current records indicate that a payment of $10,979.00 has been applied to the 2nd corrected assessment. 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 "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

income. Thus, the petitioners are entitled to a resident credit of $13,203.00, the lesser of the tax paid or Ohio tax due on their income subject to tax in Michigan.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Hasan Reza & Sharmin Hossain
8903 Glassford Ct. N
Dublin, OH 43017

Re: Assessment No.: 02202019632795
Individual Income Tax - 2017

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

Tax	Interest	Penalty	Total
$770.00	$80.82	$161.64	$1,012.46

Hasan Reza and Sharmin Hossain (the "petitioners") timely filed their 2017 Ohio individual income tax return claiming an Ohio Business Income Deduction ("BID") of $20,180.00 and received a refund of $1,461.00. The Department later determined that the petitioners did not include all income reported on federal Schedule E when calculating their BID on Ohio Schedule IT BUS, and thus adjusted the petitioners' return; this adjustment resulted in the assessment at issue. The petitioners allege the Department erroneously adjusted their BID. The petitioners did not request a hearing; therefore, the matter is now decided based on the information currently in the Commissioner's possession.

Former R.C. 5747.01(A)(31) allows jointly filing taxpayers to deduct up to $250,000 of business income. "Business income" is defined, in part, as "income, including *gain or loss*, arising from transactions, activities, and sources in the regular course of a trade or business". R.C. 5747.01(B) (Emphasis added.). Ohio law provides for two tests to determine if income is business income for the purpose of Ohio's BID.[1] The transactional test is used to determine if income generated in the course of a trade or business "arises from a transaction or activity that occurs in the regular course of the business in which the taxpayer engages." *Kemppel* at 422. Similarly, the functional test determines that income not generated in the *regular* course of a trade or business is business income if the "use of the [property or other asset of the business that generated the income] constituted an integral part of the regular course of a trade or business operation." *Id.* at 423.

The petitioners were entitled to deduct their *net* business income on their 2017 Ohio income tax return. Here, the petitioners deducted the gains from their PTE income without netting it against the losses from their seven rental properties.[2] Because the petitioners own seven rental properties and rent those properties 365 days a year, they are in the business of renting real property. The petitioners also take

[1] *See Kemppel v. Zaino*, 91 Ohio St.3d 420, 746 N.E.2d 1073 (2001)

[2] The record indicates the petitioners included $20,180.00 in business income from their PTE but did not include the $26,129.00 in losses from their seven rental properties as reported on their federal Schedule E. They reported 365 fair rental days for each property for 2017. The petitioners do not otherwise assert how the rental losses are nonbusiness income under Ohio law. *See* R.C. 5747.01(B) and 5747.01(C) (defining nonbusiness income).

expenses against the properties that are consistent with operating a business, such as travel, cleaning and maintenance, commissions, management fees, repairs and taxes. Any income realized from their real property rental activities qualifies as business income under the transactional test, because it is income, whether gain or loss, generated in the normal course of a real estate rental business.

Similarly, the functional test is satisfied because any loss they realized from the management, rental, or upkeep of their rental properties is derived from the use of the real property integral to their real estate rental business. When the real property rental losses the petitioners included on their federal Schedule E are netted against their gains from their PTE ownership, they are left with negative net business income for 2017. Because the petitioners' net business income was less than zero, they were not entitled to a BID for tax year 2017. The assessed amount of tax and interest is thus affirmed.

The petitioners request a penalty abatement if the assessment is affirmed. The Commissioner may abate penalties when the taxpayer demonstrates the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). 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
$770.00	$80.82	$0.00	$850.82

Current records indicate that no payment has 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 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 8 2022

Robert A. Sanders
1941 Sterling Ave.
Cincinnati, OH 45239

Re: Multiple Assessments
Individual Income Tax – Multiple Periods

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

Assessment	Year	Tax	Interest	Penalty	Total
02202021735769	2016	$972.00	$143.69	$287.38	$1,403.07
02202021735770	2017	$894.00	$96.40	$192.80	$1,183.20
02202021735768	2018	$1,136.00	$73.35	$146.70	$1,356.05

Robert Sanders (the "petitioner") timely filed Ohio individual income tax returns for the tax years at issue. The Department adjusted the petitioner's federal adjusted gross income ("FAGI") reported on his Ohio returns for those years, which resulted in the assessments at issue. The petitioner filed for reassessment but did not provide specific contentions regarding the assessments. The petitioner did not request a hearing.

Ohio's individual income tax is levied on Ohio adjusted gross income ("OAGI") less exemptions. R.C. 5747.02(A)(3). R.C. 5747.01(A) defines OAGI as "federal adjusted gross income, as defined and used in the Internal Revenue Code, adjusted as provided in" that division. While the petitioner used the FAGI from his federal returns when completing his Ohio returns, the Commissioner determined the FAGI was not computed in accordance with applicable federal laws.[1] Specifically, the Department determined the petitioner's federal returns incorrectly reported business expenses on federal Schedule C, which decreased his FAGI as reported on his federal returns and Ohio returns.[2]

Pursuant to R.C. 5747.13(E)(2), an individual filing a petition for reassessment of individual income tax "shall pay the assessed amount, including assessed interest and assessed penalties," on or before the last day a petition for reassessment may be filed, if "[t]he person files a tax return that the tax commissioner determines to be incomplete, false, fraudulent, or frivolous." R.C. 5747.13(E)(2). In the present case, the Tax Commissioner has determined that the petitioner's returns were false, fraudulent, or frivolous, and

[1] The Commissioner "is not confined to follow a taxpayer's statement that certain income should be excluded from the taxpayer's federal adjusted gross income," and may adjust FAGI in accordance with federal law on a taxpayer's Ohio individual income tax return. *Knust v. Wilkens*, 111 Ohio St.3d 331 (2006) (Internal quotation marks omitted).
[2] The petitioner provided no evidence that he operated a trade or business during those years; evidence available to the Commissioner shows the petitioner served as an employee and reported compensation from a W-2 during these tax years.

the petitioner has not paid the assessed amount of tax, interest and penalty. Thus, the petitioner must pay the entire assessed amounts prior for his petitions to be considered. Unless the taxpayer makes the required payments, the Commissioner must dismiss the petitions.

Accordingly, these matters are dismissed for lack of jurisdiction, and the assessments stands as issued.

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." 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 THESE MATTERS. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THESE MATTERS 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

Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 8 2022

Richard A. and Sharon Stein
17271 Coral Cove Way
Boca Raton, FL 33496

Re: Refund Claim No. 2019404488
Individual Income Tax - 2019

This is the final determination of the Tax Commissioner regarding the following individual income tax refund claim filed pursuant to R.C. 5747.11:

Tax Year	Refund Claimed
2019	$382.00

Richard and Sharon Stein (the "claimants") filed a 2019 Ohio IT 1040 reporting $382.00 on line 15 as an estimated or extension payment or credit carryforward from the previous year's return and requested a refund of that amount.[1] The Department denied this amount because the claimants did not make an estimated or extension payment with their IT 1040, nor did they have a credit carryforward from their 2018 Ohio IT 1040. In response to the refund variance notice, the claimants submitted an Ohio IT K-1 from Hinsdale Partners II LLC ("Hinsdale") showing a pass-through entity ("PTE") credit of $382.00; they did not raise any specific contentions or objections. This matter is now decided based upon the evidence available to the Commissioner.

R.C. 5747.059(B) and 5747.08(I) allow a refundable credit to PTE investors equal to the investor's proportionate share of the lesser of the tax due or tax paid by the PTE on behalf of the investor. This credit should have been claimed on line 37 on the 2019 Ohio Schedule of Credits of the IT 1040. However, while the claimants submitted the Ohio IT K-1 from Hinsdale showing a PTE credit of $382.00, Hinsdale did not pay the underlying tax due as part of its filing. Since the PTE credit is limited to the lesser of the tax due or tax paid by the PTE, the Commissioner is unable to grant the claimants' PTE credit.

Accordingly, the refund claim is denied.

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

[1] This return meets the definition of a refund application under R.C. 5747.11. *See* Ohio Adm.Code 5703-7-02.

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FINAL DETERMINATION

Date: JUL 2 8 2022

Jorge and Maria E. Veloz
5a Privada No. 10
Pedregal Fase 1
San Luis Potosi, SLP 78295

Re: Multiple Assessments
Individual Income Tax – Multiple Years

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

Assessment No.	Year	Tax	Interest	Penalty	Total
02201934685242[1]	2014	$21,528.73	$3,847.44	$7,535.05	$32,911.22
02201934685240	2015	$13,431.27	$1,996.64	$4,700.94	$20,128.85
02201934685241	2016	$26,233.00	$3,028.63	$9,181.55	$38,443.18
02201935185495	2017	$80,266.00	$6,056.15	$28,093.10	$114,415.25

The Department assessed Jorge and Maria Veloz (the "petitioners") for failing to file Ohio individual income tax returns for tax years 2014[2] through 2017. The petitioners subsequently filed Ohio returns[3] on February 11, 2020 with their petitions for reassessment. They also requested a hearing, which was held. These matters are now decided based on the evidence currently available to the Commissioner and provided at the hearing.

Upon further review, the petitioners' returns for all years are accepted as filed. This leads to an adjustment to the 2014 and 2015 assessments and a cancellation of the 2016 and 2017 assessments. Additionally, the petitioners are also due a refund of $1,994.00 for tax year 2016 and $993.00 for tax year 2017, plus applicable statutory interest.

The petitioners requested a penalty abatement for all tax years. R.C. 5747.15(A)(1) allows the Commissioner to impose a penalty on taxpayers who fail to file their returns timely. The Commissioner may abate penalties when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). Upon review, the evidence and circumstances support a partial penalty abatement for tax years 2014 and 2015 and a full penalty abatement for tax years 2016 and 2017.

Accordingly, the assessments are adjusted as follows:

[1] A corrected assessment was issued for tax year 2014; however, it was issued in error. *See* R.C. 5703.60(D).
[2] The petitioners contend that they timely filed a 2014 Ohio individual income tax return by mail; however, the Department has no record of that return.
[3] The petitioners filed their Ohio individual income tax returns as part-year residents for 2014 and as nonresidents for 2015 through 2017.

Assessment No.	Year	Tax	Interest	Penalty	Total
02201934685242	2014	$3,178.00	$570.74	$500.00	$4,248.74
02201934685240	2015	$535.00	$79.86	$500.00	$1,114.86
02201934685241	2016	$0.00	$0.00	$0.00	$0.00
02201935185495	2017	$0.00	$0.00	$0.00	$0.00

Current records indicate that payments totaling $3,713.00 have been made on these assessments, leaving an adjusted balance due of $1,650.60. 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 COMISSIONER'S FINAL DETERMINATION WITH REGARD TO THESE MATTERS. UPON EXPIRATION OF THE SIXTY-DAY APPEAL PERIOD PRESCRIBED BY R.C. 5717.02, THESE MATTERS WILL BE CONCLUDED AND FILED 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 2022

Lillian D. and Kerry J. Wendell
471 West Branch Crossing
Spring Branch, Texas 78070

Re: Tax Type: Individual Income Tax - 2018
Assessment No.: 02201933771517

This is the final determination of the Tax Commissioner following a decision and order of the Board of Tax Appeals in Case No. 2020-973, dated March 16, 2021. In that order, the Board of Tax Appeals remanded the case to the Tax Commissioner for further consideration.

In resolution of this matter, the assessment has been cancelled.

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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4485 Northland Ridge Blvd• Columbus, OH 43229
(614) 466-6750 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 2 8 2022

Pillsbury Winthrop Shaw Pittman LLP
P.O. Box 2824
San Francisco, CA 94126

Re: Multiple Assessments
Pass-Through Entity Tax – Multiple Periods

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

Assessment No.	Tax Year	Tax	Interest	Penalty	Total
100001756608	2017	$29,863.00	$3,704.18	$7,408.36	$40,975.54
100001756609	2018	$49,193.00	$4,003.40	$8,006.80	$61,203.20
100001756610	2019	$61,546.00	$1,160.29	$2,320.58	$65,026.87

The Ohio Department of Taxation assessed the petitioner for failing to file tax returns for the periods at issue. The petitioner does not contest the tax and interest portions of the assessments,[1] but requests an abatement of the assessed penalties. The petitioner requests a hearing; however, because the petitioner's contention is well taken, the hearing is waived.

The Commissioner may abate penalties when the taxpayer demonstrates the failure to comply was due to reasonable cause rather than willful neglect. R.C. 5747.15(C). In this case, the petitioner claims its failure to comply was due to reasonable cause, and the evidence and circumstances support a full abatement of the penalty.

Accordingly, the assessments are adjusted as follows:

Assessment No.	Tax Year	Tax	Interest	Penalty	Total
100001756608	2017	$29,863.00	$3,704.18	$0.00	$33,567.18
100001756609	2018	$49,193.00	$4,003.40	$0.00	$53,196.40
100001756610	2019	$61,546.00	$1,160.29	$0.00	$62,706.29

[1] The record indicates the petitioner has paid all taxes and interest for each tax year at issue.

Current records indicate payments totaling $149,469.87 have been applied to these assessments, 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 THESE MATTERS.

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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4485 Northland Ridge Blvd, Columbus • Columbus, OH 43229
(614) 466-6750 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 2 8 2022

David J. & Courtney J. Rostorfer
4435 Logan Thornville Rd. NE
Rushville, OH 43150

Re: Assessment No.: 04202007025898
School District Individual Income Tax – 2016

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

Tax	Interest	Penalty	Total
$1,129.97	$144.20	$395.48	$1,669.65

The Department assessed David and Courtney Rostorfer (the "petitioners") for failing to file a school district income tax return for Pickerington Local School District ("2307") for 2016. The petitioners assert they did not live in this school district in 2016 and submitted additional evidence related to this contention. The petitioners requested a hearing; however, because their contention is well taken, the hearing is waived.

Based on evidence now available to the Commissioner, the petitioners have shown they did not reside in school district 2307 during tax year 2016.

Accordingly, the assessment is cancelled.

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
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 2 7 2022

1st Gear Auto Inc.
333 Broadway Ave.
Bedford, OH 44146

RE: Refund Claim No.: 20201990653
Refund Amount Requested: $256,303.00
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $256,303.00 of sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was held.

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. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1, 6 (1974). The Tax Commissioner will not engage in speculation. 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 is due. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018). 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. The claimant must provide information of undisputed facts that a refund is not only due but is due in a sum certain. *CSI Controls v. Testa*, 2018 WL 1372809, *2.

The claimant submitted a refund request form claiming a refund under the bad debt deduction, a statement describing its claim, and a refund schedule. The claim was initially denied.

In response to the letter of denial, the claimant provided evidence to show that the tax was paid to the state, evidence to support the bad debt deduction claim, and a statement that identifies errors the claimant contends that the Department made when initially evaluating its claim. The claimant submitted additional information to support this claim with its appeal.

The claimant is requesting a refund based upon the bad debt deduction. The definition of bad debt is located in R.C. 5739.121(A) and modified by Ohio Adm.Code 5703-9-44. "Bad debt" means any debt or account receivable arising from the sale of tangible personal property or a taxable service by the vendor upon which sales or use tax has been reported and paid in a prior reporting period which has become worthless or uncollectible during the period between the

vendor's preceding tax return and the present return and which has been uncollected for at least six months. Ohio Adm.Code 5703-9-44(A). No interest is granted on claims for the bad debt deduction. Pursuant to R.C. 5739.132(B), interest is only allowed on refunds granted under R.C. 128.47, R.C. 5739.07, and R.C. 5741.10.

The claimant contends that it is entitled to a refund of tax paid to the state when the title of the motor vehicle was transferred to the customer because the transaction was later written off as a bad debt. This contention is not well met. Under R.C. 5739.121 and Ohio Adm.Code 5703-9-44, a bad debt is to be deducted on the sales tax filing for the period when the debt was written off. The effect of this deduction is that the vendor lowers its present taxable sales and therefore pays less sales tax, equal to the amount of tax from the previous period when the bad debt was consummated. The claimant contended in correspondence to the Department that it pays the taxes due when transferring the title to its customers from its operating funds and those taxes are included in the financing agreement that is agreed to by the customer. Taxpayer Follow Up Letter, dated Aug. 3, 2020. The down payment and payments then made by the customer on the financing agreement are proportionally allocated to the purchase price of the vehicle and the taxes. The claimant argues that this process is done pursuant to Ohio Adm.Code 5703-9-44(D). *Id.*

This, however, is not the correct application of this administrative code section. Ohio Adm.Code 5703-9-44(D) provides, "In the event that the *commissioner determines that a vendor has not maintained adequate records*, the commissioner may test check the vendor's business in order to verify the amounts deducted as bad debts. In the absence of adequate records showing the contrary, it is presumed that any payments made on a debt or account are applied first to the price of the property and sales tax thereon and secondly to interest, service charges and any other charges." (Emphasis Added.) This means that the presumed allocation of payments only applies in the absence of sufficient records from the vendor. If a vendor has insufficient records, they will have not satisfied all eight requirements of Ohio Adm.Code 5703-9-44(C) and as such would not be entitled to claim the bad debt deduction. Here, the claimant concluded that they were entitled to the bad debt deduction as the basis for this refund claim but then proceeded to justify their contention by citing an administrative code section that explains the Department's procedure in the event that records submitted are insufficient to support a bad debt claim. The Department is not able to reconcile this contradiction presented by the claimant. Therefore, this contention is denied.

Further, the claimant failed to comply with the procedure for applying the bad debt deduction that is described in the Ohio Revised Code. R.C. 5739.121(D) states in relevant part, "[i]n any reporting period in which the amount of bad debt exceeds the amount of taxable sales for the period, the vendor may file a refund claim for any tax collected on the bad debt in excess of the tax reported on the return". The bad debts that qualify for this deduction are to be deducted against the taxable sales for the period when the claimant writes off the bad debt. The claimant may then file a refund claim if the amount of bad debt exceeds the amount of taxable sales. Here, the claimant has not shown that it properly applied this deduction and that an excess of bad debt was claimed. Also, the claimant has filed this refund claim based on vehicles sold suggesting that the claimant did not apply the deduction to its returns when filed and did not amend its returns.

Therefore, the claimant has failed to comply with the procedure set forth in R.C. 5739.121 and as such this contention is denied.

Based on how the claimant has presented its claim, the Department believes that the claimant is seeking a sales tax refund under R.C. 5739.07 rather than the bad debt deduction under R.C. 5739.121 on the basis that they paid the sales tax to the county clerk and are seeking a refund of that tax paid. This claim is equally flawed. Under Ohio Adm.Code 5703-9-19, sales tax is to be collected from or charged to a consumer when an installment sale is consummated. When the financing company and the customer finalize the purchase of the vehicle through the financing agreement, the tax is charged to the customer. There is no requirement under Ohio Adm.Code 5703-9-19 for a customer to make a down payment. As such, the claimant may be the party that actually remitted the tax to the state, but the tax liability was charged to the customer via the financing agreement. Also, a refund is only granted if the claimant proves that tax was illegally or erroneously paid to the state. R.C. 5739.07. Here, the tax paid was a legal and required payment of tax. Amounts of tax that are legally required to be paid at the time that they are remitted to the state are not illegal or erroneous payments of tax. *Internatl. Business Machines Corp. v. Levin*, 125 Ohio St.3d 347, 2010-Ohio-1861, 928 N.E.2d 440. The claimant has failed to provide evidence to show that there was an illegal or erroneous payment of tax. Therefore, there is no basis on which to grant a refund and this contention is denied.

The claimant contends that its transactions qualify for the bad debt deduction and provided proof to support this contention. This contention is not well met. Under Ohio Adm.Code 5703-9-44, certain disqualifying factors exist for the bad debt deduction and there is a list of eight records that must be kept in order to receive the deduction. The Department reviewed the claimant's bad debt deduction claim and found various issues with the information provided.

Property Repossessed

The claimant contends that it repossessed vehicles, sold them at auction, and then reduced its bad debt deduction claim by the amount of proceeds from the sale. This is, however, contrary to how the statute is written. R.C. 5739.121(A) provides in relevant part that ""Bad debt" does not include * * * repossessed property". Further, Ohio Adm.Code 5703-9-44(A)(7) states that the uncollectable amount of property repossessed cannot be excluded as bad debt. This means that whenever the vendor repossesses the tangible personal property subject to the debt, it does not qualify for the bad debt deduction. On the majority of transactions on the refund schedule, the claimant provided records proving that it repossessed the vehicles from the customers that defaulted on their loans. This is further supported in their statement which states that the claimant was claiming the bad debt deduction on the balance of the transactions where the claimant repossessed the vehicle and sold it at auction, applying the sale proceeds to the debt. This is not what is provided for in R.C. 5739.121 or Ohio Adm.Code 5703-9-44 and is in fact expressly prohibited. Therefore, all transactions where property was repossessed is excluded from the bad debt deduction and a claim for refund on these transactions are denied.

Interest, Finance and Service Charges

The claimant also presented issues in the records that were provided to the Department as they pertain to interest, finance, and service charges. Pursuant to Ohio Adm.Code 5703-9-44(B)(4), the vendor must keep records of "[t]he amount of interest, finance and service charges charged to the debt or account." The Department reviewed the transactions and the financial histories that were provided with each and was unable to ascertain how all of the finances fit together. The BTA has expressly upheld the denial of a refund where there are unexplained discrepancies within the claimant's own documents. *CSI Controls v. Testa*, 2018 WL 1372809, *2. At the beginning of the transactions, the vendor only provided the sale price of the vehicle and the sales tax based on that price. However, the transaction history provided started with a figure that was higher than the sum of the purchase price and tax. This higher figure usually had an associated down-payment but there was no accounting for how the down payment was applied. Further, when reviewing the transaction histories, the starting balance of one line would be higher than the ending balance of the previous line. The claimant was adding additional money owed to the balance of the debt, but the reason for this is not explained or accounted for in the information provided by the claimant. The claimant failed to comply with all of the requirements set forth in Ohio Adm.Code 5703-9-44(B) by not providing the required information laid out in that section. The claimant failed to fulfil all the requirements under the bad debt deduction.

Accordingly, this 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 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
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 27 2022

39 Transport LLC
8633 Maple Dr. NW
Sugarcreek, OH 44681

RE: Refund Claim No.: 168603690946
Refund Amount Requested: $4,366.00
Refund Period: September 25, 2020 – September 25, 2020
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $4,366.00, 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). 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.

During the above refund period, the claimant remitted sales tax for a 2008 Peterbilt 389 Semi-Truck. Based on R.C. 5739.02(B)(32), the claimant contends that a refund of sales tax is warranted, since sales tax was erroneously paid towards a vehicle utilized for transportation-for-hire. The evidence in the file supports that contention.

Accordingly, a refund of $4,366.00, plus applicable interest, 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
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 27 2022

Akron Auto Finance
5755 Granger Rd.. Ste. 777
Independence, OH 44131

RE: Refund Claim No.: 20201956212
Refund Amount Requested: $3,566.00
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $3,566.00 of sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was held.

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. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1, 6 (1974). The Tax Commissioner will not engage in speculation. 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 is due. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018). 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. The claimant must provide information of undisputed facts that a refund is not only due but is due in a sum certain. *CSI Controls v. Testa*, 2018 WL 1372809, *2.

The claimant submitted a refund request form claiming a refund under the bad debt deduction, a statement describing their claim, and a refund schedule. The claim was initially denied.

In response to the letter of denial, the claimant provided evidence to show that the tax was paid to the state, evidence to support the bad debt deduction claim, and a statement that identifies errors the claimant contends that the Department made when initially evaluating its claim. The claimant submitted additional information to support this claim with its appeal.

The claimant is requesting a refund based upon the bad debt deduction. The definition of bad debt is located in R.C. 5739.121(A) and modified by Ohio Adm.Code 5703-9-44. "Bad debt" means any debt or account receivable arising from the sale of tangible personal property or a taxable service by the vendor upon which sales or use tax has been reported and paid in a prior reporting period which has become worthless or uncollectible during the period between the

vendor's preceding tax return and the present return and which has been uncollected for at least six months. Ohio Adm.Code 5703-9-44(A). No interest is granted on claims for the bad debt deduction. Pursuant to R.C. 5739.132(B), interest is only allowed on refunds granted under R.C. 128.47, 5739.07, and 5741.10.

The claimant contends that it is entitled to a refund of tax paid to the state when the title of the motor vehicle was transferred to the customer because the transaction was later written off as a bad debt. This contention is not well met. Under R.C. 5739.121 and Ohio Adm.Code 5703-9-44, a bad debt is to be deducted on the sales tax filing for the period when the debt was written off. The effect of this deduction is that the vendor lowers its present taxable sales and therefore pays less sales tax, equal to the amount of tax from the previous period when the bad debt was consummated. The claimant contended in correspondence to the Department that it pays the taxes due when transferring the title to its customers from its operating funds and those taxes are included in the financing agreement that is agreed to by the customer. Taxpayer Follow Up Letter, dated Aug. 3, 2020. The down payment and payments then made by the customer on the financing agreement are proportionally allocated to the purchase price of the vehicle and the taxes. The claimant argues that this process is done pursuant to Ohio Adm.Code 5703-9-44(D). *Id.*

This, however, is not the correct application of this administrative code section. Ohio Adm.Code 5703-9-44(D) provides, "In the event that the *commissioner determines that a vendor has not maintained adequate records*, the commissioner may test check the vendor's business in order to verify the amounts deducted as bad debts. In the absence of adequate records showing the contrary, it is presumed that any payments made on a debt or account are applied first to the price of the property and sales tax thereon and secondly to interest, service charges and any other charges." (Emphasis Added.) This means that the presumed allocation of payments only applies in the absence of sufficient records from the vendor. If a vendor has insufficient records, they will have not satisfied all eight requirements of Ohio Adm.Code 5703-9-44(C) and as such would not be entitled to claim the bad debt deduction. Here, the claimant concluded that they were entitled to the bad debt deduction as the basis for this refund claim but then proceeded to justify their contention by citing an administrative code section that explains the Department's procedure in the event that records submitted are insufficient to support a bad debt claim. The Department is not able to reconcile this contradiction presented by the claimant. Therefore, this contention is denied.

Further, the claimant failed to comply with the procedure for applying the bad debt deduction that is described in the Ohio Revised Code. R.C. 5739.121(D) states in relevant part, "[i]n any reporting period in which the amount of bad debt exceeds the amount of taxable sales for the period, the vendor may file a refund claim for any tax collected on the bad debt in excess of the tax reported on the return". The bad debts that qualify for this deduction are to be deducted against the taxable sales for the period when the claimant writes off the bad debt. The claimant may then file a refund claim if the amount of bad debt exceeds the amount of taxable sales. Here, the claimant has not shown that it properly applied this deduction and that an excess of bad debt was claimed. Also, the claimant has filed this refund claim based on vehicles sold suggesting that the claimant did not apply the deduction to its returns when filed and did not amend its returns.

Therefore, the claimant has failed to comply with the procedure set forth in R.C. 5739.121 and as such this contention is denied.

Based on how the claimant has presented its claim, the Department believes that the claimant is seeking a sales tax refund under R.C. 5739.07 rather than the bad debt deduction under R.C. 5739.121 on the basis that they paid the sales tax to the county clerk and are seeking a refund of that tax paid. This claim is equally flawed. Under Ohio Adm.Code 5703-9-19, sales tax is to be collected from or charged to a consumer when an installment sale is consummated. When the financing company and the customer finalize the purchase of the vehicle through the financing agreement, the tax is charged to the customer. There is no requirement under Ohio Adm.Code 5703-9-19 for a customer to make a down payment. As such, the claimant may be the party that actually remitted the tax to the state, but the tax liability was charged to the customer via the financing agreement. Also, a refund is only granted if the claimant proves that tax was illegally or erroneously paid to the state. R.C. 5739.07. Here, the tax paid was a legal and required payment of tax. Amounts of tax that are legally required to be paid at the time that they are remitted to the state are not illegal or erroneous payments of tax. *Internatl. Business Machines Corp. v. Levin*, 125 Ohio St.3d 347, 2010-Ohio-1861, 928 N.E.2d 440. The claimant has failed to provide evidence to show that there was an illegal or erroneous payment of tax. Therefore, there is no basis on which to grant a refund and this contention is denied.

The claimant contends that its transactions qualify for the bad debt deduction and provided proof to support this contention. This contention is not well met. Under Ohio Adm.Code 5703-9-44, certain disqualifying factors exist for the bad debt deduction and there is a list of eight records that must be kept in order to receive the deduction. The Department reviewed the claimant's bad debt deduction claim and found various issues with the information provided.

Property Repossessed

The claimant contends that it repossessed vehicles, sold them at auction, and then reduced its bad debt deduction claim by the amount of proceeds from the sale. This is, however, contrary to how the statute is written. R.C. 5739.121(A) provides in relevant part that ""Bad debt" does not include * * * repossessed property". Further, Ohio Adm.Code 5703-9-44(A)(7) states that the uncollectable amount of property repossessed cannot be excluded as bad debt. This means that whenever the vendor repossesses the tangible personal property subject to the debt, it does not qualify for the bad debt deduction. On the majority of transactions on the refund schedule, the claimant provided records proving that it repossessed the vehicles from the customers that defaulted on their loans. This is further supported in their statement which states that the claimant was claiming the bad debt deduction on the balance of the transactions where the claimant repossessed the vehicle and sold it at auction, applying the sale proceeds to the debt. This is not what is provided for in R.C. 5739.121 or Ohio Adm.Code 5703-9-44 and is in fact expressly prohibited. Therefore, all transactions where property was repossessed is excluded from the bad debt deduction and a claim for refund on these transactions are denied.

Interest, Finance and Service Charges

The claimant also presented issues in the records that were provided to the Department as they pertain to interest, finance, and service charges. Pursuant to Ohio Adm.Code 5703-9-44(B)(4), the vendor must keep records of "[t]he amount of interest, finance and service charges charged to the debt or account." The Department reviewed the transactions and the financial histories that were provided with each and was unable to ascertain how all of the finances fit together. The BTA has expressly upheld the denial of a refund where there are unexplained discrepancies within the claimant's own documents. *CSI Controls v. Testa*, 2018 WL 1372809, *2. At the beginning of the transactions, the vendor only provided the sale price of the vehicle and the sales tax based on that price. However, the transaction history provided started with a figure that was higher than the sum of the purchase price and tax. This higher figure usually had an associated down-payment but there was no accounting for how the down payment was applied. Further, when reviewing the transaction histories, the starting balance of one line would be higher than the ending balance of the previous line. The claimant was adding additional money owed to the balance of the debt, but the reason for this is not explained or accounted for in the information provided by the claimant. The claimant failed to comply with all of the requirements set forth in Ohio Adm.Code 5703-9-44(B) by not providing the required information laid out in that section. The claimant failed to fulfil all the requirements under the bad debt deduction.

Accordingly, this 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 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
4485 Northland Ridge Blvd • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUN 28 2022

Arboris, LLC
1011 W. Lathrop Ave.
Savannah, GA 31415

Re: Assessment No. 100002161036
Use Tax
Account No. 97308059
Reporting Period: 07/01/2013 – 02/28/2019

This is the final determination of the Tax Commissioner with regard to a petition for reassessment filed pursuant to R.C. 5739.13 and 5739.14 Concerning the following use tax assessment:

Tax	Interest	Penalty	Total
$205,544.73	$43,287.80	$30,831.39	$279,663.92

This assessment is the result of an audit of the petitioner's purchases for the period shown above. The petitioner operates a manufacturing plant that is the world's largest producer of phytosterols and offer an extensive portfolio of bio-based industrial chemicals. A hearing was not requested.

Interest Abatement

The petitioner requests reduction of the 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

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. 5739.113(A). Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. Considering all the facts and circumstances, partial penalty abatement is granted.

Therefore, the new assessment is modified as follows:

Tax	Interest	Penalty	Total
$205,544.73	$43,287.80	$20,554.04	$269,386.57

Current records indicate that no payments have 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.

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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(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 28 2022

Bibi Carrier LLC
6539 Harrison Ave., Ste. 1219
Cincinnati, OH 45247

Re: Refund Claim No.: 325978391066
Refund Amount Requested: $4,001.20
Use Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $4,001.20, in use tax filed pursuant to R.C. 5739.07 and 5741.10. The claimant purchased a 2019 Ram 3500 truck on or about June 10, 2020. The claimant contends this vehicle qualifies for the transportation-for-hire exemption from taxation pursuant to R.C. 5739.02(B)(32). 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. Before the Tax Commissioner may grant an application for sales tax refund under RC 5739.07, the Tax Commissioner must acquire information from the taxpayer of undisputed facts showing that the refund application should be granted. *AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487 (June 4, 1987).

Transportation-for-Hire

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). The sale of motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire are exempt from taxation. R.C. 5739.02(B)(32). In accordance with R.C. 5739.01(Z), "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;

(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;
(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

The claimant contends that it purchased a motor vehicle for the purpose of transporting tangible personal property belonging to others for consideration. In support of its contention, the claimant provided documentation concerning its motor carrier licensure status and the purchase of the vehicle. To qualify for the transportation-for-hire exemption pursuant to R.C. 5739.02(B)(32) and 5739.01(Z), a taxpayer must satisfy four elements. The taxpayer must transport tangible personal property, that belongs to someone else, for consideration, while also satisfying one of the three licensure requirements found in R.C. 5739.01(Z). The taxpayer must be certified by Ohio or the United States to engage in the transportation of personal property *at the time of the purchase of the vehicle*. (Emphasis added.) *A Transport LLC v. McClain*, BTA No. 2021-2277, 2022 WL 102057 (Mar. 28, 2022).

The claimant purchased the vehicle in question on June 10, 2020. The claimant submitted a letter from the U.S. Department of Transportation, dated June 11, 2020, that demonstrated that it had an application to operate in interstate commerce pending with the Department of Transportation that needed further action to be completed. The claimant submitted evidence that demonstrated that its motor carrier license issued by the Department of Transportation, MC-1116277-C, became effective July 6, 2020. Thus, the claimant did not hold the requisite licensure at the time of its purchase of the vehicle. As a result, the claimant fails to satisfy the elements of R.C. 5739.01(Z) necessary to qualify for exemption under R.C. 5739.02(B)(32). Therefore, the claimant has failed to prove that it is entitled to a refund of tax paid illegally or erroneously to the state.

Accordingly, this 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 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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4485 Northland Ridge Blvd. • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 9 2022

Bodimers Grocery Inc.
3747 Jackson Pike
Gallipolis, OH 45631

RE: Assessment No. 100001981636
Sales Tax
Account No. 27-009210

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
$75,219.28	$9,391.10	$37,609.48	$122,219.86

The petitioner operates a carryout convenience store. This assessment is the result of an audit of the petitioner's sales from January 1, 2017 through December 31, 2019. A hearing was not requested.

The petitioner seeks abatement of the penalty. Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. Review of petitioner's records show that they collected sales tax but did not remit all of the tax collected. Audit Remarks, p. 9. Considering the surrounding facts and circumstances, abatement of the penalty is not warranted.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments of $8,000.00 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, 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

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Office of the Tax Commissioner
4400 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 9 2022

Capital City Mechanical Inc.
5929 Haughn Rd.
Grove City, OH 43123-8936

RE: Assessment No. 100001870489
Use Tax
Account No. 97-309464

This is the final determination of the Tax Commissioner regarding 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
$132,260.67	$21,118.03	$9,918.83	$163,297.53

The petitioner operates as a contractor specializing in plumbing, HVAC, excavation, hydro excavation, and drain service. This assessment is the result of an audit of the petitioner's purchases from October 1, 2013, through September 30, 2019. The petitioner filed a petition for reassessment. A hearing was held on the matter.

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 purchase audit was conducted using the petitioner's purchase records. It was mutually agreed by the petitioner and the Department of Taxation to review the fixed assets and leases comprehensively. The expense transactions were reviewed using a statistical sampling methodology. The target population was determined, and the screening process was completed, and stratum breaks for all sampled ranges were calculated by the Department using the "Cumulative Square Root of the Frequency" method. This widely used technique mathematically determined where the stratum breaks should be created by segregating the data into homogenous dollar ranges while objectively improving precision by minimizing the standard deviation. A total of 4 strata ranges were developed with the top range reviewed comprehensively. The minimum dollar amount for the top range was mutually established by the petitioner and the

Department. Sample sizes were calculated separately by each of the three lower stratum ranges using a variable type of calculation. The sample size for all sampled ranges consists of a minimum of 250 transactions. A Sample Design was provided with a breakdown of the strata ranges and sample sizes used. Once all worksheet reviews were concluded, the error in tax was be quantified by dollars for the sample by stratum. Each sampled stratum's error in tax sum was divided by the total dollar amount of all items sampled for the respective stratum. These calculations result in the percentage of error for each sampled stratum. These percentages were then applied to the total dollars in the target population for the entire audit period for each respective sampled stratum to determine total tax error per stratum. The sum of these amounts was added to the comprehensively reviewed stratum's error in tax to determine the total tax error for the audit period for the statistical sample.

Objections

The petitioner contends that it has additional documentation that was not available during the audit to reduce the calculated use tax liability. The petitioner submitted a schedule with its petition that listed thirty-six transactions from the sample errors in the assessment and one transaction from the fixed assets in the assessment. The petitioner submitted invoices and an exemption certificate to support the contentions. The Department reviewed the information provided and informed the petitioner in an email that the petitioner should resubmit all invoices in order to ensure all of the relevant information is reviewed. The petitioner sent additional documentation in response to the Department's request. After reviewing the information provided by the petitioner, the Department found sufficient proof to support nineteen of the thirty-six sample error transactions and those transactions have been removed from the error calculation. The remaining seventeen sample error transactions and one fixed asset are denied and will be discussed below.

Missing Invoices

Of the seventeen denied transactions, two transactions did not have additional documentation provided. These transactions were with Scioto Valve for $1,750.00 total purchase price and with Ferguson for $6,538.37 total purchase price. The Scioto Valve transaction was determined during the assessment to be an equipment rental. The petitioner contends that it was used in a manufacturing equipment repair and that the vendor does not rent equipment. No verifiable evidence was provided in support of this assertion. The Ferguson transaction was denied during the audit because no invoice was provided. The petitioner failed to supply an invoice for this transaction on appeal. Without any documentation in support of these contentions, the Department is unable to verify these transactions. Therefore, these contentions are denied.

Another two transactions, with the listed vendor of "Cashier's Check", were for $10,400.00 each and did not have invoices provided. The petitioner contends that it used these checks to purchase a watercraft and trailer and that tax was paid on the watercraft when it was titled. The petitioner claims that the watercraft was purchased for $20,000.00 and the trailer was purchased for $800.00. This contention is not well met. The petitioner's claim that tax was paid at the time of title of a watercraft is supported by evidence provided to the Department. The transaction was

denied during the audit because there was no invoice provided that accounted for this transaction and, on appeal, the petitioner again failed to provide an invoice of the transaction, instead providing the title for a watercraft. The title for the watercraft had a total price of $21,350.00, which is more than the $20,800.00 paid over the two transactions. Looking at just the title for the watercraft, the information provided by the petitioner does not account for the total amount of the transaction. The claim that $800.00 of the $20,800.00 was for a trailer would then be added to the price of the watercraft, but no information was provided concerning the alleged trailer. The petitioner did not provide any proof connecting the cashier's checks to the purchase of the titled watercraft. The value of the checks did not match the purchase price of the watercraft and no proof was provided to show that a trailer was purchased along with the watercraft. While the petitioner has shown, through the title, that tax was paid for this watercraft when titled, the petitioner failed to provide sufficient proof to connect its cashier's checks to the explanation provided for these transactions. The petitioner failed to meet its burden to prove error in the assessment. Therefore, these contentions are denied.

The petitioner further claimed that this watercraft purchase was duplicated on the fixed assets schedule of the assessment. This contention is not well met. The transaction was again denied due to the lack of an invoice, and one was not provided on appeal. The fixed asset was listed in the petitioner's records as costing $20,800.00 but the petitioner did not provide records to tie that cost to this asset. Similar to the analysis above for the expenses, the petitioner provided proof that tax was paid on the titled watercraft but failed to connect the disputed transaction to the watercraft's title. Therefore, this contention is denied.

The petitioner claimed that another entry was for work that was improperly entered into the computer as "office cleaning" but was actually an exempt professional service and that another error was a payment to the petitioner's wife as a rental payment directed by a separation agreement. These contentions are not well met. No proof was provided that could be verified by the Department and as a result the petitioner has not met its burden to show error in the assessment for either transaction. Therefore, these contentions are denied.

No Tax Paid on Invoice

The petitioner contends that one invoice from Paycor charged tax monthly for a subscription service. This contention is not well met. The invoice provided for this transaction does not have a line-item for tax listed, totaling $256.21 in taxable sales. This invoice does not support the petitioner's contention and is, therefore, denied.

The petitioner also contends that a transaction for TSheets had tax paid on the invoice and that the transaction was a summary of multiple months. This contention is partially granted. The petitioner provided the multi-month summary of charges during the audit and on appeal only provided the monthly information for one month totaling $550.00 of the $5,572.80 on the expense error list. This amount will be deducted from the error list. The Department requested that the petitioner resubmit all invoices for their claim so all information can be reviewed. The petitioner submitted invoices to the Department in response to this request, but the response only included one monthly invoice for the transaction with TSheets. The Department is unable to

verify the petitioner's claim that tax was previously paid on the remainder of the transaction. Therefore, this contention is denied.

The petitioner claimed that it provided "HVAC job trade" to Pinnacle Golf Club in exchange for a credit in the amount of $8,839.38 in membership dues and that tax was paid on this transaction. This contention is not well met. Pursuant to R.C. 5739.01(H)(1)(a), ""Price" * * * means the total amount of consideration, including cash, *credit*, property, and services, for which tangible personal property or services are sold, leased, or rented, valued in money, *whether received in money or otherwise*". (Emphasis added.) Here, the petitioner took credit with the golf club in exchange for their service and the value of that credit is the price of the provided service. Pursuant to Ohio Adm.Code 5703-9-14, a construction contract where tangible personal property is permanently installed in real property is exempt from taxation. However, if the item is incorporated into a business fixture it is not exempt and remains taxable until the contrary is proven. The petitioner has not offered any information to show in what circumstances the HVAC system is used and, as such, it must remain taxable as the petitioner has failed to prove an exemption is due. The invoice provided does not have sales tax assessed on the credit that was allowed and no other proof of tax paid on that transaction has been provided. The petitioner instead offered records covering July 8, 2017, through January 14, 2020, showing that it was charged sales tax by the golf club when it purchased taxable items from the golf club after its HVAC job trade. The fact that a taxpayer will eventually pay sales tax when it later spends money collected through taxable activities does not absolve it of the duty to collect and remit sales tax. The petitioner failed to show that it is entitled to an exemption and failed to prove that it remitted sales tax on its taxable transaction. Therefore, this contention is denied.

Casual Sales

The petitioner contends that five of the denied transactions were for casual sales that are exempt under R.C. 5739.02(B)(8). This contention is not well met. For all of these transactions, no invoices were provided during the audit to corroborate the transactions. The petitioner provided an affidavit for one transaction stating that they purchased a lawnmower, but no evidence that could be verified. The petitioner failed to provide a contemporaneous record of the sale or a sworn statement from the seller attesting to the sale. For two other transactions, the petitioner submitted a copy of a check with a hand-written note stating the transaction was a casual sale for "ladder" and "equipment". For the two remaining contentions, the petitioner merely entered a description on the appeal expense schedule that stated the purchase was a casual sale for "equipment". The Department is unable to verify these assertions by the petitioner and cannot accept this as sufficient proof that a casual sale occurred. The petitioner failed to meet its burden to prove that it is entitled to the exemption being sought and as such these contentions are denied.

Manufacturing Exemption

The petitioner contends that its purchase of materials to be used in a repair contract of manufacturing machinery is exempt from taxation under R.C. 5739.011. This contention is not well met. The manufacturing exemption allows for a manufacturer's purchases to be exempt

from taxation when buying replacement parts and repair services for exempt manufacturing equipment. Ohio Adm.Code 5703-9-21(C)(11). The petitioner provided the Department with the exemption certificate from its customer showing that the repair services provided were performed on exempt manufacturing machinery and exempt from taxation. The petitioner then proceeded to claim that this manufacturing exemption extended to its purchases of tangible personal property. This is not correct. The wording of an exemption is to be narrowly construed. "Tax-exemption statutes 'must be strictly construed, because exemptions are in derogation of the rights of all other taxpayers.'" *Cincinnati v. Testa*, 143 Ohio St.3d 371, 2015-Ohio-1775, 38 N.E.3d 847, ¶ 16, quoting *Panther II Transp., v. Seville Bd. Of Income Tax Rev.*, 138 Ohio St.3d 495, 2014-Ohio-1011, 8 N.E.3d 904, ¶ 23.

The petitioner did not prove that they are entitled to a specific exemption for the claimed transaction and also did not provide a separate exemption certificate to its parts vendor, endorsed by them, that lists the reason the transaction was exempt from taxation. The Department cannot accept the exemption certificate between different vendors for a different exemption reason to stand in the place of a valid and properly executed exemption certificate. The petitioner has only proven that its customer is a manufacturer and has properly claimed the manufacturing exemption. The petitioner failed to show how this exemption is applied to its business or if it can claim any other exemption. Because the petitioner has not provided a valid reason as to why it is exempt from taxation, it is presumed that all sales are taxable as they are the consumer of the parts purchased, and the contrary has not been proven. Therefore, this contention is denied.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$121,904.71	$19,351.68	$9,142.14	$150,398.53

Current records indicate that a payment in the amount of $137,730.77 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 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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(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 29 2022

Jimmy W. Carpenter
3749 Jackson Pike
Gallipolis, OH 45631-8429

Re: Assessment No. 100001983269
Tax Type: Sales
Account No. 27-012731
Reporting Period: 09/01/2017 – 09/30/2020

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:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$36,330.81	$3,371.04	$18,165.30	$57,867.15

This assessment is the result of an audit of the petitioner's record for the period shown above. The petitioner operates a carryout in Gallipolis, Ohio. The store sells a variety of products which include various alcohol products, cigarettes and other tobacco products, pop, and energy drinks. Audit Remarks, p. 2. A hearing was not requested.

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. 5739.113(A). Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. The evidence indicates that the taxpayer failed to remit the full amount of sales tax it collected from its customers. Audit Remarks, p. 7. Based on the facts and circumstances, penalty abatement is not warranted. The objection is denied.

Therefore, the assessment is affirmed as issued.

Current records indicate that payments totaling $10,000.00 have 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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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
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 2 8 2022

Cimarron Express, Inc.
21611 State Route 51 W.
P.O. Box 185
Genoa, OH 43430-1245

Re: Assessment No.: 100002213576
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 5741.14 concerning the following use tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$1,671.25	$30.75	$250.69	$1,952.69

This assessment was issued based upon the conduct of a special audit of the purchase of a motor vehicle. On or around June 22, 2021, the petitioner purchased a 2017 Hyundai Trailer 3H3 without the payment of tax. The petitioner contends that the purchase was exempt because the trailer was used in highway transportation for hire. The Department was unable to verify the exempt use of this vehicle. Accordingly, the assessment was issued. A hearing on the matter was not 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., 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).

Transportation for Hire

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). The sale of motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire are exempt from taxation. R.C. 5739.02(B)(32). In accordance with R.C. 5739.01(Z), "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;
(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;
(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

The petitioner contends that its vehicle qualified for the transportation for hire exemption pursuant to R.C. 5739.02(B)(32). The petitioner contends that it was properly licensed pursuant to R.C. 5739.01(Z) to provide transportation for hire services until July 7, 2021, which was after the date of purchase. In support of its contention, the petitioner provided a completed transportation for hire questionnaire and a copy of its insurance history from the U.S. Department of Transportation website. The petitioner's contentions are not well met.

In order to qualify for the transportation for hire exemption, a taxpayer must prove that its business meets three elements. It must transport property belonging to another, for consideration, while possessing the proper licensure. The Supreme Court of Ohio has further held that the primary usage of a piece of tangible personal property can determine its eligibility to qualify for exemption from taxation. The Court has explained that "to show that a motor vehicle is primarily used for the transportation of tangible personal property of others, there must be proof of that use." *R.K.E. Trucking, Inc. v. Zaino*, 98 Ohio St.3d 495, 2003-Ohio-2149, ¶ 27. The petitioner has failed to demonstrate that the trailer was used primarily in a manner that qualified for exemption.

By the petitioner's own admission in its transportation for hire questionnaire, the trailer's entire usage was list as "other," with the description stating the "trailer is wrecked/totaled paying owner out." The questionnaire states that the trailer was used supposed to be used to haul auto parts, but it also states that the company closed in June 2021. The trailer was not purchased until June 22, 2021. The petitioner failed to provide any evidence that demonstrates the trailer was primarily used for the transportation of property belonging to others for consideration. As a result, the petitioner failed to satisfy the elements necessary to qualify for exemption pursuant to R.C. 5739.02(B)(32). Therefore, these contentions are denied.

Purchase Price

The petitioner contends that the assessed purchase price of the trailer is inaccurate because the trailer was involved in a wreck and in a salvage condition. The trailer was titled at a price of $23,875.00 and no tax was paid at the time of titling. The petitioner contends that the trailer should not have been titled at $23,875.00 because the wrecked condition of the trailer makes it worth far less than that amount. The purchase price of the vehicle was assessed at the amount in which it was titled. The burden of proof lies with the petitioner to prove that an assessment is incorrect. The petitioner failed to provide any evidence showing that the purchase price of the trailer did not

equal the assessed value. The petitioner failed to present any evidence to substantiate its claims regarding the condition of the trailer and when the trailer was wrecked. As a result, the petitioner failed to meet its burden to prove error in the assessment. Therefore, these contentions are denied.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments in the amount of $1,952.69 have been made in complete satisfaction of this assessment.

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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4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 27 2022

Cleveland, Mary
12140 Village Woods Dr.
Cincinnati, OH 45241

RE: 26 Assessments
Tax Type: Sales (Responsible Party)
Stergo LLC

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

Assessment No.	Filing Period	Total
100002040659	1/01/10 - 1/31/10	$1,520.14
100002040664	2/01/10 - 2/28/10	$1,519.15
100002040661	3/01/10 - 3/31/10	$1,531.44
100002040666	4/01/10 - 4/30/10	$1,533.19
100002040667	5/01/10 - 5/31/10	$68.38
100002040665	6/01/10 - 6/30/10	$1,518.26
100002040663	7/01/10 - 7/31/10	$1,529.86
100002040662	8/01/10 - 8/31/10	$1,515.12
100002040656	9/01/10 - 9/30/10	$1,531.63
100002040669	10/01/10 - 10/31/10	$1,530.78
100002040660	11/01/10 - 11/30/10	$1,532.28
100002040668	12/01/10 - 12/31/10	$1,515.45
100002040672	1/01/11 - 1/31/11	$1,533.02
100002040677	2/01/11 - 2/28/11	$1,515.07
100002040673	3/01/11 - 3/31/11	$1,527.98
100002040678	4/01/11 - 4/30/11	$1,526.93
100002040671	5/01/11 - 5/31/11	$1,515.84
100002040679	6/01/11 - 6/30/11	$1,515.61
100002040680	7/01/11 - 7/31/11	$1,525.40
100002040681	8/01/11 - 8/30/11	$1,529.34
100002040676	9/01/11 - 9/30/11	$1,513.64
100002040674	10/01/11 - 10/31/11	$1,512.41
100002040675	11/01/11 - 11/30/11	$1,512.35
100002040670	12/01/11 - 12/31/11	$1,511.52
100002040694	1/01/12 - 6/30/12	$1,513.54
100002040683	7/01/12 - 12/31/12	$1,513.29
	Total	$38,111.36

These are responsible party assessments. Stergo LLC incurred sales tax liability resulting in multiple assessments. The assessments were never fully satisfied by Stergo LLC 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 or those in charge of the execution of fiscal responsibilities personally liable for the unpaid amounts. Accordingly, the outstanding liability of Stergo LLC has been derivatively assessed against Mary Cleveland. 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 hearing was requested; however, the petitioner did not call in at the scheduled time for the hearing.

Responsible Party

The petitioner fails to submit specific objections related to her appeal. The petitioner merely states, in relevant part, "The assessment does not specify why I am being assessed the amounts owed and as such I am not liable for the assessment. Please note, I have not had any sales to warrant paying sales taxes." This contention relates to the underlying corporate assessment and is not related to the responsible party assessments. The petitioner does not challenge her status as the responsible party; however, it is important to note the petitioner is responsible based on the evidence.

The evidence indicates that the petitioner was a manager of Stergo LLC and is identified as the sole authorized representative and agent on the company's Ohio Secretary of State business filings. Further, the evidence indicates that the petitioner was the sole manager of Stergo LLC as indicated by the county vendor's license application and Secretary of State Articles of Organization for Stergo LLC, which identified the petitioner as the only signatory and party on both documents. Additionally, the petitioner's personal address is listed as the mailing address for the business on all business filings and applications for Stergo LLC.

After receiving notice of the responsible party assessments, the petitioner appealed by providing a written statement to the Department regarding the company's financial records in the form of sales information. Such information indicates intimate knowledge over the company's finances that would not be typical of a person with no involvement in a company. The petitioner has not met her burden to demonstrate the assessments were in error. Therefore, it is determined that the petitioner was a responsible party of Stergo LLC under R.C. 5739.33.

Underlying Assessments

The petitioner submitted an objection related to the underlying corporate assessments. Since these are responsible party assessments, 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. Therefore, this objection cannot be considered as it relates to the underlying assessments.

Accordingly, the assessments 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

Ohio | Department of Taxation

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

FINAL DETERMINATION

Date: JUL 29 2022

Cullen Park Enterprises LLC
4465 N. Summit St.
Toledo, OH 43611-3002

Re: Assessment No: 100002161666
Sales Tax
Account No. 48-485457
Reporting Period: 06/01/2017 – 11/30/2020

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:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$81,962.90	$7,391.03	$40,981.34	$130,335.27

This assessment is the result of an audit of the petitioner's purchases for the reporting period shown above. The petitioner operates a carry out & bait store. A hearing was not requested.

Audit Methodology

A mark-up analysis was conducted using the petitioner's inventory purchase records and the records supplied by the petitioner's suppliers. Utilizing these records, the auditor calculated the taxable beer, wine, cigarettes, other tobacco, other alcohol, pop & soft drinks, energy drinks, and other taxable merchandise. Each category was assigned a mark-up percentage based on evidence from the petitioner, industry standards, and state minimum requirements. Since the taxpayer was registered to accept food stamps, an adjustment was necessary for taxable items that were qualified to be purchased with food stamps.

The period of January 1, 2018, through November 30, 2020, was used to calculate taxable sales. Invoice dates were used to determine which inventory purchase transactions occurred within the period used. In the instances when confirmation of the amount of the taxable inventory purchases could not be obtained from either the taxpayer or the distributor, 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. Taxable inventory purchase amounts derived from distributor summaries or estimates were divided by the number of the months in the calendar year period and recorded as monthly purchase for the audit period. Each taxable category was totaled, and each

category multiplied by the applicable mark-up percentage to determine the categorical taxable sales totals for the audit. The remaining calculated taxable sales from all categories were totaled by month and then multiplied by the applicable tax rate in effect throughout the audit period to determine the sales tax liability by month for the entire audit period. The sales tax remitted by the taxpayer was subtracted from the total sales tax liability to arrive at the assessed tax liability.

The petitioner contends that the audit methodology is based on an incomplete field audit, the assessment is incomplete and the tax owed is overstated. Pursuant to R.C. 5739.11 and Ohio Adm.Code 5703-9-02, vendors must maintain accurate and adequate records indicating the taxes charged on each transaction. The Ohio Administrative Code states that in order for records to be adequate, they must distinguish between taxable and nontaxable items. Ohio Adm.Code 5703-9-02(B)(1). When a vendor does not maintain complete and accurate records, the Tax Commissioner may conduct an audit. Ohio Adm.Code 5703-9-02(D). The Tax Commissioner is statutorily authorized to utilize any information at his disposal that would reasonably estimate the taxpayer's sales. R.C. 5739.13. The evidence indicates that the taxpayer did not maintain complete records. Audit Remarks, p. 8. 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 did not submit any evidence to support its contention that the tax is overstated. The auditor provided the petitioner with a Ten-Day Mark-up Analysis Letter dated August 19, 2021 which provided that the petitioner could provide an alternative method to calculate sales tax liability. The petitioner did not provide an alternative method. The petitioner did request reduced mark-up percentages for the pop and soft drinks and energy drinks categories. However, the auditor informed the taxpayer that in order for such a change to be made, the taxpayer would need to submit supporting documentation. The taxpayer did not provide any supporting documentation. Therefore, no adjustments were made. Audit Remarks, P. 9. The petitioner has not provided sufficient evidence to support their contention. The objection is denied.

Penalty Abatement

The petitioner requests that the penalty be waived. 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. 5739.113(A). Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. The auditor determined that the petitioner failed to remit all of the sales tax collected from its customers. Audit Remarks, P. 16. Based on the facts and circumstances, penalty abatement is not warranted.

The assessment is affirmed as issued.

Current records indicate that no payments have been made towards 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.

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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 2 9 2022

Herbert W. Davis Jr.
6964 Quarterhorse Dr.
Springboro, OH 45066-7782

Re: Assessment No.: 100002187977
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 5741.14 concerning the following use tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$1,714.70	$18.17	$257.21	$1,990.08

This assessment was issued based upon a special audit of a motor vehicle title transfer. The petitioner purchased a 2021 Polaris Ranger ATV on September 3, 2021. The petitioner stated that the ATV was used directly in farming and, therefore, exempt from taxation. The Department was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. No hearing was 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., 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).

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 an exemption to 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 to produce crops* as a *business* and includes raising livestock, bees, or poultry, if 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 includes tractors, combines, planters, balers, and similar equipment.

For a vehicle to be eligible for the farming exemption, a taxpayer must meet three prerequisites. First, the vehicle must be used by a taxpayer who is engaged in the business of farming. Second, the vehicle must be used primarily in specified farming activities as a part of growing crops or caring for the livestock. Third, those specified farming activities must account for the primary use of the vehicle.

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code.

The petitioner was not engaged in the business of farming at the time of purchase. The petitioner stated that he purchased farmland but, due to the pandemic, he was not able to clear the land or plant crops. As such, the petitioner was not engaged in the business of farming at the time he purchased the ATV. As a result, the petitioner has failed to provide sufficient evidence that demonstrates the ATV is used primarily in the production of tangible personal property for sale by farming as required for exemption pursuant to R.C. 5739.02(B)(42)(n). Therefore, the petitioner's objection is denied.

Further, the primary use of the ATV is not farming. The questionnaire indicates that the ATV is used twenty-eight percent of the time for cutting and hauling wood and brush; twenty percent for hauling trash and garbage; five percent for recreational activities; 0.5 percent for picking up mail; and 0.3 percent for snowplowing. While some of these uses may be associated with farming and can make caring for the land more manageable, the majority of these uses does not involve "tilling the soil to produce crops as a business." Ohio Adm.Code 5703-9-23(A)(1). Furthermore, it is important to note that "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 petitioner failed to meet the prerequisites to prove entitlement to the farm use exemption. The petitioner submitted a farm use questionnaire that demonstrated that the ATV is primarily used for taxable purposes. As stated above this exemption is only available for equipment primarily used in exempted farming activities.

Penalty

Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. Based upon a totality of the facts and circumstances, abatement of the penalty is appropriate.

Accordingly, this assessment is amended as follows:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$1,714.70	$18.17	$0.00	$1,732.87

Current records indicate that no payments have been made towards satisfaction of 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 "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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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
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 2 8 2022

Deere Green Acres
14936 N. Elyria Rd.
West Salem, OH 44287-8957

Re: Assessment No.: 100002135630
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 assessments:

Tax	Pre-Assessment Interest	Penalty	Total
$325.00	$8.67	$48.75	$382.42

This assessment was issued based upon the conduct of a special audit on the purchase of a motor vehicle. On or around December 29, 2020, the petitioner purchased a 1999 Peterbilt Motor 378 without the payment of tax. It is the petitioner's contention that this purchase was exempt because the vehicle is used directly in farming. The Department was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was not requested.

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 exemption 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." *See* R.C. 5739.01(F). Equipment that generally qualify for the exemption are tractors, combines, planters, balers, and similar equipment.

In order for a vehicle to be eligible for the farming exemption, three prerequisites must be met. First, the vehicle must be used by a person that farms as a business enterprise, such as growing agricultural crops or raising livestock for sale as a business. Second, the person must be able to demonstrate that the vehicle is used primarily in specific farming activities that are part of growing

crops or caring for livestock. Third, these farming activities must account for the primary usage of the vehicle.

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code.

In order to claim the exemption, the petitioner must first prove that they are farming as a business. To demonstrate that the farming activities constitute a "business," typically a copy of the I.R.S. Form 1040 Schedule F (Profit or Loss from Farming) is necessary. The schedule is used to report farm income and expenses. The petitioner provided a copy of its 2020 Schedule F.

The petitioner failed to complete the farm use questionnaire that was sent to it regarding the usage of the truck. The petitioner stated in its petition for reassessment that the truck is used for hauling and mixing fertilizer. No evidence was provided to support this contention.

When analyzing if a piece of equipment is used for farming as defined by law, the primary use of the equipment is the key factor. *Lucinda Hart v. Limbach*, BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). The petitioner has not provided evidence that it is using the vehicle in an exempt manner as defined by law. Although this truck may be used exclusively for farming and may be necessary to the petitioner's business operations, "the law does not provide * * * that any item necessary for farming is exempt." *Bahan Farms, LLC v. McClain*, BTA No. 2017-2180, 2019 WL 1260533 (Mar. 11, 2019).

The petitioner has failed to provide sufficient evidence that the truck is used primarily in the production of tangible personal property for sale by farming as required pursuant to R.C. 5739.02(B)(42)(n). Therefore, the petitioner's contentions are denied.

Accordingly, this assessment is affirmed as issued.

Current records indicate that no payments have been made towards satisfaction of 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 "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
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 2 8 2022

Deere Green Acres
14936 N. Elyria Rd.
West Salem, OH 44287-8957

Re: Assessment No.: 100002136841
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 assessments:

Tax	Pre-Assessment Interest	Penalty	Total
$65.00	$0.72	$9.75	$75.47

This assessment was issued based upon the conduct of a special audit on the purchase of a motor vehicle. On or around July 10, 2021, the petitioner purchased a trailer without the payment of tax. The petitioner claimed an exemption for direct use in farming. The Department was unable to verify the exempt use of the trailer. Accordingly, this assessment was issued. A hearing was not requested.

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 exemption 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." *See* R.C. 5739.01(F). Equipment that generally qualify for the exemption are tractors, combines, planters, balers, and similar equipment.

In order for a vehicle to be eligible for the farming exemption, three prerequisites must be met. First, the vehicle must be used by a person that farms as a business enterprise, such as growing agricultural crops or raising livestock for sale as a business. Second, the person must be able to demonstrate that the vehicle is used primarily in specific farming activities that are part of growing

crops or caring for livestock. Third, these farming activities must account for the primary usage of the vehicle.

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code.

In order to claim the exemption, the petitioner must first prove that they are farming as a business. To demonstrate that the farming activities constitute a "business," typically a copy of the I.R.S. Form 1040 Schedule F (Profit or Loss from Farming) is necessary. The schedule is used to report farm income and expenses. The petitioner provided a copy of its 2020 Schedule F.

The petitioner failed to complete the farm use questionnaire on how it uses the trailer. The petitioner stated in its petition that the trailer is used for hauling and mixing fertilizer. No evidence was provided to support this contention.

When analyzing if a piece of equipment is used for farming as defined by law, the primary use of the equipment is the key factor. *Lucinda Hart v. Limbach*, BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). The petitioner has not provided evidence that it is using the trailer in an exempt manner as defined by law. Although this trailer may be used exclusively for farming and may be necessary to the petitioner's business operations, "the law does not provide * * * that any item necessary for farming is exempt." *Bahan Farms, LLC v. McClain*, BTA No. 2017-2180, 2019 WL 1260533 (Mar. 11, 2019).

The petitioner has failed to provide sufficient evidence that the trailer is used primarily in the production of tangible personal property for sale by farming as required pursuant to R.C. 5739.02(B)(42)(n). Therefore, the petitioner's contentions are denied.

Accordingly, this assessment is affirmed as issued.

Current records indicate that no payments have been made towards satisfaction of 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 "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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JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 27 2022

Diamond Well Services LLC
4494 Warren Sharon Rd.
Vienna, OH 44473-9642

Re: Assessment No. 100001032456
Consumer's 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
$2,092.50	$38.96	$313.88	$2,445.34

This assessment was issued based upon the conduct of a special audit of a motor vehicle title transfer. The petitioner purchased a vehicle without the payment of tax. The Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. The petitioner failed to attend the scheduled 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 petitioner contends that the vehicle is exempt because it was purchased for use in their business for highway transportation for hire. R.C. 5739.02(B)(32) exempts "the sale, lease, repair, and maintenance of, parts for, or items attached to or incorporated in, motor vehicles that are *primarily* used for transporting tangible personal property by a person engaged in highway transportation for hire." (Emphasis added.) According to R.C. 5739.01(Z), "highway transportation for hire" means "the transportation of personal property belonging to others for consideration" by the holder of a permit or certificate issued by Ohio or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration on the public highways."

In order to qualify for the exemption, the petitioner is required to demonstrate that the motor vehicle in question is primarily used in transporting personal property belonging to others for consideration. The petitioner provided the Department with a written explanation of their use of the vehicle. The explanation of use states: "This truck is used to haul a set of Power Tongs (A

specific tool used in the Oil and Gas service industry). It is not able to be used to haul any other specific item for financial compensation" and "This truck is specifically used for Oil and Gas service work ONLY and is unable to perform any other tasks".

Based on the petitioner's statement, this vehicle appears to be specialized to assist in the petitioner's oil and gas well services business and would, therefore, be taxable under R.C. 5739.02(B)(42)(q)(ii)(XI). Based on the petitioner's explanation, the Department is unable to determine the ownership of the power tongs referenced or if the petitioner was compensated for transporting the power tongs. If the power tongs are owned by the petitioner, any transportation of the power tongs would not be property belonging to others and, therefore, not qualify for this exemption. If the petitioner were to prove that the powers tongs belonged to a third party, it would also need to prove that it was compensated for the transportation. The petitioner failed to provide any contracts or invoices with its petition and did not provide additional information. Therefore, the petitioner failed to meet two requirements for the transportation for hire exemption and its objection is denied.

Further, to qualify for the exemption, the petitioner is required to have a permit or certificate issued by Ohio or the United States authorizing them to engage in highway transportation for hire. The petitioner is registered with PUCO and has a US DOT number. However, the petitioner's US DOT authority was first obtained on April 5, 2018, but the vehicle at issue was purchased on March 30, 2018. This means that at the time of the purchased of the vehicle the petitioner was not authorized by the US DOT to engage in transportation for hire. Further, the Department's internal records show that the petitioner was not authorized by PUCO until April 2, 2018, meaning they were not authorized to engage in transportation for hire at the time of purchase by PUCO. Therefore, the petitioner was not the holder of a permit or certificate authorizing it to engage in transportation for hire as is required by 5739.02(Z) at the time of purchase and failed to meet the third requirement of the transportation for hire exemption, and its objection is rejected.

Accordingly, the assessment shall stand as issued.

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.

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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 9 2022

E428 Staffing LLC
1600 Madison Rd.
Cincinnati, OH 45206

RE: Assessment No. 100001835945
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 corrected assessment:

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$4,990.27	$98.38	$74.85	$499.03	$748.54	$6,411.07

On March 2, 2021, the above-listed assessment was issued after the petitioner failed to timely file a sales tax return for the period of August 3, 2020 through August 31, 2020. A hearing was requested but the petitioner waived the hearing.

The petitioner received a notice from the Department on October 28, 2020, notifying the petitioner that the Department had not received the petitioner's sales tax return for August 2020. The notice stated that immediate action was required. The Department issued a notice of assessment in the amount of $3,006.97 on March 2, 2021. The petitioner filed its sales tax return on March 16, 2021 through Ohio Business Gateway and made payment in the amount of $5,109.13. The Department adjusted the assessment to account for the petitioner's reported sales tax listed on its sales tax filing. The petitioner requests abatement of the remaining balance of $1,301.94 in penalties and additional charges.

The petitioner contends that the second corrected assessment is not correct and is not based on competent evidence. The petitioner contends that it submitted the correct tax, and the remaining balance of mainly penalty and post-assessment interest should be adjusted to $0.00. The petitioner requests the remaining charges be reassessed or abated for good cause. Further, the petitioner contends that the findings are not accurate, and the corrected assessment is unreasonable or unlawful under R.C. 5739.12.

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). If the taxes shown to be due on the return are not submitted by the twenty-third day of each month, then taxes are not properly remitted in the manner prescribed by the Ohio Revised Code, which subjects the vendor to additional charges pursuant to R.C. 5739.12(D). Sales tax returns must be filed for each period even if no taxable

sales are made. Additionally, the law does not distinguish between taxpayers who fail to remit taxes and those who simply remit the liabilities late.

The petitioner contends that post-assessment interest should be abated. However, this contention lacks merit as the Department did not assess post-assessment interest since tax was remitted prior to issuance of the assessment. The petitioner also seeks remission of penalties and additional charges. The petitioner contends that the remaining balance should be abated for good cause as the assessment is not accurate and is unreasonable or unlawful under R.C. 5739.12. This contention is not well taken. The petitioner did not file or remit its sales tax return until five months following the delinquency notice, which notified the petitioner of the need to file a sales tax return. Further, the Department issued a corrected assessment with the tax reported by the petitioner on its sales tax return. Since the Department's assessment is based on the petitioner's reported tax, it is unclear how the assessment is inaccurate or unreasonable. The Department used the petitioner's reported tax and the statutory charges permitted under R.C. 5739.12(D) to arrive at the amount owed in the corrected assessment. Since the petitioner did not file or remit sales tax as required by the twenty-third day of September for the reporting period of August 2020, the additional charges are appropriate.

Penalty remission is within the discretion of the Tax Commissioner. R.C. 5739.133; *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. The Tax Commissioner may abate all or a portion of any penalty when the taxpayer demonstrates that the failure to comply was due to reasonable cause rather than willful neglect. The petitioner has not elaborated on its failure to properly file or remit tax as required under R.C. 5739.12(A)(1). The evidence and circumstances do not support abatement of the penalty. Therefore, the request for a penalty abatement is denied.

Accordingly, the assessment shall stand as issued.

Current records indicate that payments in the amount of $5,109.13 have been made toward the assessment, leaving a balance of $1,301.94. 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

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FINAL DETERMINATION

Date: JUL 2 7 2022

Easy Way Express LLC
1605 Mack Ave.
Dayton, OH 45404-2710

Re: Assessment No.: 100002211646
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
$1,691.10	$56.91	$253.67	$2,001.68

This assessment was issued based upon the conduct of a special audit of the purchase of a motor vehicle. The petitioner purchased a 2018 BMW 650, on or around December 23, 2020, without the payment of tax. It was the petitioner's contention that the purchase was exempt because the vehicle is used to provide transportation-for-hire services. The Ohio Department of Taxation was unable to verify the exempt usage of the vehicle. Accordingly, this assessment was issued. A hearing was not 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).

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). However, the sale of motor vehicles that are primarily used for transporting tangible personal property belonging to others for consideration by a person engaged in highway transportation-for-hire are exempt from taxation. R.C. 5739.02(B)(32). In accordance with R.C. 5739.01(Z), "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;
(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;
(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

In support of its contention, the petitioner stated in their petition that the vehicle was used "by my trucking company to perform duty." The petition further stated that "I used it to transport important documentations, paperwork for my company as well as to travel back and forth from home to truck stop." The petitioner failed to state an exempt usage for the vehicle or a primary usage that involved transporting property belonging to others. No logbooks, contracts, or business records were provided to demonstrate the usage of the vehicle in providing transportation-for-hire services. The petitioner failed to provide evidence that, at the time of purchase, it held the license required pursuant to R.C. 5739.01(Z). The petitioner has not provided any evidence that demonstrates that the vehicle is used to transport personal property belonging to others for consideration under the proper licensure, as required by R.C. 5739.02(B)(32) and 5739.01(Z). As a result, the petitioner has failed to prove error in the assessment. Therefore, the petitioner's contention is denied.

Accordingly, the assessment is affirmed as issued.

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 "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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Jeffrey A. McClain

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

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4485 Northland Ridge Blvd. • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 9 2022

Holliday's Quik Stop, Inc.
3302 St. Rt. 243
Ironton, OH 45638-8973

RE: Assessment No.: 100001941222
Sales Tax
Account No. 44-021967

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
$78,456.84	$10,303.95	$31,382.59	$120,143.38

The petitioner operates a convenience store. This assessment is the result of an audit of the petitioner's sales from January 1, 2017 through December 31, 2019. The petitioner filed a petition for reassessment and requested abatement of the penalty. A hearing was not requested.

The petitioner seeks abatement of the penalty. Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. The penalty was reduced to 40% at the conclusion of the audit. Audit Remarks, p. 9. The auditor found evidence that the petitioner failed to remit all of the tax it collected. *Id.* Considering the surrounding facts and circumstances, further abatement of the penalty is not warranted.

Accordingly, the assessment is affirmed as issued.

Current records indicate that payments of $103.50 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, Ohio 43216-2678.

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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 27 2022

J.A.T. Co.
2167 Denise Dr. NE
New Philadelphia, OH 44663-9454

Re: Assessment No.: 100002227551
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
$1,080.00	$24.22	$162.00	$1,266.22

This assessment was issued based upon the conduct of a special audit of the purchase of a motor vehicle. The petitioner purchased a 1997 Freightliner truck, on or about May 10, 2021, without the payment of tax. The petitioner contended at the time of titling that the purchase was exempt because the vehicle was used in transportation-for-hire. The Ohio Department of Taxation was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing on this matter was not 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., 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).

Transportation for Hire

It is presumed that all sales of tangible personal property and any use, storage, or other consumption of tangible personal property occurring in Ohio are subject to tax until the contrary is established. R.C. 5739.02(C) and 5741.02(G). The sale of motor vehicles that are primarily used for transporting tangible personal property belonging to others by a person engaged in highway transportation for hire are exempt from taxation. R.C. 5739.02(B)(32). In accordance with R.C. 5739.01(Z), "Highway transportation for hire" means the transportation of personal property belonging to others for consideration by any of the following:

(1) The holder of a permit or certificate issued by this state or the United States authorizing the holder to engage in transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare;
(2) A person who engages in the transportation of personal property belonging to others for consideration over or on highways, roadways, streets, or any similar public thoroughfare but who could not have engaged in such transportation on December 11, 1985, unless the person was the holder of a permit or certificate of the types described in division (Z)(1) of this section;
(3) A person who leases a motor vehicle to and operates it for a person described by division (Z)(1) or (2) of this section.

In support of its contention that the vehicle was used to provide transportation-for-hire services, the petitioner provided documentation regarding its status as a licensed motor carrier, a transportation-for-hire questionnaire, and the vehicle's title. To qualify for the transportation-for-hire exemption under R.C. 5739.02(B)(32), one *must be certified* by Ohio or the United States to engage in transportation of personal property *at the time of the purchase* of the motor vehicle. (Emphasis added.) *A Transport LLC v. McClain,* BTA No. 2021-2277, 2022 WL 102057 (Mar. 28, 2022). The petitioner purchased the vehicle on May 10, 2021. The petitioner provided evidence that demonstrates that its motor carrier license, MC-166024-P, was revoked by the Federal Motor Carrier Safety Administration on August 17, 2020. The license was not reinstated until March 9, 2022. Thus, the petitioner did not hold the requisite licensure at the time of its purchase of the vehicle. As a result, the petitioner fails to satisfy one of the elements of R.C. 5739.01(Z) necessary to qualify for exemption under R.C. 5739.02(B)(32). Therefore, the petitioner's contentions are denied.

Accordingly, the assessment is affirmed as issued.

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 "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
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 28 2022

Shawn Kittle
33920 Moore Rd.
Logan, OH 43138

Re: Assessment No.: 100002213242
Use Tax

This is the final determination of the Tax Commissioner with regard to a petition for reassessment pursuant to R.C. 5739.13 and 5471.14 concerning the following use tax assessment:

Tax	Pre-Assessment Interest	Penalty	Total
$420.50	$8.43	$63.08	$492.01

This assessment was issued based upon the conduct of a special audit on the purchase of a vehicle. On or around June 2, 2021, the petitioner purchased an ATV, a 2018 Polaris ACE, without the payment of tax. The petitioner contends that the ATV qualified for exemption from taxation because it was used directly in farming. The Department was unable to verify that exempt usage of the vehicle. Accordingly, this assessment was issued. A hearing on the matter was not requested.

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 exemption 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 to produce crops* as a *business* and includes raising livestock, bees, or poultry, if 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." *See* R.C. 5739.01(F). Types of equipment that generally qualify for the exemption include tractors, combines, planters, balers, and similar equipment.

Therefore, in order for a vehicle to be eligible for the farming exemption, three prerequisites must be met. First, the vehicle must be used by a person that farms as a business enterprise, such as growing agricultural crops or raising livestock for sale as a business. Second, the person must be able to demonstrate that the vehicle is used primarily in specific farming activities that are part of

growing crops or caring for livestock. Third, these farming activities must account for the primary usage of the vehicle.

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952). The farming exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming as defined in the Ohio Administrative Code.

In order to claim the exemption, the petitioner must first prove that they are farming as a business. To demonstrate that the farming activities constitute a "business," typically a copy of the I.R.S. Form 1040 Schedule F (Profit or Loss from Farming) is necessary. The schedule is used to report farm income and expenses. The petitioner failed to provide a copy of his Schedule F. The petitioner maintains that they are a first-year farmer as of 2021, and as such did not yet have a Form 1040 Schedule F or other tax forms for the farm. The petitioner failed to submit any other documentation that supports his contention that he engages in the business of farming.

The remaining questions are whether the ATV is used in farming and whether the farming uses make up the primary usage of the vehicle. When analyzing if a piece of equipment is used for farming as defined by law, the primary use of the equipment is the key factor. *Lucinda Hart v. Limbach*, BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). The petitioner has not provided evidence that it is using the ATV in an exempt manner as defined by law. Although this ATV may be used exclusively for farming and may be necessary to the petitioner's business operations, "the law does not provide * * * that any item necessary for farming is exempt." *Bahan Farms, LLC v. McClain*, BTA No. 2017-2180, 2019 WL 1260533 (Mar. 11, 2019).

The petitioner submitted two farm use questionnaires, one was dated August 20, 2021 and the other was dated February 18, 2022. The information contained within the two questionnaires was inconsistent because each stated different usage activity percentages for the vehicle. The petitioner failed to provide any evidence to explain the differences between the two questionnaires he submitted. Without any supporting documentation to explain the inconsistencies arising from the conflicting responses, the questionnaires cannot be relied upon to meet the taxpayer's burden of showing the primary usage of a vehicle. *See Piqua Steel Co., Inc. v. McClain*, BTA No. 2020-148, 2021 WL 681730 (Feb. 16, 2021). As such, the petitioner has failed to provide evidence that the ATV was primarily used in an exempt manner for specific farming activities.

The petitioner has failed to provide sufficient evidence that the ATV is used primarily in the production of tangible personal property for sale by farming, as required by R.C. 5739.02(B)(42)(n). Therefore, the petitioner's contentions are denied.

Accordingly, this assessment is affirmed as issued.

Current records indicate that no payments have been made towards satisfaction of 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 "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
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

Date:
JUL 29 2022

Kraft Heinz Foods Company LLC
200 E. Randolph St., Ste. 7600
Chicago, IL 60601

RE: Refund Claim No.: 20201898903
Sales Tax
Refund Period: 04/01/2016 – 12/31/2018

This final determination of the Tax Commissioner hereby vacates the final determination issued on May 25, 2022, pertaining to the above-referenced refund claim.

The matter will be reconsidered.

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

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Ohio | Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date:

JUL 2 7 2022

Melissa McFadden
314 Bryn Du Dr.
Granville, OH 43023-1511

RE: Assessment No.: 100002206321
Tax Type: Sales
Account No.: 94-043904
Reporting Period: 07/01/2021 – 07/31/2021

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	$24.32	$200.00	$70.00	$700.00	$2,994.32

The petitioner was issued an assessment after failing to file the sales tax return for the period shown above. A hearing was held on the matter.

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).

After the filing her petition for re-assessment, the petitioner filed a sales tax return reflecting no sales were made in the period. Accordingly, the tax, pre-assessment interest, and assessment penalty on tax was modified to reflect the filed return.

The petitioner also objects to the additional charge and the additional charge penalty. 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 abatement of the additional charge penalty, but the additional charge will remain as assessed.

Accordingly, the assessment is modified as follows:

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

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.

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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 7 2022

Shawn A. McNeal
337 Spitler Ave.
Bradford, OH 45308

RE: Refund Claim No.: 20222925977
Refund Claim Amount: $5,172.73
Tax Type: Use

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $5,172.73, 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 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). To be entitled to a refund, the taxpayer must first demonstrate that they "illegally or erroneously" paid tax to the state of Ohio. R.C. 5739.07(C). Before the Tax Commissioner may grant an application for sales tax refund under R.C. 5739.07, the Tax Commissioner must acquire information from the taxpayer of undisputed facts showing that the refund application should be granted. *AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487 (June 4, 1987). 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.

The claimant submitted documentation showing that he purchased a motor vehicle, a 2017 Western Star Conventional tractor truck, on or around August 23, 2021. The claimant paid sales tax in the amount of $5,172.73 to the state of Michigan at the time of purchase. The claimant titled the vehicle in Ohio on September 24, 2021, claiming a transportation-for-hire exemption from use tax. The State of Ohio granted the claimant a tax credit at the time of titling for the amount of tax that had been paid to Michigan. The claimant was then sent a billing notice to determine if the vehicle qualified for the transportation-for-hire exemption. In response, the claimant presented information that the vehicle was indeed used primarily in an exempt manner to provide transportation-for-hire services and qualified for exemption.

The claimant contends that he is due a refund because the vehicle was proven to have qualified for exemption from taxation. Unfortunately, the Tax Commissioner can only grant a refund for taxes that have been proven to have been paid illegally or erroneously to the State of Ohio. R.C.

5739.07(C). The claimant provided a motor vehicle title receipt from the Miami County Clerk of Courts that he contends shows that tax was paid to Ohio when titling the vehicle. However, the receipt clearly lists that Ohio was recognizing that the claimant had paid $5,172.73 in tax to a different jurisdiction and, therefore, was entitled to a credit in that amount. The claimant did not pay any amount of Ohio sales tax when it titled the vehicle in Ohio. The Department cannot refund the claimant for sales tax that he paid to a different state. Therefore, the evidence submitted is insufficient to warrant a refund, as the claimant failed to demonstrate that he paid sales tax erroneously or illegally to the State of Ohio.

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
4485 Northland Ridge Blvd • Columbus, OH 43229

FINAL DETERMINATION

DATE: JUN 28 2022

Middletown Coke Company, LLC
1011 Warrenville Rd.
Lisle, IL 60532

Re: Refund Claim Nos. 20181347002, 20181406485, 20181406483, 20181406484
Use Tax
Account No. 97-806881

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

In resolution of this matter, the refund claims have been amended and paid in full.

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

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
4485 Northland Ridge Blvd. • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 29 2022

Morton Salt, Inc.
444 West Lake St., Ste. 3000
Chicago, IL 60606

RE: Assessment No.: 100002130813
Use Tax
Account No.: 98-002935

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
$399,242.48	$73,367.76	$59,886.21	$532,496.45

The petitioner is an American food company that produces salt for a variety of uses. This assessment is the result of an audit of the petitioner's purchases from January 1, 2016 through August 31, 2018. The petitioner filed a petition for reassessment and requested abatement of the penalty. A hearing was not requested.

The petitioner seeks full abatement of the penalty. Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. Considering the surrounding facts and circumstances, partial abatement of the penalty is warranted.

Therefore, the assessment is modified as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$399,242.48	$73,367.76	$29,943.04	$502,553.28

Current records indicate that payment of $532,496.45 was received, resulting in a refund of $29,943.17 plus applicable interest.

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

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4485 Northland Ridge Blvd., • Columbus, OH 43215

FINAL DETERMINATION

Date: JUL 27 2022

North East Auto Credit LLC
5755 Granger Rd., Ste. 777
Independence, OH 44131

RE: Refund Claim No.: 20201990681
Refund Amount Requested: $148,390.00
Sales Tax

This is the final determination of the Tax Commissioner with regard to an application for refund in the amount of $148,390.00 of sales tax filed pursuant to R.C. 5739.07. The claim was initially denied. The claimant disagreed with the denial, requested reconsideration of the matter, and submitted additional documentation. A hearing was held.

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. *Belgrade Gardens, Inc. v. Kosydar*, 38 Ohio St.2d 135, 143, 311 N.E.2d 1, 6 (1974). The Tax Commissioner will not engage in speculation. 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 is due. *CSI Controls v. Testa*, BTA No. 2017-122, 2018 WL 1372809, *1 (January 4, 2018). 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. The claimant must provide information of undisputed facts that a refund is not only due but is due in a sum certain. *CSI Controls v. Testa*, 2018 WL 1372809, *2.

The claimant submitted a refund request form claiming a refund under the bad debt deduction, a statement describing its claim, and a refund schedule. The claim was initially denied.

In response to the letter of denial, the claimant provided evidence to show that the tax was paid to the state, evidence to support the bad debt deduction claim, and a statement that identifies errors the claimant contends that the Department made when initially evaluating its claim. The claimant submitted additional information to support this claim with its appeal.

The claimant is requesting a refund based upon the bad debt deduction. The definition of bad debt is located in R.C. 5739.121(A) and modified by Ohio Adm.Code 5703-9-44. "Bad debt" means any debt or account receivable arising from the sale of tangible personal property or a taxable service by the vendor upon which sales or use tax has been reported and paid in a prior reporting period which has become worthless or uncollectible during the period between the

vendor's preceding tax return and the present return and which has been uncollected for at least six months. Ohio Adm.Code 5703-9-44(A). No interest is granted on claims for the bad debt deduction. Pursuant to R.C. 5739.132(B), interest is only allowed on refunds granted under R.C. 128.47, R.C. 5739.07, and R.C. 5741.10.

The claimant contends that it is entitled to a refund of tax paid to the state when the title of the motor vehicle was transferred to the customer because the transaction was later written off as a bad debt. This contention is not well met. Under R.C. 5739.121 and Ohio Adm.Code 5703-9-44, a bad debt is to be deducted on the sales tax filing for the period when the debt was written off. The effect of this deduction is that the vendor lowers its present taxable sales and therefore pays less sales tax, equal to the amount of tax from the previous period when the bad debt was consummated. The claimant contended in correspondence to the Department that it pays the taxes due when transferring the title to its customers from its operating funds and those taxes are included in the financing agreement that is agreed to by the customer. Taxpayer Follow Up Letter, dated Aug. 3, 2020. The down payment and payments then made by the customer on the financing agreement are proportionally allocated to the purchase price of the vehicle and the taxes. The claimant argues that this process is done pursuant to Ohio Adm.Code 5703-9-44(D). *Id.*

This, however, is not the correct application of this administrative code section. Ohio Adm.Code 5703-9-44(D) provides, "In the event that the *commissioner determines that a vendor has not maintained adequate records*, the commissioner may test check the vendor's business in order to verify the amounts deducted as bad debts. In the absence of adequate records showing the contrary, it is presumed that any payments made on a debt or account are applied first to the price of the property and sales tax thereon and secondly to interest, service charges and any other charges." (Emphasis Added.) This means that the presumed allocation of payments only applies in the absence of sufficient records from the vendor. If a vendor has insufficient records, they will have not satisfied all eight requirements of Ohio Adm.Code 5703-9-44(C) and as such would not be entitled to claim the bad debt deduction. Here, the claimant concluded that they were entitled to the bad debt deduction as the basis for this refund claim but then proceeded to justify their contention by citing an administrative code section that explains the Department's procedure in the event that records submitted are insufficient to support a bad debt claim. The Department is not able to reconcile this contradiction presented by the claimant. Therefore, this contention is denied.

Further, the claimant failed to comply with the procedure for applying the bad debt deduction that is described in the Ohio Revised Code. R.C. 5739.121(D) states in relevant part, "[i]n any reporting period in which the amount of bad debt exceeds the amount of taxable sales for the period, the vendor may file a refund claim for any tax collected on the bad debt in excess of the tax reported on the return". The bad debts that qualify for this deduction are to be deducted against the taxable sales for the period when the claimant writes off the bad debt. The claimant may then file a refund claim if the amount of bad debt exceeds the amount of taxable sales. Here, the claimant has not shown that it properly applied this deduction and that an excess of bad debt was claimed. Also, the claimant has filed this refund claim based on vehicles sold suggesting that the claimant did not apply the deduction to its returns when filed and did not amend its returns.

Therefore, the claimant has failed to comply with the procedure set forth in R.C. 5739.121 and as such this contention is denied.

Based on how the claimant has presented its claim, the Department believes that the claimant is seeking a sales tax refund under R.C. 5739.07 rather than the bad debt deduction under R.C. 5739.121 on the basis that they paid the sales tax to the county clerk and are seeking a refund of that tax paid. This claim is equally flawed. Under Ohio Adm.Code 5703-9-19, sales tax is to be collected from or charged to a consumer when an installment sale is consummated. When the financing company and the customer finalize the purchase of the vehicle through the financing agreement, the tax is charged to the customer. There is no requirement under Ohio Adm.Code 5703-9-19 for a customer to make a down payment. As such, the claimant may be the party that actually remitted the tax to the state, but the tax liability was charged to the customer via the financing agreement. Also, a refund is only granted if the claimant proves that tax was illegally or erroneously paid to the state. R.C. 5739.07. Here, the tax paid was a legal and required payment of tax. Amounts of tax that are legally required to be paid at the time that they are remitted to the state are not illegal or erroneous payments of tax. *Internatl. Business Machines Corp. v. Levin*, 125 Ohio St.3d 347, 2010-Ohio-1861, 928 N.E.2d 440. The claimant has failed to provide evidence to show that there was an illegal or erroneous payment of tax. Therefore, there is no basis on which to grant a refund and this contention is denied.

The claimant contends that its transactions qualify for the bad debt deduction and provided proof to support this contention. This contention is not well met. Under Ohio Adm.Code 5703-9-44, certain disqualifying factors exist for the bad debt deduction and there is a list of eight records that must be kept in order to receive the deduction. The Department reviewed the claimant's bad debt deduction claim and found various issues with the information provided.

Property Repossessed

The claimant contends that it repossessed vehicles, sold them at auction, and then reduced its bad debt deduction claim by the amount of proceeds from the sale. This is, however, contrary to how the statute is written. R.C. 5739.121(A) provides in relevant part that ""Bad debt" does not include * * * repossessed property". Further, Ohio Adm.Code 5703-9-44(A)(7) states that the uncollectable amount of property repossessed cannot be excluded as bad debt. This means that whenever the vendor repossesses the tangible personal property subject to the debt, it does not qualify for the bad debt deduction. On the majority of transactions on the refund schedule, the claimant provided records proving that it repossessed the vehicles from the customers that defaulted on their loans. This is further supported in their statement which states that the claimant was claiming the bad debt deduction on the balance of the transactions where the claimant repossessed the vehicle and sold it at auction, applying the sale proceeds to the debt. This is not what is provided for in R.C. 5739.121 or Ohio Adm.Code 5703-9-44 and is in fact expressly prohibited. Therefore, all transactions where property was repossessed is excluded from the bad debt deduction and a claim for refund on these transactions are denied.

Interest, Finance and Service Charges

The claimant also presented issues in the records that were provided to the Department as they pertain to interest, finance, and service charges. Pursuant to Ohio Adm.Code 5703-9-44(B)(4), the vendor must keep records of "[t]he amount of interest, finance and service charges charged to the debt or account." The Department reviewed the transactions and the financial histories that were provided with each and was unable to ascertain how all of the finances fit together. The BTA has expressly upheld the denial of a refund where there are unexplained discrepancies within the claimant's own documents. *CSI Controls v. Testa*, 2018 WL 1372809, *2. At the beginning of the transactions, the vendor only provided the sale price of the vehicle and the sales tax based on that price. However, the transaction history provided started with a figure that was higher than the sum of the purchase price and tax. This higher figure usually had an associated down-payment but there was no accounting for how the down payment was applied. Further, when reviewing the transaction histories, the starting balance of one line would be higher than the ending balance of the previous line. The claimant was adding additional money owed to the balance of the debt, but the reason for this is not explained or accounted for in the information provided by the claimant. The claimant failed to comply with all of the requirements set forth in Ohio Adm.Code 5703-9-44(B) by not providing the required information laid out in that section. The claimant failed to fulfil all the requirements under the bad debt deduction.

Accordingly, this 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 FILE APPROPRIATELY CLOSED.

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Jeffrey A. McClain

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 29 2022

Rhenium Alloys, Inc.
38683 Taylor Pkwy.
North Ridgeville, OH 44035

RE: Assessment No.: 100000938364
Reporting Period: 04/01/2012– 12/31/2016
Use Tax
Account No.: 98-002942

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
$111,943.01	$17,019.23	$16,791.11	$145,753.35

The petitioner operates as a manufacturer and provider of research and development services. This assessment is the result of a use tax audit of the petitioner's records from April 1, 2012 through December 31, 2016. The petitioner filed a petition for reassessment. A hearing was held.

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., 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).

Background

During the audit period, the taxpayer operated a single facility, which housed administrative offices, manufacturing operations, and research and development ("R&D") operations. The taxpayer manufactured a wide range of metallic products from razor-thin wires to ingots and sheets.

In May 2015, the Department initiated a use tax audit into the taxpayer's records to check compliance levels as part of the taxpayer's participation in the Department's direct pay program. Multiple documents were signed and used to detail the scope and methodology of the audit in accordance with the terms of the taxpayer's direct pay permit agreement. The taxpayer signed a statistical methodology letter of agreement, an addendum to that agreement, a purchase audit letter of agreement for acquisitions made with procurement cards, and a taxable percentage letter of agreement for three specific categories of purchases. The taxpayer's objections to the assessment that arose as a result of the audit are addressed below.

Resale

R&D Materials

The petitioner contends that the Department erroneously assessed use tax liability on materials that that were listed in an inventory account under the name "JE to reclass materials to R&D" and with the description "expensed materials consumed in R&D." Rhenium Workpapers, p. 4. The contested transactions involve tangible personal property which had been purchased and reclassified for accounting purposes from the petitioner's inventory account to an inventory adjustment account for materials that were consumed during R&D. The purchase of raw materials used in developing new products is taxable to the consumer of the materials and is not exempt as qualified research and development equipment under R.C. 5739.02B(42)(i).

The petitioner states that it would tailor its R&D activities around customers' specific needs. The petitioner contends that its business practice was to bill customers for the costs of any materials and labor that were going to be consumed prior to commencement of the research because rhenium and other necessary materials were quite expensive. The petitioner contends that the assessed materials listed in Exhibit A qualified for exemption from taxation because the raw materials were resold to its customers before technically being consumed by the petitioner when the R&D or manufacturing activity began.

The petitioner states that its customers would discuss exact specifications and quantities for products they desired, and, in response, the petitioner would create quotes for the costs associated with developing such products. To accept a quote, customers would issue a purchase order that listed the final quantities of any desired products. The petitioner contends that once it received a purchase order for a specific product from a customer it would withdraw all the necessary materials from inventory before beginning the project. The petitioner contends that it would then issue an invoice to its customer that memorialized the total costs. The petitioner argues that once it issued an invoice to a customer, it had effectively sold any raw materials that it was about to consume during R&D to that customer.

Evidence available during the audit demonstrated that the petitioner accounted for the materials in the contested transactions by recording a reciprocal journal entry in an R&D inventory adjustment account since it consumed the materials in a taxable manner during R&D pursuant to Ohio Adm.Code 5703-9-21(D)(8). The petitioner contends that the assessed charges were not charged to an R&D adjustment account because of personal consumption, as the Department

determined. The petitioner contends that, because of how it keeps its books, it is not possible to show a direct movement of the costs captured in Exhibit A to a cost-of-goods-sold account. Appeal Memo, p. 5. The petitioner states that the charges were reflected as revenue via credit entries in one of its external recovery accounts because it does not keep a traditional cost-of-goods-sold account. *Id.*

The petitioner submitted documentation (Exhibit B) comprised of purchase orders, transaction inquiry reports, inventory cards, and sales invoices. The petitioner contends that these documents demonstrate the inventory control system that was utilized during the audit period to account for the movement of property from raw materials to finished goods by means of uniquely coded item numbers. This contention is not well met.

The petitioner contends that the Department erroneously assessed use tax liability on the raw materials listed in Exhibit A because it purchased and resold them to customers pursuant to R.C. 5739.01(E). The petitioner argues that it purchased raw materials which were then resold to its customers before the petitioner consumed the materials by attempting to manufacture them into whatever finished product was desired. Unfortunately, the evidence submitted by the petitioner shows that it purchased raw materials which were then manufactured into products before being sold to customers. To qualify for the resale exemption, tangible personal property must be resold in the same form as it was received. The assessed transactions contained the description "expensed materials consumed in R&D." Comprehensive Transactions Detail Report. The contested transactions were assessed use tax liability because they involved purchases of materials that the petitioner consumed during R&D pursuant to Ohio Adm.Code 5703-9-21(D)(8).

This information proved that the petitioner maintained an internal accounting system that tracked items from the time they arrived at its facility as raw materials, to the time they exited as finished products. The petitioner is correct that the Revised Code does not require taxpayers to utilize a specific accounting system to record their purchase and sales data. The Revised Code does require items to be sold in the same form as they were received to qualify for the resale exemption pursuant to R.C. 5739.01(E). None of the descriptions or amounts shown on the transaction inquiry reports or inventory cards in Exhibit B matched the amount of any of the contested transactions. None of the information submitted by the petitioner demonstrated that its customers purchased raw materials from it that were incorrectly listed under the description "expensed materials consumed in R&D."

The petitioner also contends that four credit transactions for reclassified R&D materials were erroneously included in the sample pull list, creating a duplication of tax liability. *See* Exhibit A; Comprehensive Transaction Detail Report. Contrary to the petitioner's contentions, the inclusion of these credit transactions reduced the amount of the petitioner's taxable basis as opposed to creating double taxation. The Department determined that certain materials had erroneously been classified to one of the petitioner's inventory accounts, so it included the adjustment credits to offset those amounts and avoid double taxation.

The petitioner failed to present evidence that that the raw materials it purchased to create a prototype of the products for its customers comprised any portion of the transactions that were assessed for being consumed during R&D. The petitioner failed to submit evidence that shows that it did not consume the assessed property during R&D. The petitioner failed to demonstrate that it sold any of the assessed property in the same form as which it was received. The petitioner failed to provide any evidence that directly relates to any of the contested transactions. As a result, the petitioner failed to meet its burden to prove error in the assessment. These contentions are denied.

Concept Alloys, Inc.

The petitioner contends that the Department erroneously assessed use tax on a transaction that involved the purchase of two hundred feet of ".020-inch diameter W5%Re/W26%Re bare thermocouple" wire from Concept Alloys. The petitioner contends that the wire was a standard product that was routinely purchased and resold to customers. The petitioner argues that the Department erred when it determined that the wire was consumed by the petitioner to calibrate equipment. In support of its contentions, the petitioner submitted a copy of the purchase invoice for the wire and a statement from its manufacturing manager. These contentions are not well met.

The petitioner admitted during the audit process that it consumed the wire purchased from Concept Alloys during an equipment calibration project for comparison testing. Audit Remarks, p. 27. The description provided by the taxpayer for this transaction stated, "material for testing to compare to ours for calibration project." Audit Pull List. The petitioner's description for the account that contains this transaction was "Sup - Wear Parts - MFG." Audit Pull List. The evidence shows that the wire served as a testing material that was consumed in a taxable manner to help calibrate the petitioner's manufacturing equipment pursuant to Ohio Adm.Code 5703-9-21(D)(9), which is now codified under 5703-9-21(D)(8).

The petitioner did submit the purchase invoice and a statement of usage from its manufacturing manager to substantiate its contentions. The manufacturing manager stated that the wire was a standard product that was routinely purchased and resold to its customers but failed to provide any sale invoices or primary records to support such a contention. The purchase invoice failed to present any evidence regarding how the wire was sold or consumed by the petitioner. The petitioner failed to demonstrate that the wire was resold in the same form in which it was purchased, so it fails to qualify for the resale exemption pursuant to R.C. 5739.01(E). As a result, the petitioner failed to prove error in the assessment. These contentions are denied.

Toshiba America Electronic Components, Inc.

The petitioner contends that the Department erroneously assessed use tax liability on a transaction that involved multiple purchases of tungsten wire from Toshiba that were resold to customers pursuant to R.C. 5739.01(E). The petitioner asserts that the transaction amount listed in the audit results was the sum of five invoices involving purchases of different types of tungsten wire. The petitioner contends that the tungsten wire was "recorded as a raw material

inventory item at the time of purchase, was manufactured, and was resold to customers." Appeal Memo, p. 10. The petitioner submitted a purchase order, five Toshiba invoices, a transaction inquiry report, and a sales invoice in support of its contentions as Exhibit D. The petitioner believes that these documents illustrate the flow of the purchased items from raw materials to finished goods in its accounting system, which proved its entitlement to exemption from taxation. *Id.* at p. 11.

The petitioner contends that it purchased tangible personal property from Toshiba that it resold to customers. The petitioner was assessed use tax on a transaction with Toshiba, dated September 26, 2013 and in the amount of $13,233.70, that contained the description "Tungsten wire, supplies charged to R&D Department." Sample Transactions Detail Report, p. 19. The purchase order, dated September 10, 2013, showed the purchase of three different types of W3%Re wire. The petitioner purchased $7,290.15 worth of .0064-inch diameter W3%Re, $7,567.42 worth of .0072-inch diameter W3%Re, $8,644.12 worth of .0084-inch diameter W3%Re for a total of $23,501.69. The five purchase invoices from Toshiba, dated September 24, 2013, sum to a total of $13,121.10. Each individual invoice's amount is far below the amount of the assessed transaction. No combination of the amounts listed on the purchase order nor the sum of the five invoices equate to the amount of the assessed transaction, $13,233.70. The description in the purchase order showed that the petitioner purchased three different widths of tungsten rhenium wire, while the descriptions for the assessed transaction and the five Toshiba invoices listed that pure tungsten wire, not tungsten rhenium wire, was purchased. *Id.* The description for the assessed transaction failed to state what type or width of tungsten wires had been purchased and consumed. The provided documentation does not support the petitioner's contentions.

More importantly, the petitioner stated during the audit process that the wire was purchased "to use as test for a R&D project to flatten wire/eddy current wire." Audit Pull List. The petitioner's description for the department that recorded the transaction was "R&D (SG&A Expense)." *Id.* The petitioner failed to present evidence that matched the amount of the contested transaction. The petitioner failed to explain why none of the evidence it submitted matched the date or amount of the contested transaction. As a result, the petitioner failed to meet its burden to prove error in the assessment. These contentions are denied.

U.S. Government

The petitioner entered into the an agreement with the government in 2014 during the middle of the audit period. The Air Force committed to cover direct costs for machinery, consulting, and direct labor up to a certain threshold. The petitioner contends that the agreement was meant to be a means by which the Air Force funded the direct costs associated with acquiring and installing the manufacturing and research equipment that was necessary to create different types of W3%Re wire and products for sale. The petitioner contends that, as a result, it billed the Air Force for the materials and services it purchased from Duplicast Corporation during the transactions with the ID number 19259819, 19259820, 19259703 and from Mike Jirousek during the transaction with the ID number 19259845. The petitioner purchased swagers from Duplicast and labor and materials to provide a power supply to swagers and an exhaust fan from Mike

Jirousek. The petitioner contends that these purchases qualified for the resale exemption pursuant to R.C. 5739.01(E).

In support of its contentions, the petitioner submitted two of the three invoices for the purchases from Duplicast, the invoice from Mike Jirousek, and Exhibit H. The petitioner contends that it has presented sufficient evidence to demonstrate that it purchased and resold these contested items to the U.S. government pursuant to R.C. 5739.01(E). These contentions are not well met.

There is no dispute that the petitioner submitted evidence that it billed the government for reimbursement costs under the terms of its SBIR agreement. The petitioner provided an invoice that it issued for costs from the first quarter of 2015 to the government on December 21, 2015. The property and services that it contests were resold to the government were purchased and consumed by the petitioner from January 31, 2015 through March 16, 2015. Exhibit H. The reimbursement invoice was issued by the petitioner well after it had consumed the contested swaggers from Duplicast and the benefit of the services and property from Mike Jirousek. Seeking reimbursement from the government for costs per a private agreement does not provide evidence that the petitioner purchased property and services that were resold in the same form as they were received pursuant to R.C. 5739.01(E).

Additionally, the petitioner provided only partial records to substantiate what it billed the government for and how much money it received. The petitioner contends that its costs from the four contested purchases were included in that billing, as evidenced by the transactions listing included in Exhibit H, but the description for the purchases from Duplicast in Exhibit H do not match the product descriptions on the corresponding invoices. The evidence shows that the swaggers from Duplicast and the materials and services from Mike Jirousek were consumed by the petitioner at its facilities and they were not resold in the same form in which they were received. As a result, the petitioner failed to prove error in the assessment by presenting evidence that it resold the property and services it purchased from Duplicast and Mike Jirousek to the U.S. government in the same form in which they were received. These contentions are denied.

Manufacturing Equipment

Duplicast

The petitioner contends that the Department erroneously assessed use tax liability on the three transactions that involved purchases of equipment from Duplicast. The petitioner contends that the swagers were also used in a manufacturing operation to produce tangible personal property for sale. The petitioner argues that these purchases were exempt from taxation pursuant to R.C. 5739.02(B)(42)(g), 5739.011(B), and Ohio Adm.Code 5703-9-21. The petitioner states that it had purchased component parts for swagers from Duplicast that were used to alter the dimensions of wires, rods, and tubing it manufactured. The petitioner contends that it had purchased the swagers as part of its SBIR agreement to manufacture tungsten rhenium wire for the government. In support of its contentions, the petitioner submitted two of the contested invoices and Exhibit H. These contentions are not well met.

The petitioner contends that the swaggers were used to manufacture tangible personal property for sale. *See* ID 19259819, 19259820, and 19259703. The petitioner contends that it provided two of the three invoices for the contested transactions. The transaction ID numbers on the invoices submitted by the petitioner fail to match the invoice numbers in the audit workpapers. The transaction IDs for the two invoices submitted by the petitioner in the audit workpapers are 19262423 and 19262424, but the petitioner contends that they were ID 19259819 and 19259820. The petitioner failed to submit the invoice for the transaction with the ID 19262307, or ID 19259703 as the petitioner contends.

The descriptions that were provided for the Duplicast transactions as part of the audit workpapers stated, "swagers consumed in R&D, made of softer material." Sample Transactions Detail Report, pp. 17, 19. During the audit, the Department had noted that:

> "there are three transactions included in the pull list from Duplicast Corporation for swaging dies that were charged to Taxpayer's SBIR Government Projects Department. The Federal Government funded Taxpayer's research efforts to develop the technology to create a process to produce high quality rhenium wire, with the ultimate goal of producing and selling this wire to the government. In the development phase, rhenium wire was produced, but often did not meet the standards required by the government. Although this wire was inferior in terms of the standards required by the government, it was often perfectly acceptable to Taxpayer's other customers. Consequently, most equipment charged to Taxpayer's SBIR Government Projects Department qualified for the manufacturing exemption as provided by RC 5739.011. However, the swagers purchased from Duplicast Corporation are an exception. These swagers did not produce any product for sale, they were constructed of a softer material and were entirely consumed in performing R&D. Although, Taxpayer indicated these swagers were re-machined for production uses by Taxpayer in a different operation, these swagers were consumed in performing R&D."

Audit Remarks, p. 23. The purchase descriptions on the two invoices that the petitioner provided simply stated "#4 swagers - .500" bearing." ID 19259819 and 19259820. The descriptions in Exhibit H for the two invoices that the petitioner submitted state, "(60) stellite #4 Torrington dies; (30) stelite #2 Torrington dies; (38) stellite dies #2 Torrington dies." Exhibit H, pp. 2-3. The descriptions provided on the audit workpapers do not match the descriptions submitted by the petitioner in Exhibit H or the invoices. The petitioner has failed to present evidence that substantiates its contentions that it used the swagers as component parts in a manufacturing operation to produce tangible personal property for sale pursuant to R.C. 5739.02(B)(42)(g). The petitioner has failed to present evidence that it did not initially purchase and consume the swagers during R&D. As a result, the petitioner has failed to prove error in the assessment. Therefore, these contentions are denied.

Mike Jirousek

The petitioner contends that the Department erroneously assessed use tax liability on transaction ID 19259845 because it involved the purchase of property and services to install equipment that was used in manufacturing operation to produce tangible personal property for sale. The petitioner contends that the labor and materials to provide a power supply to its swager machine and an exhaust fan that it purchased from Mike Jirousek were exempt from taxation pursuant to Ohio Adm.Code 5703-9-21(C)(8), 5703-9-21(C)(11), and R.C. 5739.02(B)(42)(g). In support of its contentions, the petitioner submitted the purchase invoice and Exhibit H. These contentions are not well met.

The petitioner contests one expense transaction that involved the purchase of parts and services from Mike Jirousek. The invoice submitted by the petitioner shows that transaction involved the purchase and installation of a power supply for swagers and an exhaust fan, the disconnection and reconnection of a power supply, cooling the nitrogen and hydrogen lines from the induction duct, the installation of "motor start wire #4 swager neon induction unit," and "motor starter for 3 swagers." 19259845. The invoice shows the purchase of both taxable and non-taxable services that were provided for one non-itemized price. The materials and parts were also listed together for a different non-itemized price. As a result, the invoice evidenced that the petitioner purchased a bundled transaction, so the entire amount was held taxable pursuant to R.C. 5739.012(C)(l).

During the audit, the petitioner failed to provide a detailed explanation of what work was performed, why the work was performed, on what machines the work was performed, or a cost breakdown of the various items comprising the invoice. Audit Remarks, p. 24. The purchase of the materials for, and the installation of, the power supply to the exhaust fan was taxable pursuant to Ohio Adm.Code 5703-9-21(D)(6). Pursuant to R.C. 5739.01(B)(3)(b), providing installation services for taxable tangible personal property was a taxable service. The purchase was determined to be a bundled transaction that involved at least the taxable component of installing a power supply to an exhaust fan, in addition to the numerous other tasks for which the taxable status could not be determined due to a lack of information. The petitioner failed to demonstrate that it only purchased services to install exempt property that were used in a manufacturing operation to produce tangible personal property for sale. As a result, the petitioner failed to prove error in the assessment. These contentions are denied.

Non-Taxable Services

Group Management Services, Inc.

The petitioner contends that the Department erroneously assessed use tax liability on expense transactions that involved purchases of non-taxable services from Group Management Services, Inc. These contentions are well met. As a result, the tax, interest, and penalty have been reduced as shown below.

Bramhall Engineering & Surveying, Co.

The petitioner contends that the Department erroneously assessed use tax liability on a transaction that involved the purchase of non-taxable services from Bramhall Engineering & Surveying Co., Inc. These contentions are well met. As a result, the tax, interest, and penalty have been reduced as shown below.

Penalty

The petitioner seeks abatement of the penalty. The surrounding facts and circumstances warrant a partial abatement of the penalty.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$99,949.25	$15,305.58	$4,997.16	$120,251.99

Current records indicate that no payments have been made in 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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 28 2022

Silo Tree Farm
1469 S. St. Rt. 741
Lebanon, OH 45036-7513

Re: Assessment No. 100001813875
Use Tax

This is the final determination of the Tax Commissioner with regard to 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
$4,209.24	$116.98	$631.39	$4,957.61

This assessment is the result of an audit of the petitioner's purchase of a pickup truck. On or about July 10, 2020, the petitioner purchased a 2020 Ford F-150. No tax was paid at the time of purchase. Instead, an exemption was claimed for use directly in farming. The Department was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing was held.

Legal Standard

Sales where the purpose of the purchaser is to use or consume the thing transferred primarily in farming, agriculture, horticulture, or floriculture are exempted from taxation. R.C. 5739.02(B)(42)(n). "Farming" is defined 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." Ohio Adm.Code 5703-9-23. "Business" requires the "object of gain, benefit, or advantage." R.C. 5739.01(F). Making a casual sale is not engaging in business. R.C. 5739.01(G).

Critically, the burden is on the taxpayer to demonstrate that a purchase was exempt from tax. *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus. The exemption is not a status exemption. It is not automatic to persons who own farmland, acreage, crops, or livestock. It is only available for equipment used actively in farming or agriculture as defined in the Ohio Administrative Code. A pickup truck is not a traditional piece of farming equipment with a use limited to a farming or agricultural function.

Therefore, for the vehicle to be eligible for the farming exemption, three prerequisites must be met. First, the vehicle must be used by a person that farms as a business. Second, the person must be able to demonstrate that the vehicle is used in specific farming activities that are directly a part

of raising livestock or the production of crops, and not for some other use, such as transportation. Third, these farming activities must account for the primary usage of the vehicle.

Engaged in the Business of Farming

First, a taxpayer must be engaged in the business of farming to qualify for the farming exemption. The petitioner provided a copy of its 2020 Form 1040 Schedule F to demonstrate that it is engaged in the business of farming.

Directly Used in Farming

In order to qualify for the exemption, a taxpayer must demonstrate that the item is primarily used in specific farming activities. When analyzing if a piece of equipment is used for farming as defined by law, the primary use of the equipment is the key factor. *Lucinda Hart v. Limbach,* B.T.A. No. 86-D-280, 1988 WL 162378 (July 22, 1988).

The petitioner did not fill out and submit the Department's Farm Use Questionnaire. In the petition for reassessment, the petitioner contends that the pickup truck "is used in the direct production of hay/alfalfa for sale as feed for livestock." However, the petitioner did not state or describe the type of farming activities he engaged in. The petitioner further expressed that the vehicle was "involved in the direct production of the crop and livestock duties at least 75% of its overall usage."

During the hearing, the petitioner asserted that the vehicle is primarily used for farming but did not provide any additional documentation or evidence to support that declaration. Further, the petitioner contended that the vehicle is an exempt farm vehicle used to haul people, equipment, building materials and seed on its hay farm. The petitioner emphasized that the vehicle is solely for farm use and road licensed to haul heavy equipment; however, the primary use of the vehicle is farming. The petitioner explained that help is hired to cut and bail hay and the petitioner uses the pickup truck to haul a trailer used to transport bailed hay to storage. After the hearing, the petitioner was given additional time to submit evidence to support these contentions. No supporting evidence or documentation was provided.

"[T]o qualify for an exemption under R.C. 5739.02(B)(42)(n), the taxpayer must affirmatively demonstrate that he purchased the tangible personal property for use in an agriculture business." *Wells v. Testa*, B.T.A. No. 1342, 2018 WL 6493033. Based on the evidence in file, the Department has insufficient information to show that the vehicle was used in exempt farming activities. The petitioner stated that the truck is licensed for road-use and transported bailed hay to a storage facility using a trailer. Further, as conveyed within the exemption certificate provided by the petitioner, the vehicle is "the main source of transportation to and from [the] farm." The Board of Tax Appeals has held that a vehicle's use is taxable if it is to haul supplies on the public roads to the farm, and to haul the produce from the field to the place of sale because it is not used directly in the petitioner's farming operation. *Lucinda Hart v. Limbach,* BTA No. 86-D-280, 1988 WL 162378 (July 22, 1988). There was no evidence submitted to demonstrate the vehicle played a part in sowing, harvesting, or cultivating the goods the petitioner produces. Without such evidence or documentation, the petitioner was unable to demonstrate that the vehicle was used directly in the production of hay/alfalfa. "Statutes relating to exemption or exception from taxation are to be

strictly construed, and one claiming such exemption or exception must affirmatively establish his right thereto." *Natl. Tube Co. v. Glander*, 157 Ohio St. 407, 105 N.E.2d 648 (1952), paragraph two of the syllabus. Therefore, the petitioner has not met this burden for the primary usage prerequisite.

Although the petitioner has demonstrated, through evidence and/or documentation, that it engaged in the business of farming, the petitioner has not substantiated that the 2020 Ford F-150 is primarily used in exempt farming activities. The evidence in file does not support the petitioner's affirmations. The petitioner failed to provide sufficient evidence that validates the pickup is used as required under R.C. 5739.02(B)(42)(n). Therefore, the petitioner does not qualify for this exemption.

Penalty & Interest

The petitioner requested abatement of the interest and penalty. The Tax Commissioner lacks jurisdiction to abate preassessment interest added to an assessment pursuant to R.C. 5739.133. Therefore, this request cannot be allowed. Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. Based on the facts and circumstances, penalty abatement is not warranted.

Accordingly, the assessment is affirmed as issued.

Current records indicate that no payments have been made in 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

JEFFREY A. MCCLAIN
TAX COMMISSIONER

/s/ Jeffrey A. McClain

Jeffrey A. McClain
Tax Commissioner

Ohio Department of Taxation

Office of the Tax Commissioner
4485 Northland Ridge Blvd • Columbus, OH 43229

000000028

FINAL DETERMINATION

Date: JUL 27 2022

Sterling Jewelers, Inc.
Attn: Rebecca Wilde
375 Ghent Rd.
Akron, OH 44333

Re: Refund Claim No. 201803315
Filed 10/27/2017
Consumer's Use Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $18,815.20 of consumer's use tax filed pursuant to R.C. 5739.07 and 5741.10.

Upon initial review, the refund claim was denied. In response to the denial of the refund, the claimant submitted additional information. In accordance with R. C. 5703.70(C)(2), if an applicant provides additional information within the prescribed timeframe set forth in the code, the tax commissioner shall review the information and make any adjustments deemed proper and issue a final determination. This final determination is issued pursuant to this section of the Ohio Revised Code.

Background

The claimant filed the refund claim based on its contention that it paid tax erroneously on various items. The claimant explained that its tax compliance department reviews invoice data in an effort to determine what is taxable. According to the claimant, the compliance team utilizes general rules to determine the taxability. If the compliance team does not know the taxability, it errs on the side of paying tax. Subsequently, tax audit reviews and files refund claims on items it determines are exempt from taxation. In support of its position, the claimant provides a spreadsheet of transactions it contends is exempt, the return at issue, an accrual spreadsheet and invoices. A hearing was not requested. The claimant's objections are discussed below.

Double Taxation

The claimant maintains that it accrued tax twice on certain transactions. The claimant provided sufficient evidence to support its position on the following transactions:

Tyco Integrated Security LLC, Invoice 97148082, 97148061 and 741257
Educational Equipment, Invoice 64297
Skyriver Communications Inc., Invoice Inv00022049
Atlassian Pty Ltd., Invoice AT1315482
Corbel Solutions LLC, Invoice 7707 and 7633
Crosscom National Inc, Invoice N5808737
S.A. Comunale Co., Invoice F442846

Thompson Electric Inc., Invoice 9212, 9361, 9378, 110298
Advanced Communica Cabling LLC, Invoice 13105, 13071, 13091, 13046, 13069
Poth Construction, Invoice 2015
Mendelson & Associates, Inc., Invoice 9900006
Geopfert Co, Invoice 7519
Noble Systems Corp, Invoice 127085B

Tangoe, PL Inc., Invoice 101641307290958, 101641307221025, 101641307151226, 101641307081137, 101641307011728

Professional Services

The claimant contends that it erroneously accrued tax because the service provided by Tangoe is an exempt professional service. The claimant's contention is not persuasive. The claimant provides the invoices in question in support of its position. However, the claimant's accruals do not match the amounts on the invoices.[1] The claimant acknowledged that it could not provide additional support that links the invoice amounts to the use tax accruals. Therefore, the claimant failed to sufficiently demonstrate that it accrued tax on the specific Tangoe transactions at issue. As noted above, the claimant did provide sufficient evidence that the transactions appear twice on its accrual documentation. Therefore, the objection is granted as to the double taxation; consequently, one set of Tangoe invoices will be allowed in the refund. However, the objection is denied as to the exempt professional service.

Real Property

Pursuant to R.C. 5739.01(B)(5), the installation of tangible personal property into real property pursuant to a construction contract is exempt from taxation. However, business fixtures are taxable.

Thus, the question becomes does the invoice represent a construction contract and real property or a business fixture that would be taxable to the claimant. To answer that question, we start with R.C. 5701.02(A), which defines real property.

R.C. 5701.02(A), provides in relevant part:

> "Real property," "realty," and "land" include land itself, whether laid out in town lots or otherwise, all growing crops, including deciduous and evergreen trees, plants, and shrubs, with all things contained therein, and, unless otherwise specified in this section or section 5701.03 of the Revised Code, all buildings,

[1] The Hearing Officer allowed the claimant the opportunity to provide additional information to support this contention. The claimant explained that Tangoe manages phones services on behalf of all Sterling Jewelers US locations. The claimant further explained that the costs are allocated at the store level. However, the claimant acknowledged that it could not provide additional support to link the invoice amounts to the use tax accruals.

> structures, improvements, and fixtures of whatever kind on the land, and all rights and privileges belonging or appertaining thereto.

As set forth in *Funtime v Wilkins,* 105 Ohio St.3d 74, 2004-Ohio-6890, 822 N.E.2d 781, the inquiry does not end if 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,

> "Business fixture" means 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. "Business fixture" includes, but is not limited to, machinery, equipment, signs, storage bins and tanks, whether above or below ground, and broadcasting, transportation, transmission, and distribution systems, whether above or below ground. "Business fixture" also 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, including, but not limited to, foundations and supports for machinery and equipment. "Business fixture" does not include fixtures that are common to buildings, including, but not limited to, heating, ventilation, and air conditioning systems primarily used to control the environment for people or animals, tanks, towers, and lines for potable water or water for fire control, electrical and communication lines, and other fixtures that primarily benefit the realty and not the business conducted by the occupant on the premises.

Another relevant inquiry when determining if an item is real property or a business fixture is whether another business would be able to use the property or is the property designed to meet the requirements of the specific business on the premises. *Nationwide Mutual Ins. Co., et al vs McClain,* BTA Nos. 2018-313, 2018-315, 2018-316, 2018-317, 2018-318, 2019 WL 5682231 (Oct. 22, 2019).

Finally, it is also noted that sales are presumed taxable. This creates a presumption of taxability. It is the claimant's burden to establish that its transaction is exempt. This requires a sufficient explanation of the transaction and probative evidence. It is further noted that when the Tax Commissioner cannot tell what was actually purchased and/or if the evidence does not support what is claimed, the claimant fails to meet its burden. *See Pep Boys-Manny, Moe & Jack of Delaware, Inc., v Testa,* BTA No. 2015-706, 2016 WL 3018415 (Apr. 4, 2016). The claimant's objections will be evaluated using these parameters.

There is sufficient evidence that the following transactions are exempt real property:

Environmental Conditioning Systems Invoice 118174, 503236, 503166
Yerman & Young Painting, Inc. Invoice 11666
Geopfert Co., Invoice 1251P, 1380P, 1243P
Poth Construction Invoice 2017, 2007

Exempt Personal Service

The petitioner has provided sufficient evidence that the following transactions are exempt from taxation as a personal service:

Mentus, Invoice 13917, 13931, 13958
Mendelson & Associates, Inc., Invoice 9900006[2]

Noble Systems Corp, Invoice 127085B

The claimant maintains that its purchase from Noble qualifies for the sales tax exemption for call centers found in R.C. 5739.02(B)(45).

R.C. 5739.02(B)(45), provides in relevant part,

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

Therefore, the claimant needs to establish that it purchased a telecommunications service that is used directly and primarily in call center functions. Specifically, in order to meet the definition of a "call center", the claimant needs to establish that it places or receives calls in high volume for the purpose of making sales, marketing, customer service, technical support, or other specialized business activity; the claimant must also establish that it employs at least fifty full-time positions engaging in call center activities, and finally in order to prevail, the claimant must establish that the telecommunications service provided is used directly and primarily in the call center functions.

The claimant maintains that Noble Systems Corporation was utilized as part of a project to expand the disaster recovery services to the Credit Collections and Recovery Department. In

[2] The claimant provided sufficient evidence that it accrued tax twice on this transaction. In addition, the claimant provided evidence that the transaction is exempt. Therefore, both transactions are allowed in the refund.

support of its position, the claimant provides a Capital Project Summary, Agreement Addendums A, O and P. The claimant's contention is without merit.

The evidence demonstrates that the transaction does not meet the criteria set forth in R.C. 5739.02(B)(45). First, the evidence indicates that Noble is not providing a telecommunications service. The evidence indicates that Noble installed the software and hardware and telephone lines for Sterling Jewelers. This is explicitly excluded from the definition of a telecommunications service. The definition of telecommunication service is found in R.C. 5739.01(AA).

R.C. 5739.01(AA), provides, in part,

> (1) "Telecommunications service" means the electronic transmission, conveyance, or routing of voice, data, audio, video, or any other information or signals to a point, or between or among points. "Telecommunications service" includes such transmission, conveyance, or routing in which computer processing applications are used to act on the form, code, or protocol of the content for purposes of transmission, conveyance, or routing without regard to whether the service is referred to as voice-over internet protocol service or is classified by the federal communications commission as enhanced or value-added.
>
> "Telecommunications service" does not include any of the following:
>
> (b) Installation or maintenance of wiring or equipment on a customer's premises;

Therefore, in accordance with R.C. 5739.01(AA), the sale of a telecommunications service means the transmission of electronic data, voice, audio or video. Also significant is the fact that the installation and maintenance of wiring or equipment on the customer's premises, as well as tangible personal property, is explicitly excluded from the definition of a telecommunications service. Indeed, the installation of tangible personal property is taxable pursuant to R.C. 5739.01(B)(3)(b).

Moreover, the claimant has not met the other requirements of R.C. 5739.02(B)(45). Specifically, the claimant has not demonstrated that it places or receives calls in high volume. Finally, the claimant has not demonstrated that it employs at least fifty individuals engaging in call center activities on a full-time basis. Accordingly, the objection is denied.[3]

Accordingly, the request for refund in granted, in part. The refund is granted in the amount of $17,255.26, plus applicable interest.

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[3] It is noted that the clamant provided sufficient evidence that it accrued and paid tax on this transaction twice. Therefore, one of the transactions will be granted.

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
4485 Northland Ridge Blvd. • Columbus, OH 43229

FINAL DETERMINATION

Date: JUL 2 8 2022

Tennessee Steel Haulers Inc.
2607 Brick Church Pike
Nashville, TN 32707

Re: Refund Claim No.: 20212887671
Refund Amount Requested: $4,494.50
Sales Tax

This is the final determination of the Tax Commissioner on an application for refund, in the amount of $4,494.50, in sales tax filed pursuant to R.C. 5739.07. The claimant contends that it purchased various major components and replacement parts between August 1, 2018 and October 23, 2020 that are used to repair transportation equipment and, as such, qualify for the transportation-for-hire exemption pursuant to R.C. 5739.02(B)(32). The claim was initially denied. The claimant disagreed with the denial and requested reconsideration of the matter and submitted additional documentation. The refund was subsequently granted in part for $4,073.45 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 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. Before the Tax Commissioner may grant an application for sales tax refund under RC 5739.07, the Tax Commissioner must acquire information from the taxpayer of undisputed facts showing that the refund application should be granted. *AAA Fire Protection Co. v. Limbach*, BTA No. 84-G-206, 1987 WL 57487 (June 4, 1987).

In response to the denial letter, the claimant submitted additional information on August 30, 2021. This included relevant invoices and an accompanying spreadsheet for the invoices. The claimant provided cancelled checks or bank statement to show the payments had cleared after these items were requested by the Department. After reviewing the additional documentation provided by the claimant, the Department determined that a partial refund of $4,073.45 plus applicable interest was warranted.

However, the documentation provided, failed to adequately account for the remaining $421.05 requested by the claimant. Five invoices either had no corresponding check number listed or are not listed on the provided check detail. As such, the claimant failed to show that that an overpayment of taxes occurred regarding the remaining $421.05, and therefore is not entitled to a refund.

Accordingly, the remaining 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

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FINAL DETERMINATION

Date: JUL 2 9 2022

Texas Eastern Transmission L.P.
f/k/a Texas Eastern Transmission Corp.
P.O. Box 1642
Houston, TX 77251

RE: Assessment No.: 100000917894
Reporting Period: 12/01/2011 – 12/31/2015
Use Tax
Account No.: 98-001480

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:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$116,140.18	$8,579.16	$0.00	$124,719.34

The petitioner operates an oil and gas pipeline transportation system. This use tax assessment is the result of an audit of the petitioner's purchases, from December 1, 2011 through December 31, 2015. The petitioner filed a petition for reassessment. A hearing on the matter was held.

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).

Background

The petitioner operated over 8,825 miles of oil and gas pipelines across the nation. The petitioner's network of pipeline transportation systems qualified it as a provider of a public utility service in Ohio. The taxpayer expanded its network in Ohio through the construction of the Ohio Pipeline Energy Network ("OPEN") pipeline. By means of the OPEN pipeline project, the petitioner added 76 additional miles of pipelines to its network in Ohio, along with the ability

to transport gas along both directions of its pipelines. On March 23, 2017, the taxpayer submitted two applications for exempt pollution control facility certification for purchases made in conjunction with the OPEN pipeline expansion project. Application 041707W addressed purchases that became a direct part of the physical pipeline or were used to test welds using x-ray equipment during the construction. Application 041708W addressed purchases related to sedimentation control around the pipeline before, during, and after construction of the pipeline. On June 30, 2017, the Ohio E.P.A. denied both applications after determining that none of the items listed on either application qualified as part of an exempt pollution control facility.

On September 18, 2017, the Tax Commissioner issued a final finding that also denied the taxpayer's applications for certification as exempt pollution control facilities. By law, the Department had 180 days from the issuance of its determination to audit the purchases of the equipment, supplies, and services listed in the taxpayer's exempt pollution control facility applications to determine if there were any tax deficiencies. The Department reviewed both applications and addressed the taxability of the listed items. The Department determined that every item listed in Application 041707W qualified for exemption from use tax because the purchases were used to build the physical pipeline, so they were directly incorporated into its production, transmission, transportation, or distribution system. The Department determined that the items listed in Application 041708W were used or consumed to provide sedimentation control, which involved taxable leases and purchases of tangible personal property and services.

Therefore, the Department requested purchase invoices along with cost breakdowns for the items listed in Application 041708W. On November 13, 2017, the taxpayer provided 142 invoices and documents for review. The taxpayer and its contractors had used a standard progression billing system to account for the costs of the property and services that had been purchased and consumed during the pipeline construction process. The petitioner was periodically issued a progress payment invoice by each contractor that was accompanied by report worksheets. These worksheets recapped the incremental line-item costs that had been incurred by the contractors by using categories titled "Cost Previous," "Cost This Period," and "Cost to Date." The consumables that had been purchased were not listed individually on the progress payment invoices, so the Department pulled the amounts of consumables from the report worksheets.

After the Department reviewed the newly submitted documentation, it was able to determine that the "Cost to Date" amounts listed on report worksheets dated toward the end of the audit period reflected the total amounts of each type of property and service that had been purchased the audit period. The review of those invoices found that the taxpayer had purchased or leased taxable tangible personal property and services from contractors that were not properly taxed. Therefore, the amounts listed in this audit were pulled from the "Cost to Date" amounts on the later invoices. The taxpayer was assessed use tax for its purchases of Flexterra and its application, a rock access pad installation, rock access pad refurbishments, seed, fertilizer, mulch, a temporary access road, and temporary power to run space heaters. Flexterra was a nutrient-enhanced grass seed mixture that was used as a two-in-one application of seed and fertilizer.

Petitioner's Contentions

The petitioner contends that the Department erroneously assessed use tax liability on transactions that involved purchases from three different contractors that were used for the construction of pipelines. The petitioner contends that the Department erroneously assessed use tax liability on purchases from pipeline construction contractors Sheehan Pipeline Construction Co., Bluewater Construction, and Associated Pipe Line Contractors. The petitioner purchased rock access pad refurbishments and the application of Flexterra from Sheehan Pipeline. The petitioner purchased temporary power for space heaters, temporary access roads, and services to seed, fertilizer, and mulch from Bluewater Construction. The petitioner purchased an additional rock access pad, rock access pad refurbishments, and services to seed from Associated Pipe Line Contractors. The petitioner contends that every assessed transaction involved the non-taxable purchases of materials that were used or consumed by construction contractors during pipeline installation services and the non-taxable purchases of services and materials that were used in the rendition of a public utility service. The petitioner's contentions are addressed below.

Materials Consumed by Contractors

The petitioner contends that it was erroneously assessed use tax liability for property that was used or consumed by contractors or service providers during the performance of pipeline construction services pursuant to R.C. 5739.01(B)(5) and Ohio Adm.Code 5703-9-14(A). The petitioner believes that these transactions involved non-taxable purchases of construction services and materials because the pipelines were being incorporated into real property. The petitioner contends that, since the transactions involved improvements to realty, Sheehan Pipeline, Bluewater Construction, and Associated Pipe Line were the consumers of any property that was used or consumed during the rendition of their construction services. The petitioner contendt that it never received possession or title to any of the property from the assessed transactions; title always remained with the contractors.

The petitioner contends that it never gained control over or access to the rock access pads and temporary access roads. The petitioner contends that the access pads and access roads were used by only its contractors to temporarily gain access to the pipeline installation areas. All materials related to the access pads and access roads were removed by the contractors upon the completion of the pipeline installation services in order to restore the land to its previous state. The petitioner contends that the purchases of seed, mulch, fertilizer, and Flexterra were consumed by its contractors because the petitioner never gained title to or possession of them before they were incorporated into the ground as part of the construction process. The petitioner argues that the Flexterra, seed, and mulch were necessary to reclaim the ground after the pipeline installation was completed. Lastly, the petitioner contends that the power for the temporary space heaters that it purchased were consumed by Bluewater Construction during the construction process. These contentions are not well met.

The petitioner purchased materials and services that were used to construct rock access pads, to refurbish rock access pads, and to create temporary access roads. The temporary access roads consisted of roads that were created and used by the petitioner's contractors to increase

accessibility to the areas where the pipeline was being installed. Rock access pads consisted of rocks that were spread out in various areas to act as support pads and to provide traction for heavy construction equipment.

The petitioner admitted that it followed the industry standard and paid to have all the materials that were used to create the rock access pads and temporary access roads removed once the pipeline construction work was completed, in order to restore the land back to its original state. The petitioner contends that possession of, and title to, the materials used to create the rock access pads and temporary access roads remained with its contractors. However, pursuant to Ohio Adm.Code 5703-9-14(B), the transfer and affixation of personal property where title to that property does not transfer to the lessee of the premises is a sale and not a construction contract. This is because the affixed materials retain their classification as tangible personal property since the failure to transfer title displays an intention not to make the affixation or purchase permanent.

The petitioner never intended to permanently affix the rocks and materials for the roads or pads to the ground; it simply desired to temporarily lease the materials so that they could assist the contractors until the pipeline installation was completed. The petitioner, as the lessee of the land where the pipeline was installed, purchased a license to temporarily use or consume the rocks and materials that constructed the access pads and access roads, since the petitioner stated that the title failed to transfer for the property while it was temporarily incorporated into the land pursuant to R.C. 5739.01(B)(1) and Ohio Adm.Code 5703-9-14(B). The purchases of services to refurbish the rock access pads were taxable purchases of services to repair tangible personal property pursuant to R.C. 5739.01(B)(3)(a). Even if the petitioner had purchased construction services, providing landscaping and lawn care services are never considered to be part of construction contracts. R.C. 5739.01(B)(5).

Landscaping and lawn care services include the services of seeding, sodding, mulching, applying chemicals, or fertilizing to establish, promote, or control the growth of grass, ground cover, and other flora. R.C. 5739.01(DD). As a result, the purchases of services to mulch, seed, and fertilize from Associated Pipe Line and Bluewater Construction and the purchases to spread Flexterra from Sheehan Pipeline were purchases of taxable landscaping services pursuant to R.C. 5739.01(B)(3)(g) and 5739.01(DD). Pursuant to R.C. 5739.01(H)(1)(a), price means the total amount of consideration, for which tangible personal property or services are sold, without any deduction for the vendor's cost of the property sold, the cost of materials used, labor or service costs, interest, losses, all costs of transportation to the vendor, all taxes imposed on the vendor, charges by the vendor for any services necessary to complete the sale, and any other expense of the vendor. That means that the separately stated costs for the different application styles of the Flexterra material are included when determining the price of the taxable landscaping and lawn care services that were provided.

The petitioner purchased temporary power for space heaters from Bluewater Construction which was taxable. Pursuant to Ohio Adm.Code 5703-9-14(B), tangible personal property that is temporarily affixed during construction, such as temporary electricity hook-ups, is not considered to be incorporated into real property for sales and use tax purposes so it remains taxable until the contrary is proven. Since the electricity was not being incorporated into real

property, Bluewater Construction was not considered to be the consumer of the materials pursuant to R.C. 5739.01(B)(5). The petitioner failed to present evidence that any of the assessed transactions involve the purchase of tangible personal property that was consumed by a contractor or service provider while providing construction services. As a result, the petitioner has failed to meet its burden to prove error in the assessment. Therefore, these contentions are denied.

Used in Rendition of a Public Utility Service

The petitioner argues that, even if it was determined to have been the consumer of the assessed materials it purchased from the contractors, those materials were used in an exempt manner to repair and maintain a public utility service's production, transmission, transportation, or distribution system by maintaining its access pads, roads, and rights-of-way for pipeline repair and maintenance crews pursuant to R.C. 5739.01(P) and the holding in *Ohio Oil Gathering Corp. II v. Limbach*, BTA No. 86-C-1294, 1989 WL 77402 (June 23, 1989).

The petitioner contends that in that BTA case, Ohio Oil operated oil pipelines and was contractually obligated to reclaim the rights-of-way over those pipelines. Ohio Oil purchased seed, mowers, and mowing equipment to reseed the grass and control the vegetation near its pipelines. Ohio Oil also purchased limestone gravel to repair pipeline access roads and construct access roads to its trunkline stations. The BTA determined that those purchases were exempted from taxation as being used to repair and maintain a public utility service's production, transmission, transportation, or distribution systems. *Ohio Oil Gathering Corp. II v. Limbach*, BTA No. 86-C-1294, 1989 WL 77402 (June 23, 1989). The petitioner contends that the holding in *Ohio Oil* supports its position that the purchases from Associated Pipe Line, Bluewater Construction, and Sheehan Pipeline qualified for the public utility exemption because they too were used to repair and maintain access roads for pipeline repair crews and to reclaim rights-of-way. These contentions are not well met.

To be used directly in the rendition of a public utility service, property must be essential to the provision of the service, be incorporated into a consumer's production, transmission, transportation, or distribution system, and retain its classification as tangible personal property after such incorporation. R.C. 5739.01(P). In the alternative, property may also be used to repair and maintain a consumer's production, transmission, transportation, or distribution system. *Id.* The petitioner cited to *Ohio Oil* to support its contentions, but that case is not analogous to the facts and circumstances at hand. In *Ohio Oil*, Ohio Oil was engaged in the public utility service comprised of gathering, transporting, and delivering oil from producers' wells to refiners in a common stream for a fixed per barrel tariff. Ohio Oil purchased tangible personal property for site reclamation, right-of-way maintenance, and miscellaneous repairs that included grass seed, a lawn mower, mowing equipment, and limestone gravel. Ohio Oil was contractually obligated to reclaim its pipelines' rights-of-way, which required it to reseed the areas over its pipelines after they were installed and to control the growth of vegetation near the pipelines. Those activities

allowed Ohio Oil's maintenance crews easy access to its pipelines and prevented root damage that could cause leaks. *Id.* at *5.

Ohio Oil purchased the limestone gravel to repair permanent pipeline access roads that had been destroyed by equipment as repairs were made to the pipelines. It also used the gravel to construct new access roads to its trunkline stations. Ohio Oil used the grass seed and mowing equipment to replant and cut the grass over its pipelines, so that the repair crews could quickly and easily access the pipes if an emergency arose. Instead of hiring contractors, Ohio Oil used its own workers to perform all necessary maintenance and repairs to its rights-of-way and access roads. As a result, the BTA held that the items contested by Ohio Oil were used primarily to repair and maintain its production, transmission, transportation, or distribution systems, and, thereby, qualified for exemption as being used directly in the rendition of a public utility service. *Id.*

While both Ohio Oil and the petitioner are in the oil and gas transportation business, Ohio Oil was actively using its pipelines to transport oil and gas. This audit resulted from the petitioner's initial installation of the pipelines, not from repairs and maintenance for active pipelines. Since Ohio Oil was actively providing a public utility service, the property it purchased to repair and maintain permanent access roads to its production, transmission, transportation, or distribution systems qualified as being used directly in the rendition of a public utility service. The petitioner, on the other hand, purchased tangible personal property and services from third parties that were used during the construction and installation of the petitioner's pipeline, but were removed after installation services were completed. Ohio Oil purchased gravel and grass seed that it consumed itself to reclaim and maintain permanent rights-of-way for an active pipeline. It should be noted that *Ohio Oil* was decided in 1985, prior to the decision in 1991 by the General Assembly to add landscaping and lawn care services to the enumerated list of taxable services. *Id.*

Even if landscaping and lawn care services had been enumerated, Ohio Oil's purchases would not have been taxable as landscaping and lawn care services because Ohio Oil purchased tangible personal property that it consumed to conduct its own rights-of-way maintenance, not landscaping and lawn care services to perform such tasks. Unlike *Ohio Oil*, the petitioner did not purchase tangible personal property and perform landscaping and lawn care duties itself on its pipelines' rights-of-ways. The petitioner purchased enumerated, taxable services to have landscaping and lawn care services performed. The petitioner purchased services to lay seed, mulch, fertilizer, and Flexterra, which were purchases of taxable landscaping and lawn care services pursuant to R.C. 5739.01(B)(3)(g), 5739.01(B)(5), and 5739.01(DD).

The petitioner has made conflicting statements regarding the usage of its rock access pads and access roads. First, it contended that the pads and roads were laid and used by only its pipeline installation crews because they were removed once the pipeline installation was completed. Hearing Memo, p. 2. That was a taxable usage because neither repairing nor installing rock access pads and roads were essential to the direct provision of the petitioner's public utility service since they were supposed to be removed prior to beginning of the use of the pipeline. However, the petitioner also contended that the access roads and access pad were used in rendition of a public utility service because they were used by pipeline repair crews to access the pipeline area. That implies that the installation crews would not remove the temporary access

roads and pads upon completion. *Id.* at pp. 3-4. The petitioner has presented two conflicting statements as to when the access pads and access roads were removed and has failed to present evidence that resolves the conflict. As a result, the petitioner has failed to prove its entitlement to exemption from taxation.

The landscaping activities that the petitioner purchased were not used directly in the rendition of a public utility service, so they remain taxable pursuant to R.C. 5739.01(B)(3)(g) and 5741.02(G). The petitioner has failed to provide evidence that these materials were used to maintain access roads for pipeline repair crews. The petitioner has failed to provide evidence that shows these landscaping services should be exempted from taxation because they were essential to the provision of its public utility services. The petitioner has failed to provide evidence that meets its burden to prove error in the assessment. Therefore, these contentions are denied.

Non-Taxable Services

The petitioner contends that it was assessed use tax on purchases of services that were not specifically enumerated as taxable services. This contention is not well met. The petitioner failed to specify which transactions involved the purchase of non-taxable services. The petitioner failed to submit any evidence that substantiated this contention. As a result, the petitioner has failed tot meet its burden to prove error in the assessment. Therefore, this contention is denied.

Accordingly, the assessment is affirmed as issued.

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

Ohio Department of Taxation

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FINAL DETERMINATION

Date: JUL 2 8 2022

The Right Wrench Inc.
9850 Royalton Rd.
North Royalton, OH 44133-4411

Re: Assessment No.: 100002210148
Sales Tax
Account No.: 18-487552

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
$28,829.60	$2,722.21	$14,414.75	$45,966.56

The petitioner operates an auto repair shop. This assessment is the result of an audit of the petitioner's sales from January 1, 2018 through December 31, 2020. The petitioner filed a petition for reassessment and seeks penalty abatement. A hearing was not requested.

The petitioner requests complete abatement of the penalty. The Tax Commissioner may add a penalty of up to fifty percent of the amount assessed when a taxpayer fails to collect and remit sales tax as required. R.C. 5739.133(A). Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. Based on the facts and circumstances, the petitioner's request for a penalty abatement is denied.

Accordingly, this assessment is affirmed as issued.

Current records indicate that no payments have been made towards satisfaction of 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 "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
4485 Northland Ridge Blvd. • Columbus, OH 43229
(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 27 2022

Troy Tullis
1171 Lippincott Rd.
Urbana, OH 43078-9308

Re: Assessment No.: 100001872272
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 5741.14 concerning the following use tax assessment:

	Pre-Assessment		
Tax	Interest	Penalty	Total
$1,771.89	$28.24	$265.78	$2,065.91

This assessment was issued based upon the conduct of a special audit of a motor vehicle title transfer. On or around October 19, 2020, the petitioner received title to a 2020 Polaris R20. The petitioner claimed that the vehicle was directly used in farming and thus exempt from taxation. The Department was unable to verify the exempt use of the vehicle. Accordingly, this assessment was issued. A hearing on the matter was not requested.

The petitioner disputes this assessment, contends that the vehicle qualifies for exemption pursuant to R.C. 5739.02(B)(42)(n), and submitted additional documentation. The evidence in the file now supports this contention.

Accordingly, the assessment is cancelled.

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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(614) 466-2166 Fax (614) 466-7979

FINAL DETERMINATION

Date: JUL 29 2022

Walgreen Co.
300 Wilmot Rd.
Deerfield, IL 60015-0901

RE: Assessment No. 100002210375
Use Tax
Account No. 97-135049

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
$115,938.85	$19,773.54	$17,388.67	$153,101.06

The petitioner operates a chain of retail drug stores across the United States. This assessment is the result of an audit of the petitioner's purchases from January 1, 2017 through January 31, 2021. A hearing was not requested.

The petitioner objects to the penalty. Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. Considering all the surrounding facts and circumstances, abatement of the penalty is warranted.

Accordingly, the assessment is adjusted as follows:

Tax	Pre-Assessment Interest	Penalty	Total
$115,938.85	$19,773.54	$0.00	$135,712.39

Current records indicate that payments have been made in full satisfaction of the assessment.

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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FINAL DETERMINATION

Date: JUL 2 9 2022

Walking Needle LLC
4304 Marival Way
Mason, OH 45040-2864

RE: Assessment No.: 100001460044
Tax Type: Sales
Account No.: 91-258023
Reporting Period: 01/01/2019 – 06/30/2019

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 corrected assessment:

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$217.00	$4.16	$50.00	$17.50	$75.95	$364.61

On November 12, 2019, the petitioner was issued an assessment after failing to file the sales tax return for the period of January 1, 2019 through June 30, 2019. After the issuance of the assessment, the petitioner filed a sales tax return for the period in question. A corrected assessment was issued on December 31, 2019, and the petitioner filed its petition shortly thereafter. A hearing was held.

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.

Assessment Amount

The petitioner contends the entire assessment is erroneous and invalid. The petitioner has not presented evidence or further substantiated this claim. The contention is not well taken. The Commissioner may make an assessment based on any information in his possession. R.C. 5739.13(A). 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 R.C. 5739.13. 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. 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 burden is on the petitioner to present evidence sufficient to show error in the assessment. The petitioner has not met its burden. The objection is denied.

Amnesty

The petitioner contends that the liability will fall under the tax amnesty granted by H.B. 45. This contention is not well taken. The cited bill has not been passed by the Ohio Senate or signed into law by the Governor. Proposed legislation does not have the force of law. Even if the legislation had passed, the bill excludes taxes and fees on which an assessment has already been issued. Sub. H.B. No. 45 as passed by the House, Ohio Gen. Assemb. 134, § 1(A)(2). An assessment was first issued on this matter November 12, 2019. The objection is denied.

Interest

The petitioner objects to the interest included in the assessment. The Tax Commissioner is without jurisdiction to reduce the statutory interest promulgated by the General Assembly under R.C. 5739.132. The objection is denied.

Penalty Abatement

The petitioner requests abatement of the penalty, additional charge, and additional charge penalty. Penalty remission is within the discretion of the Tax Commissioner. *Karr v. McClain*, 166 Ohio St.3d 513, 2022-Ohio-449, 187 N.E.3d 540, ¶ 7. Considering the surrounding facts and circumstances, the penalty and additional charge penalty are abated.

Accordingly, the assessment is amended as follows:

Tax	Pre-Assessment Interest	Additional Charge	Additional Charge Penalty	Penalty	Total
$217.00	$4.16	$50.00	$0.00	$0.00	$271.16

Current records indicate that payments of $364.61 have been made toward the assessment. A refund in the amount of $93.45, with appropriate interest is hereby authorized.

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